



THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

THE ADVOCATE

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PRESIDENT'S MESSAGE

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

In my first "Message from the President," I quoted these sage words from American poet LL Cool J. I did so because that Message focused on the goals that the Executive Committee and I wanted this organization to strive toward this past year and in the coming years. If you have read any of my articles, or attended any of our Board Meetings, you know that all of the specific goals that were established centered around our membership. But, for those of you who have missed the message, we wanted to accomplish four things. The first was to encourage growth in our numbers. Second, we wanted to invigorate the members that we already have. Next, we wanted to foster pride in being a member of WPTLA. Lastly, we wanted to make these goals the goals of every single member of WPTLA. Doing that would ensure that these goals are achieved and would also ensure our long-term stability. However, despite my final shameless plug for these goals, rest assured that this Message isn't going to be a celebratory State of the Union of sorts because achieving those goals will require the continued concerted effort of many people.

Instead, I would like to discuss what my journey through the ranks of WPTLA has meant to me and how it has personally motivated me to accomplish these goals. More than a decade ago, I became a member of our Board of Governors. That position forced me to become even more involved in our organization. Frankly, before becoming a Board Member, I attended some events, but far from all of them. My deepened involvement resulted in a realization that there are many more benefits of being a member of this organization. Chief among the benefits of becoming more involved is that I developed meaningful relationships with our membership and became good friends with many of you.

Five years ago, Chris Miller, who is one of those good friends, called me and asked me if I would be interested in joining the Executive Committee as its Treasurer with the goal of ultimately becoming our President. Stepping forward into a leadership role on the Executive Committee is a decision that - obviously - led to my role today, but also included many unexpected benefits.

Because I said "yes," I had the opportunity to be

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Each of you fight for the rights of individuals against huge hospitals, businesses, and insurance companies. We are the collective voice for those who otherwise couldn't seek justice against those large and powerful entities.

PRESIDENT'S MESSAGE ... CONTINUED FROM PAGE 1

around great lawyers, and even better people, such as our Past Presidents Elizabeth Chiappetta, Sandra Neumann, Larry Kelly, and Chris Miller, as well as our future Presidents, such as David Landay, Eric Purchase, Mark Milsop, Erin Rudert, and Greg Unatin. I am thankful that I also have had the friendship and support of our Executive Director, Laurie Lacher (whose tireless efforts are the reason that every single one of our events proceed flawlessly).

By becoming more involved, I realized that this organization's membership consists of attorneys with unparalleled legal talent. Quite simply, I am absolutely awestruck by the legal talent within our ranks. Beyond that, I am amazed by the passion and compassion that each of you possess. Each of you fight for the rights of individuals against huge hospitals, businesses, and insurance companies. We are the collective voice for those who otherwise couldn't seek justice against those large and powerful entities. In my honest opinion, WPTLA plays an important role in that fight. WPTLA is how we help each other to help our clients. No matter how many cases each of us may have on the trial list, the members of WPTLA band together to help each other every time and without question. I have often called upon my friends in this organization to discuss issues in my trials, to discuss potential expert witnesses, and to obtain transcripts of prior cross-examinations. Similarly, I have always answered that call from my colleagues and fellow members of this organization. We do this for two reasons. First, we do it because we all share the same passion for helping people. Second, we do it because we all know that when one of us wins, it helps us all.

I am so glad that I became involved in this organization. It provided me with great friends, wonderful resources, excellent comradery, an opportunity to sharpen my skills with on-point CLE courses, the ability to recharge my batteries with events like the Comeback Award Dinner, and opportunities to help others with events like our annual President's Challenge 5K Run/Walk/Wheel that benefits the Pittsburgh Steelwheelers.

In reflecting upon my time as President (while trying to decide what to say in this article), I realized that trying to attain this year's "President's Goals" was a natural by-product of my involvement in WPTLA. By

simply becoming more actively involved in this organization, I found that I personally began working towards those goals. For instance, by becoming more actively involved, I learned that events I had previously decided to skip because they were too far away, or because they cut into my personal time were fun, rewarding, and worthwhile. If you know me, you know that I'm not a runner. However, if you know me, you also know that I love our President's Challenge 5K Run/Walk/Wheel event. It is an event that my entire family now attends every year. By becoming more involved, I have also had the opportunity to participate in a Habitat for Humanity project on behalf of WPTLA. Participating in these events has definitely helped me develop a sense of *pride* in this organization. Similarly, attending events such as the Judiciary Dinner helped to *invigorate* my enthusiasm for this organization. At this year's dinner, we made a donation of \$31,400 to the Pittsburgh Steelwheelers, we awarded \$6,000 in college scholarships, we recognized a fellow trial lawyer for his commitment to the profession, and we made a donation to Auberle, which is a worthy recipient of the Daniel M. Berger Community Service Award. You simply can't leave a dinner like that without feeling good about WPTLA's contributions to the community. Consequently, because of my involvement in this organization, I want other attorneys to become active members of this group. I simply cannot understand why anyone who calls him or herself a trial lawyer would not be a member of WPTLA. So, if you're involved in WPTLA, become more involved. If you're not involved, attend a few events. I promise that you'll be glad you did!

By: Bryan Neiderhiser, Esq., of Marcus & Mack
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Thanks for a great year, Bryan!

ERIE (FINALLY) WELCOMES TWO NEW FEDERAL JUDGES

In a true testament to tenacity and patience, Susan Paradise Baxter was finally confirmed last fall as a United States District Judge for the Western District of Pennsylvania after a five-year delay. On August 29, 2018, the Senate confirmed Judge Baxter to the lifetime position in a unanimous voice vote.

Judge Baxter's qualifications rose above the pervasive partisan politics of our times. Although Baxter was initially nominated five years ago by then-President Barack Obama, that nomination expired in July of 2015, without a vote by the Senate. Baxter was then re-nominated by President Donald Trump in December of 2017. Judge Baxter, a democrat, had the nonpartisan support of not only Obama and Trump, she was jointly nominated by two Pennsylvania Senators from opposite sides of the aisle, Democratic Senator Bob Casey and Republican Senator Pat Toomey. Upon Judge Baxter's confirmation, Senator Toomey said, "I am pleased that Judge Baxter was confirmed by the United States Senate today...Judge Baxter has the intellect, experience, and character needed to excel as a federal judge." Senator Casey also extolled Baxter's qualifications, noting, "I am confident that Judge Baxter will serve the Commonwealth honorably, as she has for over two decades...In her 23 years of service to the people of Erie, Judge Baxter has shown that she possesses the integrity, intellect and independence required to be an outstanding federal district court judge."

District Judge Baxter received her Bachelor of Science degree from The Pennsylvania State University and her Master of Education and her Juris Doctorate degrees from Temple University. She began the practice of law in Washington, D.C., at the firm of Cole, Raywid and Braverman, now Davis Wright Tremaine LLP, where she practiced commercial, antitrust and contract litigation. She was made a partner in 1989. She returned to Pennsylvania in 1992 and served as the Court Solicitor for the Erie County Court of Common Pleas. Three years later she was appointed United States Magistrate Judge. Baxter served as Chief Magistrate Judge from 2005-2009. She is a member of the Erie County Bar Association and an honorary Lifetime member of the Federal Bar Association.

Judge Baxter served in her prior position as the Federal Magistrate Judge for more than 23 years. She will now be stepping up to the United States District Judge position vacated by Judge Sean J. McLaughlin in 2013 when he left to join Erie Insurance Group. Since Judge McLaughlin's departure, Senior U.S. District Judge David S. Cercone in Pittsburgh has been filling Judge McLaughlin's vacancy pending Baxter's confirmation. During that time, the halls of the United States District Court building in Erie have echoed vacantly, with Baxter as the only fulltime sitting judge permanently located in Erie.

On September 24, 2018, Judge Baxter received some welcome company. Richard Lanzillo was sworn in as a new Magistrate Judge of the United States District Court for the Western District of Pennsylvania, filling Judge Baxter's former position. Chief U.S. District Judge Joy Flowers Conti announced the selection of Judge Lanzillo after a long search process that began in 2016 by an appointed selection panel comprised of attorneys and non-lawyer leaders in the community. The panel reviewed applications and conducted interviews and then made its final recommendation to the Court, in accordance with the procedures established by the Judicial Conference of the United States regarding the (Continued on Page 4)

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selection, appointment, and reappointment of United States Magistrate Judges. Chief Judge Conti indicated that the District Judges considered the recommendation of the selection panel before selecting Lanzillo as Magistrate Judge. Chief Judge Conti noted, "The Court is fortunate to welcome Richard Lanzillo to the bench. He is an excellent lawyer whose commitment to equal justice and diverse legal skills are well-suited to serve the people of the Western District of Pennsylvania."

Judge Lanzillo hails from the law firm of Knox, McLaughlin, Gornall & Sennett, P.C., in Erie, where he was a shareholder and served as the firm's Vice President. At Knox, Lanzillo practiced complex commercial, employment and civil rights litigation. He also served as a mediator and neutral evaluator in the Court's Alternative Dispute Resolution Program. He has lectured on state and federal trial and appellate practice as well as on the subjects of municipal, labor and commercial law. Judge Lanzillo was president of the Erie County Bar Association and served as Bar President in 2015. He has been a staunch supporter of the Erie County Bar Foundation's Attorneys and Kids Together Program, which supports the needs of homeless children. In 2017, he was awarded the President's Award for service to the Erie County Bar Association.

Judge Lanzillo received his undergraduate degree from Mercyhurst University and his Juris Doctorate from the University of Pittsburgh School of Law, where he was Editor of the Law Review, graduated *summa cum laude*, and was inducted into the Order of the Coif.

The Western Pennsylvania Trial Lawyers Association wishes both new Erie Federal Judges longevity and happiness in their new positions. It will be an honor to practice in front of these well qualified and experienced members of the bench.

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Judge Susan Paradise Baxter (left), and
Judge Richard Lanzillo (right)

2019-2020 Kick Off Event



Tues, Aug 20

Golf Games & Dinner
TopGolf, Bridgeville

Wed, Aug 21

CLE & Breakfast
Hampton Inn,
Bridgeville

**Discounted guest rooms available at
THampton Inn for Aug 20.**

**2 credit CLE to feature Past Presidents
Chad Bowers, Cindy Danel, and Rich
Schubert**

**Registration available at:
www.wptla.org/events/**

The Halo Effect: Why a Jury Will Judge A Book by its Cover

Does it seem sometimes that attractive people get all the breaks? If so, your suspicion is warranted – attractive people benefit from the “halo” effect. For those Seinfeld fans out there, the halo effect was the theme of the show’s 130th episode, “The Calzone” where Jerry takes advantage of his beautiful girlfriend Nicki's ability to get anything she wants, including convincing a cop to not give Jerry a speeding ticket. The halo effect, however, is no laughing matter and can have a serious impact on the way a jury sees your client and your case.

What is the Halo Effect?

The Halo Effect is a cognitive bias in which our overall impression of a person's character is influenced by limited concrete information (i.e., they look nice so they must be nice). In other words, observers tend to bend their overall judgment according to one or a limited set of characteristics of the person (the "halo"). This results in generalizing towards a judgment of a person's overall character. As an example, a picture of your client in opening statement smiling while at work would lead a jury toward an overall impression of your client as an "entirely good and worthy" individual, despite the fact that, at that point, the jury knows very little about your client.

Do We Really Judge a Book by its Cover? Yes.

The power of the Halo Effect has been borne out in repeated studies:

One study found subjects were more lenient when criminally sentencing attractive individuals than unattractive ones, even though exactly the same crime was committed. The researchers attributed the result to a societal perception that people with a high level of attractiveness are seen as more likely to have successful futures due to corresponding socially desirable traits.

In another study, sixty university students half of whom were male the other half female, were given three different photos to examine - an attractive individual, an average looking individual, and an unattractive individual. Results showed that the study participants overwhelmingly believed the attractive subjects had more socially desirable personality traits than either the averagely attractive or unattractive subjects. Participants also believed that attractive individuals would lead happier lives in general, have happier marriages, be better parents, and have more career success than the others.

Finally, another study found that attractiveness and familiarity are strong predictors of decisions regarding who is put in a position of leadership. Judgments made following one-second exposures to side-by-side photos of two US congressional candidates were reasonably predictive of election outcomes. Attractiveness and familiarity were correlated with competence in this study. Candidates who appeared more attractive and familiar were also seen as more competent and were found more likely to be elected.

How Do We Use the Halo Effect to Our Advantage at Trial?

We, as trial lawyers, are wise to pay close attention to the appearance and impression our clients give off. There are many simple steps we can take with our clients to benefit from the Halo Effect, including: making appropriate eye contact, dressing neatly and professionally, minding their hair, sitting up and/or leaning in when speaking, avoiding crossing arms, and speaking concisely and with the best grammar possible. We should also strive to highlight those aspects of our client's background which not only show them to be good, moral, upstanding people but also may specifically connect with jurors (e.g. most everyone likes an animal lover). Pictures are worth a million words at trial so work hard to find photographs that exemplify specific positive aspects of your client's life (i.e., pictures from work, with family and friends, participating in activities they are passionate about). Another great way to figure out how

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UPCOMING EVENTS

2019-2020 KICK OFF EVENT

Tue, Aug 20, 2019

TopGolf, Bridgeville

Wed, Aug 21, 2019

2 credit CLE,

Hampton Inn, Bridgeville

BOARD MTG & BREAKFAST

Wed, Sep 18, 2019

Rivers Club, Pittsburgh

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

Sat, Oct 12, 2019

North Park Boathouse,
Pittsburgh

BEAVER DINNER & CLE

Mon, Oct 21, 2019

Wooden Angel, Beaver

3 CREDIT CLE W/ ERIE CBA

Fri, Nov 8, 2019

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

COMEBACK AWARD DINNER

Mon, Nov 18, 2019

The Duquesne Club, Pittsburgh

LUNCH 'N LEARN CLE

Wed, Dec 11, 2019

Gulf Tower, Pittsburgh

to cast your client in the best light is by showing a short video interview of your client to a focus group or people in your office and asking for feedback ("If you were this person's lawyer, how would you fix their testimony?" "what do you like most about what you saw or heard?" "What do you like least? Why?").

Trial lawyer legend, Paul Luvera, often points out that "a trial is a battle of impression and not logic." While this may be an oversimplification, there is no question that juries are tasked with making very significant decisions based on very limited information. Because of this, jurors are bound to use mental short cuts, including the Halo Effect, to process the information and rationalize their verdicts. Of the various factors jurors consider, the likeability of the parties can prove critical in close calls. At your next trial, be sure to channel your inner guardian angel and strive to place a halo over your client's head.

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WPTLA is pleased to offer another important benefit to its members. **Thrivest**, our legal funding partner, has agreed to offer a reduced financing rate in Western PA available only to clients of WPTLA members. Thrivest's standard rate is already very competitive. Contact George Hargenrader for details at 412-513-7919 or ghargenrader@thrivest.com



THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES VOLUME 32, 2019-2020

	ARTICLE DEADLINE DATE	TARGET PUBLICATION DATE
Vol 32, No 1 Fall 2019	Sept 6	Sept 20
Vol 32, No 2 Winter 2019	Nov 30	Dec 13
Vol 32, No 3 Spring 2020	Mar 6	Mar 20
Vol 32, No 4 Summer 2020	May 29	Jun 12



Presidents Challenge 5K Run/Walk/Wheel

Saturday, October 12, 2019

The Boathouse in North Park, Pittsburgh

Sponsor and registration information coming soon.

Requirements for teams to enter the President's Cup Challenge have been reviewed to allow for more competition between WPTLA members. **Teams will now be 3 people, consisting of 1 WPTLA member and 2 employees at a law firm. Get your team ready!**

A PAST COMEBACK AWARD WINNER - WHERE IS SHE NOW?

To me...The Marathon Des Sables (MDS) is like life....

When faced with life's obstacles we have 2 choices.

Give up.

Or

Dig deep and be your best in spite of circumstance.

For me, MDS was about helping others see that, deep inside, they do have what it takes no matter what it is that they want to do.

The MDS doesn't keep score nor does it care if you walk away with a medal.

Because like life, The MDS is about learning, it's about being stronger and smarter, but most of all it shows you what is possible if you simply try.

The Marathon Des Sables was not about a winning time and or a winning place.

I feel that with the traversing of every mile, the reaching of every check point, the completion of every stage, and the setting of the sun each and everyday, WE erased all borders and eclipsed perceived limitation. Collectively WE changed how females and those who face physical adversity are viewed.

Together with every new sunrise, every step on the course and every breath, WE brought everyone involved in the MDS together. We were an evolving storm, much like a tsunami, picking up strength as we pressed forward.

During the event, I received several emails from parents all around the world thanking me for being courageous or inspirational, but what touched me most was that they let me know that in their children's eyes a hero had emerged. That I had provided them with the realization that they too CAN DO ANYTHING.

WE DID IT!!!

Since the day of my accident I have had Alan Pepicelli's unwavering support throughout this entire journey and that is why what we did together as a team is truly something amazing. I myself have become more than I ever thought possible, a better, stronger, smarter mother and role model to my children because of his support.

Please remember, when you think you can't....

You absolutely can.

Choose to push past life's discomforts, they will in turn lead

you to the amazing you that you truly are.

Amy Palmiero-Winters

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Reprinted from the New York Times: An Amputee's Toughest Challenge Yet: Her 140-Mile Run in the Desert

THE SAHARA — It was the last difficult stage of one of the world's most punishing races. The runners, by now walking, began a steep climb up a 25 percent grade, which required many of them to use fixed ropes to reach the summit.

As Amy Palmiero-Winters, 46, of Hicksville, N.Y., began the sharp ascent, her prosthetic left leg became stuck beneath a rocky outcropping. Each time she tried to lift the carbon fiber leg, her shoe bounced against the rock, unable to clear it. Finally, the runner behind her reached and pulled the leg backward, and Palmiero-Winters swung her foot over the impediment. She was free to continue her attempt to become the first female amputee to complete the Marathon des Sables, a stage race roughly equivalent to running 23.5 miles a day for six days in relentless heat over sand dunes, rocks, dry valleys, stony plateaus and salt flats in southern Morocco.

About 780 runners (and one dog) from 51 nations fell into single file to make the abrupt ascent: A woman from Malaysia who ran the entire 140.7 miles of the ultramarathon in flip-flops; the dog, a nomad nicknamed Cactus, who ran in five of the stages and went viral on the internet; a jeweler from Dubai who once worked the American South, eating furtive meals at Waffle House counters with diamonds strapped to his chest.

Each runner carried in a backpack everything needed for a week in the desert: food, sleeping bag, compass, headlamp, venom pump to minimize any bites from snakes and scorpions. Each had his or her own motivation: to reconsider a bad marriage; to kick a habit of sloth and cigarettes; to plot a new career after the military; to find a new challenge after rowing across the Arctic Ocean.

(Continued on Page 8)

This was the first attempt at the Marathon des Sables for Palmiero-Winters or any female amputee in the 34 years of the race, organizers said. Her lower left leg was amputated below the knee in 1997 after a motorcycle accident. She is a single mother of two teenagers, 15 and 13, intensely driven, remarkably persevering. She trained for the heat of the desert, in part, by doing lunges and burpees in a sauna. She also placed her fiancé's two young boys on her shoulders while she ran during her CrossFit workouts, then put them on her back while she did bear crawls, to grow accustomed to the heaviness of a backpack.

Before this desert race, she had established a dozen or so world records or firsts for below-the-knee amputees, including running the 26.2 miles of the 2006 Chicago Marathon in 3 hours 4 minutes 16 seconds. In 2009, she was named [the winner of the A.A.U. James E. Sullivan Award](#) as the nation's top amateur athlete. In 2011, she became the first female amputee to finish the Badwater Ultramarathon, a brutal 135-mile race in July from Death Valley to the Mount Whitney trailhead at 8,300 feet.

Last summer, Palmiero-Winters was one of only 12 finishers at the hellish Spartan Death Race in Pittsfield, Vt., a 72-hour slog that included running, hiking and extreme tasks like 3,000 burpees, a 12-hour crawl under barbed wire and a seven-hour rope climb.

"Amy is the toughest person I know," said Joe De Sena, the founder of the Death Race.

Now she faced perhaps her harshest test, this marathon of the sand, taking tens of thousands of jarring strides on her prosthetic leg, her natural leg having borne years of asymmetrical pounding, the calf with reduced function, the foot with broken metal screws, the second toe fused straight.

She wanted to complete this race to inspire, to show how not to succumb to artificial limits, she said. She wanted her children to understand about pushing the envelope and not selling themselves short.

"When it's your last day, you want to come in skidding sideways, your body worn out," she said, discussing her approach not only to running but to life.

Palmiero-Winters did not spend much time studying the Marathon des Sables course. She did not want to know about terrain changes. She wore a watch, not to measure her pace or heart rate, but to remember what

time it was back home on Long Island. Her approach was not to think, only to put her head down and run. But that was a risky strategy in the desert.

At 5 feet 7 inches and 120 pounds, she faced enormous challenges almost immediately and repeatedly — first with her breathing, then with running on a carbon fiber leg in a forbidding environment while carrying a backpack that weighed 19 pounds. Her 13-year-old daughter, Madilynn, had seemed to acutely understand the risks. She gave her mother a note that was laminated and hung from the rucksack: "Good luck. I love you. Don't die."

Growing up in Meadville, Pa., east of Cleveland and near Lake Erie, Palmiero-Winters found a freedom in running. She ran track and cross-country in high school. Sometimes she ran from her family's drive-in to deliver orders of chicken wings to softball tournaments. Other times, she headed out to run after the drive-in closed at night, a family friend trailing in a Ford Ranger.

"Some people are born to do certain things," said the family friend, Stacy Meyer. "She was born to run, I guess."

Running, too, became a form of escape, Palmiero-Winters said, when she was raped in high

school and when her father drank and physically and verbally abused her mother or when her own brief marriage turned turbulent. Both of her parents died this year.

"Sports gave me self-confidence," she said. "When something bad happened to me, I went out for a run. It kept me from any darkness."

She attended Youngstown State in Ohio for a time, and planned to study criminal justice, join the military and become a police officer. But she said she dropped out of school when her family could no longer afford the cost. She became a carbide furnace operator at a plant in Meadville. Later, she became a welder.

Her life's trajectory changed on April 14, 1994, as she rode her Harley-Davidson 883 Sportster with friends. As Palmiero-Winters came up a hill in Meadville, a woman pulled from a stop sign and struck her, badly injuring her lower left leg. Doctors wanted to amputate immediately, she said, but she resisted. She was a runner. She could not imagine not running.

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A PAST COMEBACK AWARD WINNER... FROM PAGE 8

In 1995, she ran the Columbus Marathon in Ohio in 4:03:37 but felt pain in every step. She realized that a door was beginning to close. She was only putting off the inevitable. By then, she said, atrophy and surgery had reduced the size of her left foot to 4½ from 7½. Her left ankle also began to fuse. Finally, after more than two dozen surgeries, her left leg was amputated below the knee on July 27, 1997.

Palmiero-Winters tried to run again when she received a prosthesis, but it was not built for sports. If she ran three miles, she needed three days to recover. At one point, she threw out all of her running gear. That was it, she thought. Then she reconsidered. Running defined her. In October 2005, with a somewhat better prosthetic, she won her division of athletes with disabilities at the world triathlon championships in Hawaii. She wanted to begin running races of 100 miles or more, but her running leg was low-tech, its foot made of wood and foam.

A fellow competitor told her about A Step Ahead Prosthetics in Hicksville, and she drove there from Meadville with her mother and her two children. Erik Schaffer, the company's founder and chief executive, called the prosthetic leg that Palmiero-Winters arrived with "the meat grinder," which left her with bruising and contusions on her residual leg and was effectively like trying to run in a ski boot.

He began to make custom running legs for her, and in 2010, Palmiero-Winters became the first amputee to be named to a United States national track team in a championship event. She competed in the 24-Hour World Championships, helping the Americans finish fourth.

"Amy is kind of like a mudder," Schaffer said. "The worse the conditions, the better the Amy." She is now the company's director of operations.

Palmiero-Winters took three to five prosthetic legs with her to many ultra races to adapt to variable terrain and was sometimes aided by a crew from A Step Ahead. But support crews are not allowed at the Marathon des Sables, and she brought only one extra prosthesis for walking when she was not racing.

On the bottom of her running blade in the Sahara, Palmiero-Winters wore a scrap of Goodyear tire, three and a half inches wide, for traction. The prosthesis included an air chamber to cool its outer and inner layers. Then the leg was coated in a chalky color with paint used on the roofs of houses and buildings in the desert.

It was critical to keep sand from getting between Palmiero-Winters's skin and the silicon liner of her prosthesis, said Schaffer, who fashioned the prosthetic leg. The rubbing would mercilessly abrade her skin, he said, not unlike trying to run a marathon in a bathing suit full of sand.

"If Amy was out there and she needed to sit down and took off her liner and it hits the sand, it's absolutely game over," Schaffer said.

The Marathon des Sables began on April 7, the morning still cool, hills pink and brown on the horizon, the sand and rock the tawny color of lions. With loudspeakers blasting AC/DC's "Highway to Hell," Palmiero-Winters and the rest of the field took off for a 20-mile stage. She wore what most wore for shade, a hat with flaps over the ears and neck, which gave the runners the look of extremely fit beagles.

Palmiero-Winters stuck a dental floss pick into the liner of her prosthetic leg to keep the nuts and fruit and seeds from her protein bars from getting stuck in her teeth. She also slipped an MP3 player inside the liner. She planned to listen to Eminem for the entire race, drawn to the rapper's me-against-the-world bravado.

"Nobody believed in him; he paved his own path," Palmiero-Winters said. "Same with me."

Her first choice was a Dr. Dre song featuring Eminem called, "I Need a Doctor." It was not meant to be a literal request. But only about five and a half miles into the race, as Palmiero-Winters (*Continued on Page 10*) crested a short, steep hill, her lips appeared to bulge, as if with a plug of tobacco. She feared she was going into anaphylactic shock from an unknown allergy. Her tongue seemed thick, her words heavy.

"It's shutting down my airway," she said. "My throat is closing."

She had an epinephrine injector to treat the attack, but hesitated to use it. The Marathon des Sables allows only

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limited assistance to runners. Palmiero-Winters feared that if she used the EpiPen now and her shortness of breath returned during another stage, she might be forced to leave the race.

Fortunately for her, her airways soon opened without an injection and her breathing problem did not return.

The next day featured a 20.2-mile stage, including perhaps the most difficult section of the race — eight miles traversing some of the biggest dunes in Morocco, known as the Erg Chebbi. The unremitting ups and downs were the cumulative equivalent of climbing a 115-story building.

The sun was relentless. The wind picked up and sand blew into eyes and noses. Some runners sought relief from the heat under bushes in the dunes. A former British paratrooper crawled over some dunes to navigate the loose sand. A Frenchwoman fell out, exhausted, as she cleared the dune field.

Palmiero-Winters had hoped to run the entire race. But that was impossible in this terrain. So she improvised and switched from her running prosthetic to her walking prosthetic. The running leg, a blade, kept her on her tiptoes; the walking leg was attached to a running shoe and had a heel. It would give her more surface area to plant into the sand and, she hoped, a shallower step. But even before the dunes, sand began to pour into the running shoe and the prosthetic foot.

She had no sand gaiter for that prosthetic and tried, futilely, to cover the opening between the carbon fiber leg and the shoe with a plastic bag. As the dunes approached, she grew discouraged.

"I feel like such a failure," she said.

All runners feel emotional swings during long races. And while Palmiero-Winters struggled in the dunes, she also drew strength by considering her life's impediments and how she had overcome them.

Through the dune stage, she used trekking poles and followed another runner who veered from the well-trod path, seeking spots of untrammelled, crusty sand. This more secure footing required less energy to plant and withdraw her shoe. She also looked for tracks where passing camels had made only slight indentions.

After nearly three hours, Palmiero-Winters emerged from the dunes and consoled a British woman who was on her back with blistered feet. "I want to cry, too,"

Palmiero-Winters said, "but you've got this, kiddo. Take deep breaths, one foot in front of the other."

At the finish line, she returned to the tent she shared nightly with six other runners and did 100 push-ups.

For the third stage, a 23.1-miler, Palmiero-Winters started with the running blade but found it impossible to lengthen her stride in the sand and on rocky plateaus. Her body was taking a tremendous pounding. A prosthesis cannot soften the landing on different surfaces the way a natural leg can by flexing at the knee and ankle to maintain a certain amount of "give" as the foot strikes the ground.

With each choppy stride, the weight of Palmiero-Winters's backpack jolted the back and side of her left knee. Skin began to peel inside the liner of her prosthesis. Three toenails on her right foot began to loosen. The sun was ruthless and the thermometer on her prosthetic leg reached 122 degrees. Another amputee who had completed the 2018 Marathon des Sables, had to withdraw as his residual leg began to swell uncomfortably.

Palmiero-Winters told herself, "I don't know if I can do this."

When she removed the prosthesis after the stage, one of her tent mates asked, "Is that iodine?"

"No," Palmiero-Winters said. "That's blood."

She went to the medical tent and returned with disinfectant and a bandage. It was clear that her residual leg would hurt with each stride the rest of the way. So she would keep taking one step, then the next, and repeating to herself a line from Dory in "Finding Nemo": "Just keep swimming."

The longest stage, 47.4 miles, with a 31-hour time limit, began with cloud cover and cooler temperatures. In a small village, Palmiero-Winters slapped hands with schoolchildren as women nearby baked bread in an earthen oven.

But the sun burned through as runners passed near a butte that resembled a tagine and a cemetery mound for a nomad family with makeshift gravestones at the head and feet. After days without showering, runners were caked in grime. Food supplies were running low in backpacks.

"I'd pay a thousand dollars for a pepperoni pizza," said

(Continued on Page 11)

A PAST COMEBACK AWARD WINNER... FROM PAGE 10

Moritz Baier-Lentz, a German runner who works at Goldman Sachs in New York.

At checkpoints, runners took bottles of water and salt tablets, which Chuck Allison of Milwaukee called “desert candy.”

“My body is telling me to stop,” he said, “but my brain is saying, ‘Shut your filthy mouth.’”

The rocks kept bouncing Palmiero-Winters around. She fell on her right knee. An m-shaped scab formed. At a checkpoint after 13 miles, she wiped away tears. Still, she planned to keep running through the night.

The thermometer on her running leg reached 144 degrees in the afternoon. A sandstorm kicked up before dusk. Some runners and vehicles came to a brief halt. Officials at one checkpoint put on ski goggles. But Palmiero-Winters remained behind the storm and began to pick up speed in a flat valley at night, wearing a headlamp and a glow stick on her backpack.

Her vision was restricted to the circle of light shown by her headlamp, though, and Palmiero-Winters kept tripping over rocks. At a checkpoint after 31.5 miles, a nurse gave her a painkiller, her first. She switched to her walking leg, which had been ferried in an S.U.V. She taped up the front of her shoe and sealed the gap where the prosthetic leg inserted into the sneaker with a rubber foot.

Just before dawn, after 20 hours 25 minutes, Palmiero-Winters reached the finish. A tent mate, Simran Singh, an Apple engineer from San Francisco, high-fived her in his sleep.

“She changed my definition of sanity and strength,” said Singh, who entered the race to overcome panic attacks. “You think she won’t make it, but she does.”

After a day of rest, the runners embarked on a standard marathon stage of 26.2 miles that began with the steepest climb of the week, a 25 percent grade that forced some of the runners to use fixed ropes. The runners passed a man digging furiously with a shovel. He spotted an iguana and scooped it from its burrow. Later he would eat the lizard, its blood said to be a curative for spring allergies.

Palmiero-Winters wore her walking prosthesis but, by the first checkpoint, she had developed a significant limp. Her residual leg was hot and striped red with blisters and peeled skin.

“It hurts so much,” she said. “I wish I could run. God, I wish I

could run.”

By the second checkpoint, where pink flowers had been scattered across the path in a narrow gorge, she was bent over in pain. But as in previous days, she recovered as the stage progressed.

Near the finish line, she broke into a trot, smiling and high-fiving a small crowd that gathered. Patrick Bauer, the race director, placed a medal around Palmiero-Winters’s neck and hugged her. All that remained was an untimed 3.8-mile run for charity the next morning. Of the 780 runners who started, all but 40 would finish the race.

She limped to the medical tent and was examined by an orthopedic surgeon who applied antiseptic cream and bandages to Palmiero-Winters’s residual leg. No bones or tendons were exposed, the surgeon said. The wounds were superficial but needed monitoring.

As Palmiero-Winters returned to her tent, applause broke out. Competitors bumped fists with her. They told her she was a “total badass.” She laughed about a fall she took about a half-mile from the finish, when her leg seemed to whip over her head like a scorpion’s tail.

“When I fall, I laugh, I cry, I get back up,” she said, “and I keep going.”

LONGMAN, JÉRÉ. “An Amputee’s Toughest Challenge Yet: Her 140-Mile Run in the Desert.”

The New York Times, 26 APR, 2019



<https://www.nytimes.com/interactive/2019/04/25/sports/amy-palmiero-winters-marathon-des-sables.html>

JUDICIARY DINNER RECAP

The Western Pennsylvania Trial Lawyers Association held its Annual Judiciary Dinner on Friday, May 3, 2019. This event, held at Heinz Field, honors those members of the Judiciary who retired or achieved Senior Status during the preceding calendar year. The Honorable Joy Flowers Conti, Ronald W. Folino, and Harry E. Knafelc attended the dinner as this year's honorees. Honored Judges not in attendance included John Garhart, Richard A. Masson, John D. McBride, Richard E. McCormick, Jr., and Arthur J. Schwab.

The evening began with a cocktail reception featuring passed hors d'oeuvres, then moved to a sit down dinner before the program began. The program included speeches about the life and career of each Judge being honored, and the Judges were presented with a custom-engraved set of rocks glasses.

The Association made its annual presentation of the Daniel M. Berger Community Service Award to John Patrick Lydon, Esq., of Auberle, which is a faith-based non-profit that aims to transform the lives of individuals, families, and communities in our area. John is a former trial attorney and a Past-President of WPTLA. The award includes a \$2,500.00 donation to Auberle.

Three high school seniors, Arabella Hunt from Carlynton Jr/Sr High School, Ellen Poplavsk from North Allegheny Sr High School, and Brandie L. Ray from Bellwood Antic High School, attended the dinner with their families in order to be recognized as the winners of the WPTLA Scholarship Essay Contest. This year, the Association received 37 essay submissions, the most in the history of the contest. The Committee members scored and graded the essays, which is a difficult task every year as all of the submissions are worthy of winning and it seems that the essays get better year after year. These three ladies' essays stood out from the rest and were selected as the best after the Committee vote. Each received a certificate and a scholarship check in the amount of \$2,000.00.

Charles F. Bowers, Jr., known affectionately by many as "Lucky," was recognized as this year's Champion of Justice, an award which is presented to a trial lawyer who has fought to defend and preserve the rights of all people to have fair access to the court system.

The evening concluded with dessert and conversation, as many of the Judges and attendees stayed to converse after the program. We hope to see everyone in attendance at next year's event, which will be held on Friday, May 1, 2020, so save the date!

By: Erin Rudert, Esq, of Ainsman Levine, LLC er@ainsmanlevine.com



Pictured above, from L to R: The Honorable Joy Flowers Conti and President Bryan Neiderhiser, The Honorable Ronald W. Folino and President Bryan Neiderhiser, and The Honorable Harry E. Knafelc and President Bryan Neiderhiser. More photos on p. 13.

JUDICIARY DINNER PHOTOS



Pictured from L to R in #1: Past President Larry Kelly and Champion of Justice Winner Charles F. "Lucky" Bowers, Jr.

In #2: President-Elect Dave Landay and his wife Caron.

In #3: Past President and Auberle CEO John Patrick Lydon and Past President Rich Schubert

In #4: Secretary Mark Milsop, Board of Governors Member Clint Kelley, and Bill Kenney

In #5: Vice President Eric Purchase, Board of Governors Member Shawn Kressley and Past President Chris Miller

In #6: Kevin Peck, Board of Governors Member Troy Frederick and his wife Beth

In #7: Beth Tarasi, Board of Governors Member Brendan Lupetin, Board of Governors Member Greg Unatin and his wife Sydne, and Lacey Lupetin

In #8: Steelwheeler Josh McFadden, 5K Co-Chair Chad McMillen, Steelwheeler Claire Senita, Executive Director Laurie Lacher, President Bryan Neiderhiser, and Steelwheeler Lee Tempest.



On March 20th, the WPTLA held its monthly meeting at Rizzo's Malabar Inn in Greensburg. The meeting was followed by cocktails, a delicious Italian buffet and a one hour CLE entitled "Judges Roundtable on Westmoreland County Civil Practice and Procedure."

Attendance was strong with 51 attendees including 5 Westmoreland County Judges. WPTLA Board member Mike Ferguson moderated an animated discussion with Westmoreland County Judges Richard McCormick, Anthony Marsili, Harry Smal, Christopher Scherer and Scott Mears. Topics included Westmoreland County motions practice, jury pool characteristics unique to Westmoreland County, as well as motions practice and trial tips from each of the judges in attendance. A lively Q & A with the audience was also conducted.

Both the dinner and program were well received by those in attendance, including WPTLA business partner representatives Brad Borghetti and John Roseto of Ford Business Machines, Andy Getz and George Hargenrader of Thrivest Legal Funding, Dave Kassekert of Keystone Engineering, Dee Sherry of Accenturate, Rod Troupe of Finley Consulting & Investigations and Cindy Miklos of Planet Depos.

By: Michael D. Ferguson, of Ferguson Law Associates
mferguson@fergusonlawassociates.com



ANNUAL COMEBACK AWARD DINNER

Save the date for

Monday, October 12, 2019

*We're returning to The Duquesne Club for
 an inspiring and rewarding evening
 to honor*

David Gifford, 2019 Comeback Awardee,

*a client of Armand Leonelli, Esq.,
 of Edgar Snyder & Associates*



DUQUESNE
 CLUB

UPCOMING CLE PROGRAMS

Aug 21, 2019 - CLE & Breakfast featuring Past Presidents - 2 credits - Hampton Inn, Bridgeville

Oct 21, 2019 - Dinner & CLE - 1 credit - Wooden Angel, Beaver

Nov 8, 2019 - CLE featuring Brendan Lupetin - 3 credits - Erie County Bar Association, Erie

Dec 11, 2019 - Lunch 'n Learn Ethics CLE with Past President Larry Kelly - 1 credit - Gulf Tower, Pgh

Feb 6, 2020 - CLE featuring Past President Paul Lagnese - 2 credits - Gulf Tower, Pittsburgh

Feb 12, 2020 - CLE featuring Business Partners - 3 credits - Koppers Bldg, Pittsburgh

Mar, 2020 - Dinner & CLE - 1 credit - Washington County

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

On May 24, 2019, 39 golfers teed it up at the beautiful Shannopin Country Club for the 27th Annual Western Pennsylvania Trial Lawyers Ethics & Golf Event. The Ethics Seminar was conducted this year by Larry Kelly, former member of the Pennsylvania Supreme Court Disciplinary Board. It should be noted that this is the first year that Rich Schubert was not in attendance to participate in the seminar. That was for good reason, as he was in China trying to negotiate tariff reduction on behalf of the Trump Administration. (HAHA!)

After the golf scramble, a phenomenal buffet lunch was provided.

The winning team, with a score of 57, was Dr. Bart Marrow, his daughter Casey Marrow, Dave Belsito, and Dr. Barry Foster. The Second Place team, with a score of 63, was the team of Bruce Gelman, John Mackey, and Tony Seethaler. The Third Place team was Larry Kelly, Joe George, Greg Rosatelli, and Sam Mack. The Fourth Place team was Jack Goodrich, Dan Connolly, Bernie Caputo, and Sean Carmody, with a score of 64. Skilled prizes with the closest to the pin on number 7 was John Mackey, on 14 Charles Georgi, longest putt on hole number 18 was Mike Pitterich. Longest drive on the fairway was President Bryan Neiderhiser.

I would be remiss if I did not thank all the great Business Partners we had at this event, including Thrivest Legal Funding, Ford Business Machines, Finley Consulting & Investigations, Forensic Human Resources, and FindLaw.

Mark your calendars now for next year's event, which will take place on Friday, May 22, 2020, Memorial Day weekend at Shannopin Country Club.

See photos on page 16.

By: Jack Goodrich, Esq., of Goodrich & Associates
jack@goodrichpc.com



FORD BUSINESS MACHINES

Managing the integration of document and content workflows can be exceptionally difficult in an industry known for its prodigious amounts of information. Legal workflows are a composite of interlinking data sets closely aligned with a firm's ability to successfully service its clients. Ford Business Machines, a trusted business partner of WPTLA and provider of solutions within the Legal industry, puts its customers' needs first by offering solutions that can help you:

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Ford Business Machines is the largest independent authorized dealership in Western Pennsylvania, and we have spent close to three decades building upon our core objectives of unprecedented customer service and relationships founded in trust and loyalty.

We appreciate our association with the WPTLA and look forward to meeting with you in the very near future.

Contact John Roseto by telephone at 724-707-4885 or by e-mail at jroseto@buyfbm.com.





Pictured from L to R in #1: Chuck Alpern, Past President Josh Geist, George Hargenrader of Thrivest Legal Funding, Mark Melago of FindLaw

In #2: John Becker, Charlie Georgi of FindLaw, Past President John Becker

In #3: Rusty Bopp, President Bryan Neiderhiser, John Roseto of Ford Business Machines, Brad Holuta

In #4: Past President Bernie Caputo, Past President and Golf Chair Jack Goodrich, Dan Connolly, SK Co-Chair Sean Carmody

In #5: "Moose," Kirk Hannah, Past President Mark Homyak, Brian Gastaldi

In #6: Past President Larry Kelly, Greg Rosatelli, Sam Mack, Joe George

In #7: Drew Leger, Gary Ogg, Don Kirwan of Forensic Human Resources, Mike Pitterich

In #8: John Linkosky, Mark Aletto, Justin Jenkins of Ford Business Machines, Dick Kelly

In #9: John Mackey of Finley Consulting & Investigations, Bruce Gelman, Tony Seethaler



Save the date now for the 2020 Outing, on Friday, May 20, at Shannopin Country Club.

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Supreme Court to Rule on Retroactivity of *Protz*

The Supreme Court has granted allowance of appeal in the case of *Dana Holding Corporation v. Worker's Compensation Appeal Board* (Smuck), 195 A.3d 635 (2018).

In *Dana Holding*, the Claimant underwent an Impairment Rating Evaluation on June 20, 2014. Initially, the Claimant was evaluated on the basis of the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment. Based on those guides, the examining physician determined the whole body impairment rating of 11%. Employer petitioned to modify the Claimant's benefits based on the evaluation. While *Dana Holding* was pending, the Commonwealth Court decided *Protz v. WCAB (Derry Area School District)*, 124 A.3d 406 (Pa. Cmwlth. 2015) (*Protz I*). At that point, the Employer sought to reopen the record and introduced an IRE under the 4th Edition of the Guides as permitted by *Protz I*. The workers' compensation judge permitted the reopening of the record and the entry into the evidence of the second IRE using the 4th Edition and granted the petition modifying the Claimant's benefits from total to partial.

Both parties appealed to the Workers' Compensation Appeal Board. At that point, *Protz* had been appealed to the Pennsylvania Supreme Court. The Appeal Board held the matter in abeyance until the Supreme Court rendered its decision in *Protz*. After *Protz II* was decided, the Appeal Board reversed the workers compensation judge's decision, as §306 (a.2) of the Act was found unconstitutional. Benefits were reinstated as of June 20, 2014, the date of the now-unconstitutional Impairment Rating Exam.

Employer appealed to the Commonwealth Court arguing that the Board committed error in retroactively applying *Protz II*. Alternatively, it argued that *Protz II* should only apply as of the date of the Supreme Court's decision, as well as only in cases where the issue was raised and preserved. Before the Commonwealth Court, Claimant argued only for retroactive application to cases pending at the time *Protz II* was decided.

Regarding the Employer's appeal, the Commonwealth Court found that the Modification Petition was still being actively litigated at the time *Protz II* decision was rendered. The Court noted that the Employer lacked "any reasonable expectation in the finality of the modification of Claimant's disability benefits." The court next addressed the issue of whether *Protz II* should only apply from the date of the Supreme Court's decision, rather than the date of the Impairment Rating Evaluation. This would have provided

the Employer with 3 years of credit towards the 500 weeks. Again, the Commonwealth Court noted that the IRE decision was not final because it was actively in litigation at the time the Supreme Court ruled. Therefore, there would be no credit afforded to the Employer for the intervening weeks between the date of the IRE and the date of the *Protz II* decision.

The Employer also argued the Remedies Clause in Article I, § 11 of the Pennsylvania Constitution. Said Clause states as follows:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct. Pa. Const. Art. I, § 11

Employer argued that only prospective application of *Protz* would meet the requirements of the Remedies Clause. The Court noted, however, that due course of law arguments protected only vested rights. Here, because the Modification Petition continued in litigation at the time of *Protz II*, the Employer did not have a vested right. Furthermore, the Court noted that it found no case law applying the Remedies Clause to unconstitutional statutes. Therefore, the Court affirmed the Board's decision placing the Claimant back on total disability as of the date of the IRE exam.

Dana Holding then appealed to the Supreme Court. The issues accepted by the Court are stated as follows:

1. Whether the Commonwealth Court erred in applying the [*Protz II*] standard to the case on appeal at the time of this Court's decision retroactive to the date of the IRE instead of as of the date of the Supreme Court changed in the law?
2. Whether the Commonwealth Court's failure to grant the Employer credit for the 3 year period between the date of the IRE evaluation and the date of the Court's decision in [*Protz II*] unlawfully violates Employers constitutional right pursuant to the "due course of law" provisions of Pennsylvania Constitution Article I, § 11?

This case represents yet another partially filled vessel carrying the issues raised by *Protz II* to the Supreme Court. Claimant did not argue in (Continued on Page 23)

RULE OF APPELLATE PROCEDURE 126 AMENDED

Rule 126 of the Pennsylvania Rules of Appellate procedure controls when unpublished non-precedential opinions of an appeals court may be cited. In its simplified form, the rule allows for citation to Superior Court decisions filed after May 1, 2019 and Commonwealth Court decisions filed after January 15, 2008

Under the rule, decisions which are not readily available shall be attached as an appendix. In addition, the party must indicate the value or basis for the citation. Except for cases where the decision is part of law of the case, the value of such opinions will be considered as persuasive authority only.

Where unpublished opinions are available on an electronic data base, that source's citation should be included.

USE OF JOHN DOE IN CAPTIONS

Pa.R.C.P. 2005

The Pennsylvania Supreme Court has adopted Rule 2005 providing for the use of Doe designations in captions which became effective April 1, 2019. Under the new rule, there are very specific provisions in the rule setting forth the manner in which a Complaint against a Doe defendant is to be utilized.

At the outset, it is important to be aware that the Note to Rule 1007 specifies that a Doe designation is not authorized in a case initiated by a Praecipe for Writ of summons.

Rule 2005 sets forth four conditions for naming a Doe Defendant, including (1) the actual name is unknown to the plaintiff or joining party, (2) it is averred that the designation is fictitious, (3) a factual description must be averred with particularity sufficient for identification and the (4) it is averred by the party that a reasonable search has been conducted.

Rule 2005(c) requires the filing of a motion to amend within 20 days of identification of the Doe defendant. The rule further specifies information which must be included in an affidavit to be attached to the motion. Granting the motion to amend is required unless there was a lack of diligence.

A somewhat onerous requirement limits discovery by subpoena to cases in which a motion requesting leave is filed.

In addition, a judgment may not be entered against a Doe defendant .

It should be recognized that a Doe designation will not always relate back to the commencement of the action. Rather Rule 1033 provides that an amendment substituting a Doe defendant will relate back only if within the time for service, the defendant subject to the amendment received actual or constructive notice of the commencement of the action "such that it will not be prejudiced in maintaining a defense on the merits" and knew or should have known that the action would have been brought against the amended defendant "but for a lack of knowledge of the defendant's actual name."

ABATEMENT RULE CORRECTLY INTERPRETED

There is a myth out there that when a party to an action dies, the case will be abated and dismissed if an estate is not opened and substituted for the deceased party. This is not the case. As such, a brief review of Rule 2355, the PEF Code, and the recent Pennsylvania Superior Court decision in *Brown v. Quest Diagnostics Clinical Labs., Inc.*, 2019 PA Super 142, is worthwhile

Rule of Civil Procedure 2355 provides:

a) If a named party dies after the commencement of an action, the attorney of record for the deceased party shall file a notice of death with the prothonotary. The procedure to substitute the personal representative of the deceased party shall be in accordance with Rule 2352.

If a plaintiff or petitioner in any action or proceeding now pending or hereafter brought dies and a personal representative is not appointed within one year after a suggestion of such death is filed in the action or proceeding, any defendant or respondent may petition the court to abate the action as to the cause of action of the decedent.

20 Pa.C.S. § 3375

Brown is a medical malpractice action in which the plaintiff died on April 2, 2015 and a suggestion of death was filed on June 24, 2015. Letters testamentary were then granted on September 1, 2015. On February 22, 2016 a Motion to Substitute was filed. On May 10, 2017 the Motion was denied without prejudice. On May 15, 2017, a defendant filed a response in opposition to the motion to substitute as well as a Petition to Abate and Dismiss. The trial Court granted the defendant's Petition.

On appeal in an opinion written by President Judge Emeritus Ford Elliott, the Superior Court emphasized that Section 3375 must be correctly read and requires *only* that the Personal Representative be appointed within one year; and does not required that the

(Continued on Page 20)

substitution of the personal representative be completed within the one year.

It should be observed that in *Brown*, the estate was opened within one year of death so further analysis was not required. However, the actual statute is even more forgiving than the *Brown* decision since the statute only requires the appointment of the personal representative be appointed within one year of the filing of the suggestion of death. The one thing which is not clear is whether there is any time constraint as to when the suggestion of death must be filed. Clearly Rule 2355 makes the filing mandatory, but it does not state when.

The lesson to be learned is that when a party dies, you can save yourself a lot of unneeded motions practice by promptly filing the suggestion of death, having a personal representative appointed, making the substitution, and then moving forward with the litigation. However, it is not impossible to envision a situation where communication is lost and counsel is unaware of the death and/or where there is a dispute over who should be appointed personal representative or even finding the person to serve as personal representative.

It is the observation of the author that these types of cases point to the need to modernize our rules and law. In reality, the personal representative of a defendant in litigation is little other than a body to fulfill technical requirements. The estate is actually being represented by counsel through an insurance company. So if the defendant otherwise does not need to have an estate opened, why should the family of the defendant be burdened by the opening of an estate? In addition to burdening the estate, the appointment of a representative simply creates expense and consumes time and effort. It is always a dilemma when a plaintiff dies and no one wants to open an estate. The plaintiff's counsel may have little idea of who is entitled to letters or who should be notified. If a pro-forma administrator is appointed, how is that person, a complete stranger to the situation, able to really gather assets, pay taxes and distribute an estate?

Although the belief that a lawsuit against a deceased person is a nullity is long-standing, there is really little practical justification for perpetuating this convention. It is time to envision rules that provide that where a decedent is merely a nominal party and the estate has no real stake in the outcome of litigation, the litigation may proceed, or that a procedure be created to allow for the naming of a fictional, nominal or limited

purpose executor *ad litem*. There are situations where there is a need for an estate outside of litigation or where assets of the estate are at stake. In those instances, the updated rules could be fashioned so as to not apply.

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

mmilsop@bergerandgreen.com



July 1, 2019 - June 30, 2020

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***Wright v. Residence Inn by Marriot, Inc.* 2019 Pa. Super. 110 (April 9, 2019)**

Pennsylvania Superior Court reverses trial court for precluding a treating internist from serving as a medical expert for an injured Plaintiff and remands the case for a new trial as to damages only

On January 5, 2014, Bryan Wright ("Wright") was staying at the Residence Inn by Marriott located in Horsham, Pennsylvania. That morning, as Wright walked outside the hotel on a paved pathway from one building to another, he slipped on a patch of ice and fell, injuring his left shoulder and hip. The shoulder injury required arthroscopic surgery.

Wright filed suit against Defendant Residence Inn by Marriott (Marriott) seeking damages for his injuries. On the eve of trial, Marriott filed a motion in *limine* seeking to preclude the expert report and video testimony of Wright's sole medical expert, Paul Sedacca, M.D. The trial court granted Marriott's motion in part, only permitting limited testimony from Dr. Sedacca concerning Wright's medical bills. Consequently, Wright could not present any testimony about Dr. Sedacca's qualifications, or the objective findings of Dr. Sedacca's physical examination. Wright also had no expert testimony regarding the nature of his injuries, the cause of those injuries, or the resulting treatment and prognosis.

The jury entered a verdict in favor of Wright, finding that Marriott was negligent and Marriott's negligence was the sole cause of Wright's injuries. The jury awarded Wright \$8,896.44 for his medical expenses and \$55,000.00 for non-economic damages. Wright filed post-trial motions arguing that the trial court erred in ruling that Dr. Sedacca was unqualified because he was not an orthopedist, and prohibited him from testifying at trial. In addition, given the timing of Marriott's motion, Wright argued he could not obtain another medical expert and Marriott had used the lack of medical testimony and medical records against him during closing argument. The trial court denied the post-trial motions, and Wright appealed the case to the Pennsylvania Superior Court.

"[T]he test to be applied when qualifying a witness [is] whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation."

Wright's first issue on appeal was whether the trial court had abused its discretion by precluding the testimony of Dr. Sedacca, when he was qualified to render opinions about plaintiff's shoulder injuries. The Superior Court noted that the test to be applied when qualifying a witness was whether the witness has *any* reasonable pretension to specialized knowledge on the subject under investigation. The Court further observed that experts in one area of medicine may be found to be qualified to address other areas of specialization where the specialties overlap in practice, or where the specialist had experience in a selected field of medicine.

In this case, the trial court had concluded that Wright's shoulder injury was so specialized that it warranted preclusion of Dr. Sedacca's testimony. The Superior Court disagreed, finding that Wright intended to offer Dr. Sedacca as a medical expert and disability evaluating physician who would offer opinions about Wright's injuries, particularly to his shoulder, their relation to his fall, and his treatment, including the resultant surgery. The Superior Court found that the trial court incorrectly applied the heightened standard for medical expert testimony needed in a medical malpractice action where the Defendant physician is a specialist.

Applying the standard correctly, the Superior Court's review of Dr. Sedacca's qualifications established that he was qualified to testify in this case, as he possessed a reasonable pretension to specialized knowledge regarding Wright's medical issues sufficient to assist the trier of fact. The Court also noted that although an orthopedist may have been more qualified, this did not mean Dr. Sedacca was unqualified to serve as an expert on causation and damages in this case.

In reviewing his qualifications, the Court found, *inter alia*, that: Dr. Sedacca was a licensed medical doctor in Pennsylvania, practicing for over thirty-seven (37) years; Dr. Sedacca practiced in the area of internal medicine which encompassed many aspects of medicine including different subspecialties like orthopedics and general surgery; Dr. Sedacca had dealt with patients who had orthopedic or shoulder-type injuries; Dr. Sedacca routinely referred patients for diagnostic tests, such as MRIs, and customarily reviewed them in formulating opinions about a patient's diagnosis or condition; and he had been qualified as an expert in the field of internal medicine and disability evaluations in various courts.

Consequently, the Superior Court held that the trial court had abused its discretion in precluding Dr. Sedacca from testifying at trial. The errors in Wright's case were further compounded by Marriott's emphasis during closing argument on Wright's failure to produce a medical doctor at trial to tell the jury about Wright's injuries or the effect on Wright. Accordingly, the Superior

(Continued on Page 22)

Court concluded that Wright was entitled to a new trial.

Wright's second issue on appeal was whether a new trial should be limited only to damages. The Superior Court concluded that the parties had already received a fair opportunity to litigate the issues of negligence and contributory negligence and the issue of damages were easily separable from the issue of liability. Accordingly, this case was remanded for a new trial on damages only, in a manner consistent with the Superior Court's opinion on expert qualifications.

Butta v. Geico Insurance Company, Civil Action No. 19-675, (United States District Court, E.D. Pennsylvania. April 19, 2019)

Federal District Court finds that the PA Supreme Court's opinion in *Gallagher v. Geico Indemnity Co.*, applies retroactively.

On July 20, 2017, Francis J. Butta ("Butta") suffered severe injuries while riding his motorcycle after an underinsured driver struck him with her car. The tortfeasor's liability coverage provided \$300,000 in compensation to Butta but was insufficient to compensate him for his injuries. Butta then collected \$15,000 from his own UIM coverage, but his compensation remained insufficient. Butta next made a claim under the UIM policy issued to his parents. On August 18, 2017, Geico denied Butta's claim for UIM coverage under his parents' policy based on the household exclusion.

On January 23, 2019, Butta sued Geico seeking declaratory judgment that he was entitled to recover stacked underinsured motorist coverage under his parents' policy. Butta argued that the "household exclusion" is not enforceable under the Pennsylvania Supreme Court's recent decision in *Gallagher v. GEICO Indemnity Co.*, which held that the household exclusion relied upon by Geico violates Pennsylvania's Motor Vehicle Financial Responsibility Law ("MVFRL"). Butta argued that the Pennsylvania Supreme Court's decision in *Gallagher* applied retroactively to his policy. In response, Geico moved to dismiss Butta's Complaint arguing the *Gallagher* holding was not retroactive.

Because the Pennsylvania Supreme Court did not specifically decide whether *Gallagher* applies to the same language in pre-policies issued to other persons, it was up to the Federal District Court to predict how the Supreme Court would decide the case. The Federal Court noted that to determine whether a decision should have retroactive effect, a

reviewing court should first determine whether the decision announced a new rule of law. The Federal District Court conducted a thorough analysis of the case law leading up to the *Gallagher* decision, as well as a detailed analysis of the *Gallagher* decision itself. Following that analysis, the Federal District Court held that the Pennsylvania Supreme Court's *Gallagher* decision did not establish a new rule of law because it did not express a fundamental break from precedent or modify a previous opinion of the Pennsylvania Supreme Court. Instead, the District Court held that the *Gallagher* decision was interpreting the household exclusion, which had been a part of the MVFRL from its inception. Accordingly, the Federal District Court held that the holding in *Gallagher* applied to the Butta case as well as to the MVFRL since its inception, and Geico's motion to dismiss was denied.

Vaughan v. Olympus America, Inc., 2019 Pa. Super. 112 (Pa. Super. April 10, 2019)

Pennsylvania Superior Court reverses trial court on personal jurisdiction over a foreign company and removal of an action for forum non conveniens

Decedent, Janice Vaughan (Vaughan) underwent a medical procedure in Charlotte, North Carolina, during which physicians used an Olympus TJF-Q180V duodenoscope ("scope"). The scope was designed for reuse on multiple patients but needed to be reprocessed after each use. The scope used on Vaughan was allegedly contaminated and she developed an infection and subsequently passed away.

The Defendant device maker was Olympus Medical System Corp. ("OMSC"), a corporation organized under the laws of Japan with its principle place of business in Tokyo. Defendants Olympus America, Inc., ("OAI") and Olympus Corporation of the Americas ("OCA") were two (2) New York corporations with their principle places of business in Center Valley, Pennsylvania. OCA and OAI were the agents of OMSC for FDA purposes and were involved in both marketing and distribution of the scope at issue.

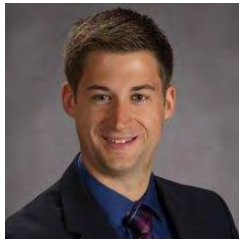
Vaughan's widower filed suit in Philadelphia County against the aforementioned entities. OMSC filed preliminary objections seeking dismissal for lack of personal jurisdiction, which the trial court sustained. Other defendants including OAI and OCA filed motions seeking dismissal based on the doctrine of forum non conveniens, which were also granted by the trial court who found that North Carolina was the more appropriate venue. Vaughan's estate appealed these decisions to the Superior Court of Pennsylvania.

The Superior Court first addressed whether the trial court had erred in sustaining OMSC's preliminary objection for lack of personal jurisdiction. The Court engaged in a due process analysis, finding that OMSC was responsible for and/or oversaw OCA's FDA-related conduct, which took place in Pennsylvania. The Court concluded that OMSC's activities through its Pennsylvania-based (Continued on p. 23)

agent, OCA, were sufficient to establish the minimum contacts needed for specific jurisdiction in Pennsylvania. The Court also found that OCA's actions as OMSC's regulatory agent with the FDA were sufficiently related to Vaughan's substantive claims regarding the scope to support specific jurisdiction over OMSC in Pennsylvania. The Court also determined that Pennsylvania's assertion of specific jurisdiction over OMSC was fair and reasonable and did not offend traditional notions of fair play and substantial justice. Accordingly, the trial court's decision to dismiss OMSC on lack of personal jurisdiction was reversed.

The Superior Court next addressed whether the trial court had abused its discretion in granting a forum non conveniens dismissal to other Defendants including OCA and OAI. Vaughan argued that under Pennsylvania law, a plaintiff was entitled to choose the forum in which to pursue their claims and that this choice should not be disturbed except for "weighty reasons." After an analysis of the facts pled, the Superior Court agreed with Vaughan's contention that Pennsylvania was the most appropriate forum for the case and not North Carolina as had been determined by the trial court. Specifically, the Court was persuaded by the fact that evidence critical to Vaughan's claims could be found in Pennsylvania since the in-state corporations were the device maker's agents for FDA purposes. The Superior Court also found that public interest factors favored Pennsylvania since the agents had robust sales and marketing departments located in Pennsylvania. In sum, faced with private and public factors that clearly supported Vaughan's choice to proceed in Philadelphia, the Court concluded there were not "weighty reasons" to disturb Vaughan's choice of forum and therefore the trial court abused its discretion when granting the dismissal on the basis of forum non conveniens.

By: Shawn David Kressley, Esq.,
of Delvecchio & Miller, LLC
shawn@dmlawpgh.com



"[U]nder Pennsylvania law, a plaintiff [is] entitled to choose the forum in which to pursue their claims and . . . this choice should not be disturbed except for 'weighty reasons.'"

Dana Holding that *Protz II* should have full retroactive effect, ultimately in the form of *void ab initio*.

This case is likely to be decided on the more limited grounds of the facts of this individual case, which involved a case still in litigation as to the modification pursuant to IREs at the time *Protz II* was issued.

The Amicus Committee of PAJ has been in touch with Claimant's counsel in *Dana Holding*. The Committee expects to file a brief in support of the injured worker before the Supreme Court.

Stay tuned.

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



Check out our new
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at

www.wptla.org/events/

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

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AGENDA
3:00 PM Meet & Greet
3:30 PM Legal Technology Trends
5:00 PM Cigars, Cocktails & Hors D'oeuvres

Join us for this exciting technology presentation from legal industry expert, **Marco Maggio, Vice President of Strategic Practices** at All Covered, IT services from Konica Minolta. Marco oversees the legal, finance, education and healthcare vertical practices. As the former Legal Practice Director for the past six years, Marco has owned the legal vertical portfolio and those key clientele relationships, as well as the vendor relationships for a myriad of best-in-class legal applications. Marco has held executive leadership positions at organizations such as Lanier, Mosaic, Ricoh and Hewlett Packard before joining Konica Minolta, and is a regular speaker for legal industry associations and a regularly published author for technology relevant to the legal industry.

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May 6, 2019

Laurie J. Lacher
Executive Director
Western Pennsylvania Trial Lawyers Association
909 Mount Royal Boulevard, Suite 102
Pittsburgh, PA 15223-1030

Dear Laurie,

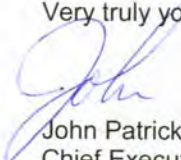
On behalf of all the children and families served by Auberle, I want to again thank you, the Officers, Board of Governors and members of the Western Pennsylvania Trial Lawyers Association for their recognition at the Judiciary Dinner of the work being done by Auberle. It was truly humbling to accept the Daniel M. Berger Community Service Award.

As I said Friday evening, there are so many similarities between the work of plaintiffs' attorneys and the work of Auberle. Both are striving with passion, creativity and hard work to help people overcome the impact of trauma in their lives. Both organizations have done a great deal to help people in the community, and I was honored Friday evening to be the link between the two to discuss that relationship.

You can be assured that we will be circulating our thanks and photos of the event on our website, through our social media, on LinkedIn and nationally through our contacts with the Alliance for Strong Families and Communities. The work that the Western Pennsylvania Trial Lawyers Association does outside the courtroom, exemplified by Dan Berger's career, is not well understood by the public.

Thank you especially for your \$1,000 gift from WPaTLA and the additional checks for a total of \$2,500 to support Auberle's work. Thanks again and congratulations on running a very smooth and successful event.

Very truly yours,



John Patrick Lydon
Chief Executive Officer

c: Bryan S. Neiderhiser, Esq.
David M. Landay, Esq.

Alliance for Strong Families and Communities
National Agency of the Year



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TRIVIA CONTEST

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

Trivia Question #19

Who do you e-mail to make submissions to the Plaintiffs'-only database?

BONUS ENTRY TO EVERYONE WHO SUBMITS A COMPLAINT, BRIEF, MOTION, DME REPORT, DEPOSITION TRANSCRIPT, OR OTHER DOCUMENT THAT WOULD BE A GOOD RESOURCE FOR OTHERS.

To claim your bonus entry, cc: Laurie on all submissions to the database manager. (This is a hint – the answer *isn't* Laurie!)

Please submit all responses to Laurie at laurie@wptla.org with "Trivia Question" in the subject line. Responses must be received by August 5, 2019. Prize for this contest is a \$100 Visa gift card. Winner will be drawn the week of August 5, 2019. The correct answer to Trivia Question #19 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 #18 – **What common office supply item is named for the Asian "abaca" fiber used to make them? Answer: Manila envelopes.**

Congratulations to Question #18 winner Fred Goldsmith, of Goldsmith & Ogrodowski.

Aug 20/21, 2019 – Kick Off Event

Aug 20 – Initial Board of Governors Meeting – Hampton Inn, Bridgeville

Golf Games & Dinner – TopGolf, Bridgeville

Aug 21 – CLE & Breakfast – Hampton Inn, Bridgeville

Sept 18, 2019 – Board Meeting & Breakfast, Rivers Club, Pittsburgh

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

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

Nov 8, 2019 – 3 credit CLE w/ Erie County Bar Association – ECBA, Erie

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

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

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

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

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

Mar, 2020 – Dinner & CLE – Washington County

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

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

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

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



Through the Grapevine....

Robert B. Woomer has a new email and website. rwoomer@woomerlaw.com
www.woomerlaw.com

Our condolences to the friends and coworkers of **William C. Stillwagon**, who passed on April 18, 2019.

Congratulations to **Immediate Past President Liz Chiappetta** on the birth of her second son, Anthony "Mac." Husband Tim and big brother Beau are thrilled with the family addition.

Speedy recovery to **Past President John Quinn** who had hand surgery in April, and to **Ed Abes** who tore his quadriceps tendon.

Good luck and best wishes to **Mark Bennett**, formerly of Berger and Green. Mark is moving to Albuquerque, NM.

A hearty congratulations to the following members who have been elected into the Allegheny County Academy of Trial Lawyers: **Board of Governors Member Joe Froetschel, Terry Ging, Jonathan Orie, Board of Governors Member Karesa Rovnan, and Treasurer Erin Rudert.**

Homage to **Past President Paul Lagnese**, who will be named President-Elect of the PA Association for Justice in July at their annual retreat in Hershey, and to **Immediate Past President Liz Chiappetta** who will be named Treasurer.