THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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DUBOSE v. QUINLAN: STATUTE OF LIMITATIONS, NOT REPOSE, FOR INJURIES RESULTING IN DEATH EXTENDS TO TWO YEARS FROM DATE OF DEATH

In *Dubose*, a case involving the neglect of a nursing home resident causing the development and worsening of pressure ulcers and resulting in sepsis and death, the Pennsylvania Supreme Court (Mundy, J.) held that, under the MCARE Act, the 2-year statute of limitations did not begin to run on the patient's Survival Act claims until the date of her death. *Dubose v. Quinlan*, 173 A.3d 635, 647 (Pa. 2017).

After falling in her home and sustaining serious head injuries, Mrs. Dubose was admitted to Albert Einstein Medical Center on July 25, 2005. *Id*., at 635. On August 9, 2005, she was transferred to Willowcrest, a nursing home owned by Albert Einstein, with numerous pre-existing medical problems, and pressure ulcers (also known as decubitus ulcers or "bed sores") that apparently developed at Albert Einstein. *Id*. To heal the existing pressure wounds, and to prevent new ulcers from forming, Mrs. Dubose's physician ordered several common pressure-reduction methods, which Willowcrest's staff negligently failed to follow. *Id*., at 636. As a result, the existing ulcers worsened, and she developed new areas of skin breakdown.

Notably, the most serious pressure ulcer, on Mrs. Dubose's sacral area, initially developed during the July 2005 hospitalization at Albert Einstein, but continued to worsen through October of 2007 (i.e., over the course of two years); by September 2007, the wound became infected, resulting in Mrs. Dubose developing sepsis, and requiring hospitalization. *Id*. She died on October 18, 2007, from sepsis and multiple pressure wounds. *Id*.

Plaintiff, the administrator of Mrs. Dubose's estate, filed the initial action on August 13, 2009 (i.e., four years after the development of the pressure ulcer that led to Mrs. Dubose developing sepsis and causing her death, but within two years of her death). *Id*. A second action, naming additional and individual defendants who were all related to the hospital and nursing home, was filed September 14, 2009; both were subsequently consolidated by the trial court. *Id*. The case was tried twice; the first resulting in a mistrial, and the second resulting in a verdict in favor of the plaintiff: *(Continued on Page 2)*

*"[U]nder MCARE, 'a survival action in a medical professional liability case **resulting in death** accrues at the time of the death, not at the time of the decedent's injury.'"*

$125,000 for Wrongful Death, $1,000,000 for the Survival Act claims, and punitive damages of $875,000. *Id*.

On appeal, the defendants claimed that, with respect to plaintiff's claims regarding the pressure ulcers, the action was not timely filed because the wounds began to develop more than four years before the case was filed, and all injury claims are subject to a two-year statute of limitations.[1] In their view, "once the statute of limitations expires on the decedent's cause of action, it cannot form the basis for a survival action following the decedent's death." *Dubose*, 173 A.3d at 637. As such, the two-year statute expired in 2007, two years after the wounds began to develop. *Id*. Plaintiff countered, and the trial court agreed that, under MCARE (specifically, § 1303.513(d)), Mrs. Dubose's estate had two years from the date of her death to file the Survival Act claims. In the alternative, plaintiff argued, and the trial court agreed, that the discovery rule also tolled the statute of limitations, because Mrs. Dubose was essentially comatose for much of the time while at Willowcrest, and thus her condition prevented her from knowing or discovering her injuries prior to her death. *Id*.

On appeal, Plaintiff more fully developed her argument relating to the statute of limitations. She argued that "while the sacral wound appeared in 2005, the complaint alleged a course of negligence" relating to plaintiff "that resulted in multiple injuries from 2005 to 2007, including additional pressure wounds, sepsis, hypertension, and acute renal failure." *Id*., at 641.

In addition to analyzing when the statute of limitations began to run under the facts of the case, the Supreme Court also engaged in a lengthy analysis of whether or not the MCARE statute at issue, specifically § 513(d), "is a statute of repose for survival and wrongful death actions or a statute of limitations that modifies the accrual date for survival actions."[2] *Id*., at 643. Plaintiff, or course, argued that it is a statute of limitations, allowing two years from the date of the death of the decedent to file an action under the Wrongful Death and Survival Acts. *Id*., at 642. Defendants argued that it is a statute of repose, barring any claims relating to injuries that occurred more than two years prior thereto, regardless of when the plaintiff dies.

The Supreme Court held that, under MCARE, "a survival action in a medical professional liability case ***resulting in death*** accrues at the time of the death, not at the time of the decedent's injury." *Id*., at 647 (emphasis added). In so holding, the Court noted that "a survival act is not an independent cause of action, but a continuation of a cause of action that accrued to the decedent" that does not accrue until the person dies. *Id*., at 645.

There are two significant points to keep in mind related to this holding:

First, the holding applies only to medical professional liability cases, since the Court specifically analyzed the MCARE statute as it related to wrongful death and survival actions. In other words, in this author's opinion, the statute of limitations in a products or automobile liability claim resulting in injuries and, later, death would not be impacted by the holding in *Dubose*. In fact, Chief Justice Saylor calls-out the majority for this purported discrepancy in his dissent ("Per the majority opinion, however, ***peculiar to the medical professional liability context***, the action now only arises upon death, and, therefore, can no longer said to have previously belonged to the decedent." *Dubose*, 173 A.3d at 653 (Saylor, C.J. dissenting) (emphasis added).

Second, injuries due to the medical negligence at issue ***may*** need to result in the person's death for the statute of limitations to accrue at the time of death. Arguably, this is a confusing aspect of the Supreme Court's opinion: in the beginning of it, the Court states, "we conclude the statute of limitations for medical professional liability cases in the form of wrongful death or survival actions is two years from the time of the decedent's death," (i.e. nothing in that sentence suggests that the injuries must have caused the death). *Id*., at 635. However, as *(Continued on Page 4)*

"'[A] survival act is not an independent cause of action, but a continuation of a cause of action that accrued to the decedent" that does not accrue until the person dies."

[1] While referring to it as a statute of limitation, the defendants' argument essentially was that it was a statute of repose, precluding any action for injuries after two years, regardless of when the death of the patient occurred.

[2] The title of Section 1303.513 of the MCARE Act is, notably, "Statute of Repose."

PRESIDENT'S MESSAGE

Spring is hopefully upon us! It's hard to believe that there are only a few more months on our 2017-2018 year. As our year winds down, there are still several events to keep on your calendar: April Membership Meeting on April 17 at Carmody's Grille (owned by member Sean Carmody), and the Judiciary Dinner on May 4 at Heinz Field. Invitations for the April meeting have gone out, as well as the Judiciary Dinner invitations. Good news: there is not a Pirates game on the night of the Judiciary Dinner!

Since I last wrote, we had an extremely successful Past Presidents' Dinner in January at the Fairmont Hotel in downtown Pittsburgh. The new-to-us venue was generally very well-received, and it is always nice to celebrate familiar faces and the former leaders of our organization! Laurie Lacher commented that she looked around the room and it felt like a great reunion of sorts. More senior attorneys were mingling with some new faces, buddies were reunited and the camaraderie was palpable. Events like the Past Presidents' Dinner are what our organization is all about, and we need to try and maintain them! We hope to have more events at the Fairmont. I hope that all of you are enjoying the new venues, new menus and new twists on old events with which we have been experimenting! We also had a new event in February, an Escape Room outing which served as our Junior Member event. Several junior members came and really immersed themselves in the group, which is always nice to see. It was a unique event, and super fun to work as a team to try and escape "the room!" We are always looking for feedback – good or bad – on our events, so please do not hesitate to speak up.

With spring on the horizon, it means prom season is also coming up soon. Our organization has teamed with Attorney Joel Feldman, the founder of End Distracted Driving, which was a community outreach program started with PAJ. It is a program where our members can present to high school students about the perils of distracted driving. The program is pre-packaged and requires little to no legwork to complete. Please do not hesitate to reach out to Bryan Neiderhiser, Greg Unatin or Laurie Lacher to get more information on this program.

We will also be ranking the submissions for our annual Essay Scholarship Contest within the next several weeks. We will continue the tradition of honoring the winners at the annual Judiciary Dinner.

Some of you might be wondering – how did the membership survey go? We are working on tabulating all of the data, but I can say that it was a worthwhile endeavor. We had a decent response, but wished there had been more. The next edition of The Advocate will include a summary of our findings. As a teaser, I can report that in the questions asked about WPTLA's CLE programs, it is apparent that membership is very interested in hearing from our own. What a wonderful tribute to ALL OF YOU! It is refreshing to see members at our CLE events. That is, a large amount of respondents indicated that they would prefer to attend CLE events given by current members or Past Presidents and that our members want to learn from each other. It was also refreshing to see that our previous CLE events given by current members or Past Presidents were the ones most well-received. Just this year, our own Tom Baumann spoke about his victory in *Protz* and Brendan Lupetin spoke about Focus Groups – both events were very popular and several folks said as much on their survey responses. We kicked off our year with a panel of Past Presidents – Larry Kelly, Paul Lagnese and Rich Schubert – and had a very robust, interactive discussion with them about trial practie year isce. We hope to host a few more CLE programs before th finished, so stay tuned for information about those!

I hope everyone has a fruitful and healthy spring, and thanks for reading!

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noted above, in the "we hold" paragraph, the Court specifically included the words "resulting in death." *Dubose*, 173 A.3d at 647.[3]

Justice Baer issued a concurring a dissenting opinion. Essentially, he believed that the majority's holding was a "radical departure from this Commonwealth's well-established jurisprudence providing that the statute of limitations for a medical professional negligence action commences when the cause of action accrued," and that the result grants "the personal representative [of an estate] far more rights than the plaintiff would have possessed while alive." *Dubose*, 173 A.3d at 648 (Baer, J. concurring and dissenting). However, Justice Baer concurred in the result, finding that the action was timely filed as "tolled by the discovery rule until the decedent's death, given the ongoing nature of decedent's disabling injuries which ultimately resulted in her death." *Dubose*, 173 A.3d at 651 (Baer, J. concurring and dissenting).

As demonstrated by the facts in *Dubose*, the case will most obviously benefit plaintiffs in long term care-related lawsuits. In those cases, pay close attention to plaintiff's counsel's arguments in *Dubose* relating to the alleged continuing course of negligence that caused harm throughout your client's residency, but also be prepared to deal with arguments that if the injuries did not result in death, then the statute of limitations is not tolled with respect to those injuries.

[3] I anticipate that this potential ambiguity may result in conflicting trial court decisions in medical professional liability cases when the statute of limitations for injuries is raised as a defense in cases where the decedent suffered injuries more than two years before the person's death that did not cause or contribute to the death. We will likely see these conflicts arise in long term care cases.

By: Pete Giglione, Esq., of Massa Butler & Giglione

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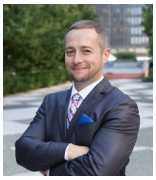

WPTLA's Annual Judiciary Dinner

in honor of the Judges serving the people of Western Pennsylvania

Members of the judiciary who have retired or achieved Senior Status during 2017 will be acknowledged, including:

The Honorable John M. Cascio	The Honorable David S. Cercone
The Honorable Thomas R. Dobson	The Honorable Damon J. Faldowski
The Honorable D. Michael Fisher	The Honorable Kim R. Gibson
The Honorable Jolene Grubb Kopriva	The Honorable W. Terrence O'Brien
The Honorable Christopher J. St. John	The Honorable Kenneth G. Valasek

Cocktails at 5:30 pm Dinner at 7:00 pm

Doors open at 5:25 pm

WPTLA President's Scholarship winners will be recognized, as well as the recipients of the Daniel M. Berger Community Service Award and the Champion of Justice Award

Friday, May 4, 2018

UPMC Club at Heinz Field

100 Art Rooney Avenue, Pittsburgh, Pennsylvania

Reservations/Cancellations are needed by Friday, April 27, 2018

UPCOMING EVENTS

MEMBERSHIP ELECTION DINNER

Elect the Officers and Board of Governors for 2018/2019

Tue, Apr 17, 2018

Carmody's Grille, 4905 Grand Ave, Neville Island

ANNUAL JUDICIARY DINNER

Fri, May 4, 2018

UPMC Club, Heinz Field, 900 Art Rooney Ave, Pittsburgh

25th ANNUAL ETHICS & GOLF OUTING

Fri, May 25, 2018

Shannopin Country Club, 1 Windmere Rd, Pittsburgh

LEGISLATIVE MEET 'N GREET

Thur, Sep 20, 2018

Revel & Roost, Pittsburgh

3-CREDIT CLE PROGRAM

Mon, Oct 1, 2018

Erie County Bar Association Education Center, Erie

PRESIDENT'S CHALLENGE 5K RUN/WALK/WHEEL

Sat, Oct 20, 2018

North Park Boat House, Pittsburgh

WILL SHINAL CHANGE VOIR DIRE IN ALLEGHENY COUNTY?

On June 20, 2017, the Pennsylvania Supreme Court issued an opinion that focused on the issues of informed consent, voir dire and challenges for cause.

The *Shinal* case was a medical malpractice case that originated in Montour County. Mrs. Shinal had brain surgery by Dr. Steven Toms who was the Director of Neurosurgery at Geisinger Medical Center and was employed by Geisinger Clinic as a neurosurgeon. During the surgery her carotid artery was perforated leaving her with significant impairments with vision and ambulation. The Shinals sued Dr. Toms and the Geisinger entities alleging lack of informed consent. The case was scheduled for trial in February of 2013 but because a large number of prospective jurors had ties to Geisinger, a jury could not be impaneled and the judge was forced to continue the case. Between February and May of 2013, the Geisinger entities were dismissed as a party defendants and the case proceeded against Dr. Toms only. During voir dire, Plaintiffs sought to strike four prospective jurors for cause based on their alleged relationship to Geisinger. The four challenged jurors were an administrative assistant at Geisinger's Sleep Lab; a spouse of an administrative employee who had worked at Geisinger for 35 years; a customer service representative for Geisinger's health plan; and a retired physician assistant who had worked at Geisinger. The trial judge rejected the argument that the relationships of these jurors requires a *per se* disqualification and instead, inquired into whether each juror or their family member had a close financial or situational relationship which may give rise to an appearance of bias. After employing this analysis, and being assured of impartiality by each juror, the trial judge denied Plaintiffs' challenge for cause in all four instances, requiring them to exhaust their peremptory strikes.

The trial proceeded and a defense verdict was rendered. Plaintiffs appealed, raising several issues, one of which was whether the trial judge erred in refusing to dismiss the jurors with ties to Geisinger for cause. In support of their position, Plaintiffs relied heavily upon the plurality opinion in *Cordes v. Association of Internal Medicine,* 87 A.3d 829 (Pa. Super. 2014). The Superior Court, in a 2-1 Opinion written by Judge Platt and joined by Judge Allen, affirmed the trial court, concluding that the relationship of these prospective jurors to a *non-party* Defendant would not automatically require a presumption of prejudice such that a dismissal for cause would be warranted. The Supreme Court accepted the case for review.

In an exhaustive analysis of when challenges for cause are required versus discretionary, and therefore subject to *de novo* or an abuse of discretion standard of review, the Supreme Court essentially held that when a presumption of prejudice arises from a juror's close relationship with the parties, counsel, victims or witnesses, a determination of fitness to serve as a juror is a question of law subject to *de novo* review. In the instances where a close relationship exists, prejudice is presumed and a juror will be dismissed for cause. In all other instances, when prejudice may be revealed through a juror's answers or conduct, the trial judge is given broad discretion to determine whether the juror can be fair and impartial and such a determination will not be disturbed on appeal unless there is an abuse of discretion and the error is "palpable."

Applying this analysis to the facts of *Shinal*, the Supreme Court affirmed the trial and appellate court's determination that the jurors did not need to be struck for cause. Essentially, the Court distinguished *Cordes* and held that an *indirect* employment relationship with an employer that has an ownership interest in a party defendant, standing alone, does not warrant a presumption of prejudice. The Court held, however, that in such a situation a juror may reveal a likelihood of prejudice resulting from an indirect employment relationship through his or her conduct or answers. If that occurs, "because the law endeavors to hold the jury system free from any appearance of partiality, it is incumbent upon trial courts to explore specific, indirect employment relationships between jurors (and their close family members) and parties, and to be vigilant in guarding against the appearance of partiality that can arise in the context of such relationships." The Court further held that an indirect employment relationship *will require* removing a potential juror for cause *if* the juror believes that the outcome of the case could have a financial impact upon his or her employer. In essence, because the facts of *Shinal* presented a situation involving an indirect employment relationship, the Supreme Court indicated that it was "incumbent upon the trial court to engage the jurors in questioning to reveal whether they believed that their or their family member's current or former employer would be financially harmed by an adverse *(Continued on Page 6)*

WILL SHINAL CHANGE VOIR DIRE IN ALLEGHENY COUNTY? FROM PAGE 5

verdict or whether the relationship would affect the juror's respective abilities to be impartial." In conducting this inquiry into each juror's mindset, the trial court's direct participation and observation of the jurors' demeanor and body language is the justification for affording the court such broad latitude in making these important determinations.

The Supreme Court recognized that the trial judge is the *only* person in the courtroom whose primary *duty* is to seat a completely impartial jury. The emphasis on the duty of the trial judge to ensure impartiality was not lost on the *Shinal* Court. While not explicitly stated, the opinion certainly implies that the trial judge must be present during voir dire in order to determine whether the potential juror has demonstrated a likelihood of prejudice by his or her *conduct* and answers to questions. The Supreme Court stated "where the juror's conduct or answers to questions reveal the likelihood of prejudice much … depends on the answer and *demeanor* of the potential juror *as observed by the trial judge."* The Supreme Court goes on to explain that deference is given to the trial judge "*because he or she is actually observing the juror's facial expression, body language and demeanor."* In making the call on challenges for cause, the Supreme Court describes a scenario where trial judges are in the trenches, observing and considering "hesitation, doubt and nervousness." These observations are particularly important when counsel or the court tries to rehabilitate a juror with the "can you be fair" question after the juror has signaled some type of bias. Under these facts, when the trial judge is affirmatively involved, the deference afforded their decisions on challenges for cause seems reasonable. However, what if you practice in Allegheny County and trial judges are not present during voir dire? What do you do then?

It has been common practice for litigants in Allegheny County to request a court reporter for voir dire. In light of *Shinal*, this request may need to be broadened to include a request for a trial judge during voir dire. Litigants need to arm themselves with the facts and holding of *Shinal* and protect the record when it comes to the important step of impaneling a fair and impartial jury. If the request for a judge is denied, lawyers need to make a clear record of any observations of the juror's nervousness, hesitation, doubt or physical manifestations that could signal the juror may be incapable of being fair and impartial regardless of the answer given to the "can you be fair" question. Filing these motions and bringing *Shinal* to the attention of the civil bench in Allegheny County is one way to effectuate much needed reform in the county's voir dire process.

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> *"While not explicitly stated, [Shinal] certainly implies that the trial judge must be present during voir dire in order to determine whether the potential juror has demonstrated a likelihood of prejudice by his or her conduct and answers to questions."*

Legislative Meet 'n Greet

scheduled for

Thursday, Sept 20, 2018

New location at Revel & Roost, on Forbes Ave in Pittsburgh!

Save the Date!

BACKGROUND

I recently had the privilege of trying a case, along with my partner, Chris Martineau, in Ramsey County District Court in St. Paul, Minnesota. While trying personal injury cases is nothing new to me, the case at hand had a wrinkle that, although I have encountered it many times, I have never included as a measure of damages – that wrinkle being an opioid addiction following a Vicodin prescription which was part of the client's treatment.

By way of background, our client was a pedestrian in Saint Paul, Minnesota. As she was crossing a street, in a marked intersection and with the walk light, a Metropolitan Council bus made a right-hand turn and struck our client, knocking her to the ground. Our client sustained physical injuries including: subarachnoid hemorrhage, a laceration and resulting scar on the back of her head, and spasm throughout her neck and back.

Her treatment included emergency room exam and diagnostics which revealed the hemorrhage and necessitated an overnight stay at the hospital. Upon discharge, the client attempted various modalities of homecare, but it quickly became apparent to her that she was in need of formal care. Thus, approximately two weeks post-accident, our client sought care through a local integrated clinic where she received physical therapy, chiropractic care, and massage; all overseen by a staff medical doctor.

Unfortunately, the passive and active care was not terribly effective in alleviating the client's pain, so she was prescribed Ibupofen and Flexeril by the medical doctor. However, within another 2 weeks, it was clear that the aforementioned prescription wasn't helping and a prescription for Vicodin was written. That prescription was filled and taken by our client; what followed was six years of misery and, finally, a jury trial.

Prior to the at-issue prescription, our client lived a fairly non-descript life as it pertained to opioids and addiction. She reported that she had only had an opioid once prior and that was many years ago and it "made her sleepy". Additionally, she was never much of a drinker since, coming from a line of alcoholics, she "didn't want to end up like that." However, she was not unaware about addiction as she does have a remote history of smoking marijuana and she is a long-term cigarette smoker.

THE ADDICTED CLIENT

It's unlikely that a potential client will ever appear on the doorstep of a Plaintiff attorney and announce that he or she would like representation as they have become a drug addict; rather, it is more probable that a current client will develop an addiction during the course of their treatment. The means by which an attorney may first become aware of an addicted client are many. In my practice, I have seen medical records which revealed drug seeking behavior; I have had clients who were very communicative simply drop off the face of the earth, and I've had family members call me with suspicions about their loved ones abusing pills. Regardless of how one comes to learn of a possible problem, it is at that moment the complexion of the case changes.

If I suspect a client is addicted, I believe it is my professional and moral duty to speak with them about it which is often easier said than done. Even the most unaware of the issues of addiction seem to be at least tangentially aware of the concept, "Admitting you have a problem is the first step."

The admission of any type of problem can be hard for all of us. Unfortunately, the admission of an addiction is complicated by the concept of "denial", which is another word frequently thrown about regarding addiction but without complete understanding of what it means in the context of addiction. Denial, in this sense, is not simply someone refusing to acknowledge an issue but, rather, on a near subconscious level, it is someone whose brain is simply unaware of or unable to grasp the fact that there is a problem. There are several school of thought on how and why this denial occurs but, for simplicity and brevity, I side with the school of thought that believes, in short, the client's addicted brain wants to protect itself, so nothing will interfere with the addiction. With such clients, it may be next to impossible to engage in any meaningful dialogue regarding their addiction and, thus, their case may be over before it even gets started.

(Continued on Page 8)

"If I suspect a client is addicted, I believe it is my professional and moral duty to speak with them about it which is often easier said than done."

THE ADDICTED CLIENT WHISPERER

If you find you are dealing with a client who is exhibiting addict behavior and seems unwilling or unable to assist with the presentation of their case, all is not lost. The Big Book of Narcotis Anonymous (and mirrored in the Big Book of Alcoholics Anonymous) states:

"...the [addict] who has found [recovery]...can generally win the entire confidence of another [addict] in a few hours. Until such an understanding is reached, little or nothing can be accomplished. *Pg. 18*

With this in mind, you might find a helping hand at the local branch of Lawyers Concerned for Lawyers or through another professional group that interacts with addicted professionals, or you can contact this writer for insight. In short, there are several resources available to help you get through to the addicted client.

Just as we have experts for practically everything, I can't stress enough the benefit(s) of an addiction and recovery expert. This person's role is not to function as a testifying expert witness but, rather, to assist the attorney with direct client communication regarding addiction and to provide first-hand insight to the attorney regarding the daily challenges faced by the addict and the recovery therefrom – sort of an "addicted client whisperer", if you will.

Working with someone experienced with addiction and recovery can also prove invaluable at counsel table as it is a near certainty the defense will attempt to parse out bits and pieces about addiction and recovery to serve their client's purposes. Having a recovery expert provides real-time, real-world experience about what is and what is not accurate or complete in the world of addiction.

By way of example, the defense team in our trial made repeated references to the types of care provided at residential treatment centers, how support group meetings are run, and "NA" and "narc-a-non" and what those groups, "say" and, "believe". Additionally, much was made about our client's choice to avoid narcotics anonymous meetings, something about which she was clearly uncomfortable.

However, by having a person with true insight into recovery at Counsel table, I was able to get into the topic of the "13th step" with my client and undercut the defense argument. Just as some of you may be thinking, "I thought there were 12 steps!", it was obvious the defense thought the same thing and all of you are correct. But, to those "in the program", it is well known that the 13th step pertains to men going to NA meetings and attempting to coerce vulnerable women into bad situations. A common enough occurrence that it even has a name! By learning, and sharing with the jury, just this tidbit about recovery, I put an end to all further questions regarding my client's attendance at meetings.

My recovery expert also proved invaluable in helping me bridge a gap of sobriety that would have otherwise been near fatal to my case. Our client became pregnant about two years into her active addiction; once she learned she was pregnant she quit using and "white-knuckled" it through her pregnancy after which she went back to using. Clearly, this presented quite a hurdle until I was educated about the meaning of "clean and sober" – another frequently, and incorrectly, used phrase. As the defense hammered on this "gap" in use, I was able to explain that, while a nice thought, my client WAS NOT clean and sober during her pregnancy; the otherwise quiet courtroom somehow became a few decibels quieter following that pronouncement. I allowed the jurors a moment to take in what I had said and then educated them that in the world of recovery, "sober" means simply abstaining from a drug of choice while "clean" means the underlying addiction and the factors playing into it have been or are being treated. In short, abstaining does not make one clean and sober. Another defense argument taken away.

EMBRACE THE INSANITY

We came to believe that a power greater than ourselves could restore us to sanity – *Big Book of Narcotics Anonymous - 2nd step.*

Typically, if during a deposition, it comes to light that my client stole money from her grandma, forgot to hold a birthday party for her child because she was high, and stole prescription medications from her sister – those would be bad things. Frankly, I have walked away from cases with fewer bad facts than those. However, in an addiction damages trial, these pitfalls are positives.

Narcotics Anonymous follows a 12-step program similar to the steps employed by Alcoholics Anonymous. It was the 2nd step, seen above, that helped establish that my client's *(Continued on Page 9)*

actions weren't unusual but, rather, a normal part of addiction. Why? Because, part and parcel to this step is the acknowledgement that the addicted person is insane – if one is not insane, one cannot be restored to sanity. I also found reliance on this step proved to be somewhat of a sticky wicket for the defense team as they attempted to parse out portions of the NA program to show how my client wasn't working a program. Thus, if they rely on part of the steps as gospel, then, surely, the "sanity" comes into play as well.

Embracing the insanity as a framework also proved quite effective during trial. As the defense attorney went through witness after witness incredulously asking, "You mean to tell me, SHE [fill in with insane behavior]?" My re-direct was very simple, "Prior to her addiction, did my client ever engage in that particular behavior?" The answer each time was, "No."

SO HE'S ADDICTED...NOW WHAT?

Addiction does not discriminate thus there is no particular type of client I look for or that I suspect will become addicted. However, once I have an addicted client, there are several factors I look at before determining whether or not a case is well suited to include addiction damages.

The first issue I look for is evidence of prior addiction. Don't limit this review to narcotic addiction, but look for any addictions: cigarettes, chewing tobacco, alcohol, marijuana, gambling, etc. This review is important as, undoubtedly, the defense will look for these as well and cry, "Addictive personality!" [Never mind that bus that hit her]. This review requires not only going through all prior medical records but also a heart to heart talk with the client. But, recall denial as you might wish to consider engaging assistance for this conversation.

Another area to review when preparing for such a case is the addiction background of family members. Be prepared that even if your client had no prior addictions, the defense will look at your client's parents and grandparents for history of addiction as, with near universal agreement, genetics plays a major role in addiction for many people.

While reviewing medical records, don't focus your look only on the opioids your client might have been prescribed over the years but look what was prescribed in lieu of narcotics *(Continued on Page 10)*

and when those were prescribed. In my most recent case, I came across a medical record from three months pre-crash where my client was seen by her family doctor for a procedure. Often, I would ignore this type of record as it clearly is not related but this record revealed, "Pt. requests ibuprofen for pain." Proof that just 12 weeks prior, my client specifically requested over the counter medications – she never requested narcotics until after she was hit by a bus.

When reviewing records, take particular note of the "History" portion of said record(s). In an addiction damages case, you want to ensure that your client answered any addiction questions completely and correctly. If the client fails to mention a past or current addiction of their own or one of their family members; an expected argument will be along the lines of, "Had the client been honest on the intake form, perhaps the narcotic wouldn't have been prescribed."

As trial lawyers, we all know the importance of supportive before and after witnesses. You can imagine the challenges of finding such a witness if your client has spent the last few years creating havoc in the lives of her friends and family. I was fortunate as most witnesses came willing but there was one person that I felt I needed to have testify and she initially refused because she didn't want to "help" my client after what, "...she put me through!" After explaining that this would provide an opportunity for her to explain how my client's behavior impacted her, she could hardly wait to take the stand. I allowed this witness all the time she needed to explain all the terrible things my client had done over the years – she yelled, she cried, and, finally, admitted that prior to the addiction, my client was a different person who "Never...never did things like that." With that line, it didn't matter what the defense asked in follow-up as the insanity was linked to the addiction and to that alone.

TRIAL TIPS

Voir Dire

It was suggested by our Judge that we consider a confidential questionnaire to begin voir dire. After several lengthy discussions between Counsel and clients, it was decided that we would forgo a questionnaire and rather the Judge lead the addiction questioning and he did a very nice job. Upon conclusion of his questioning, the follow-up questions about addiction were fairly straightforward and non-objectionable.

There was one potential juror who, fortunately, asked to speak to the Judge and attorneys privately at which time he made it clear that he could not be fair and impartial about this topic and requested he be dismissed which he was. Although I feel very fortunate that this gentleman was good enough to approach this situation in the manner he did, in the future, I will request several pre-voir dire instructions from the Judge urging anyone with this sort of proclivity to request private meetings as I may have just dodged a bullet this time around.

When crafting your questions, I suggest heading over to the criminal bar and look for examples of questioning regarding drug use as I found many useful questions not normally included in personal injury voir dire.

JIGS

In my opinion, addiction damages cases should receive an Eggshell Plaintiff instruction because, as noted above, addiction has a genetic component which, I argue, lays dormant until exposure to the drug. Following the exposure, those with the genetic component become addicted more easily than those without that component. Unfortunately, the science on addiction is not entirely settled and therefore I was denied that instruction. Additionally, questions also exist as to what percentage of the population has that genetic component and, if it is large enough, the genetic component may be too common to qualify for this instruction. The Aggravation to a Pre-Exiting Condition JIG may also be considered. If, for example, your client was in recovery and relapsed following an injury, this may be a helpful instruction. Ultimately, a hybrid instruction of the two was given.

Closing

Your closing argument will likely be addiction heavy but what to cover and how deeply is, of course, a personal decision. However, below you will find the last few sentences of my closing argument that *(Continued on page 11)*

"Addiction does not discriminate thus there is no particular type of client I look for or that I suspect will become addicted."

THE ADDICTED CLIENT ... (FROM PAGE 10)

provide one last look at a way of viewing addiction as well as, I believe, a powerful narrative that may have been a lynch pin in winning this addiction damages trial:

One way some people find it helpful to think about addiction is to see it almost as something apart from the addict…kind of like the devil of addiction sitting on her shoulder… Sometimes he's quiet – saying nothing…but he's there. Sometimes he whispers, "you haven't had a pill in months…one won't hurt you…". But, sometimes he roars…

Yes, it's true, with each day that passes, my client is getting better…she is getting stronger…but I promise you, as surely as I am standing here speaking to you, my client's devil is just outside that door…and he is doing pushups…he is getting stronger too.

By: Christopher A. Johnston, Esq., of Johnston Martineau, pllp

cjohnston@jmlegal.com

MEMBER PICTURES & PROFILES

Name: Clark Mitchell, Jr. Esq.

Firm: Law Offices of Clark A. Mitchell

Law School: WMU-Cooley Law School

Year Graduated: 2012

Special area of practice/interest, if any: Worker's Comp and PI

Tell us something about your practice that we might not know: We are a small father-son operation in Washington, PA with over 45 years experience in worker's comp and PI

Most memorable court moment: Working as a certified intern in the DA's office and witnessing a drunk individual pass out in the court room on a DUI pleader day.

Most embarrassing (but printable) court moment: Also, working as a certified intern in the DA's Office and having my supervising attorney walk out and the Judge say, "are you ready to proceed." Then proceeding not knowing what I was doing, thinking I was some hot shot lawyer. Needless to say, it didn't go over too well… .

Most memorable WPTLA moment:

To be determined…

Happiest/Proudest moment as a lawyer: Passing the BAR .

Best Virtue: Sincerity

Secret Vice: Over thinking the situation

People might be surprised to know that: I'm a really good cook. .

Favorite movie: The Sandlot

Last book read for pleasure, not as research for a brief or opening/closing: The Guns of August

My refrigerator always contains: Hot Sauce

My favorite beverage is: Bourbon .

My favorite restaurant is: Too many to pick from…

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

PAST PRESIDENTS' DINNER RE-CAP

On January 30, 2018, the Western Pennsylvania Trial Lawyers Association held a special dinner at the Fairmont Pittsburgh to honor the past Presidents of the organization. Every five years WPTLA looks for a way to extend its gratitude to members who have served and led our organization over the years. President Elizabeth Chiappetta has incorporated the theme of past leadership into several events including the Past Presidents dinner and CLE series that will feature presentations by our past presidents on topics of interest to our organization.

The Fairmont proved to be a great venue for the event. Cocktails and hors d'oeuvres were served from 5:30 p.m. to 6:30 p.m. in a spacious area adjacent to a private dining room. A delicious dinner was served and Elizabeth Chiappetta welcomed all attendees. After dinner, Elizabeth and executive director Laurie Lacher recognized each past president in attendance with a gift of glassware. The past presidents in attendance were: John Becker, Chad Bowers, Bernie Caputo, Rich Catalano, Cindy Danel, Chuck Evans, Josh Geist, Bill Goodrich, Mark Homyak, Larry Kelly, Beth Lazzara, Al Lindsay, Jon Mack, Jerry Meyers, Chris Miller, Sandy Neuman, John Quinn, Veronica Richards, Tim Riley, Carl Schiffman and Rich Schubert.

It was a great turnout and a wonderful opportunity to mingle with our past leaders. Look for information on upcoming Past President CLE programs. Plans are in the works for a panel discussion on jury verdicts. Stay tuned!

By: Sandy S. Neuman, Esq., of Richards & Richards

sn@r-rlawfirm.com

WPTLA PAST PRESIDENTS

Pictured above, from L to R in bottom row: Rich Schubert, Jerry Meyers, The Honorable Beth Lazzara, Cindy Danel, Veronica Richards, Sandy Neuman, Bill Goodrich, Carl Schiffman. In top row: Tim Riley, John Quinn, Chris Miller, Jon Mack, Al Lindsay, Mark Homyak, Josh Geist, Chuck Evans, Larry Kelly, Bernie Caputo, Rich Catalano, Chad Bowers, John Becker. *More photos from this event can be found on p. 22.*

Photo credit to Moonlight Photography by Amanda D'Amico 412-951-1804 amandamariedamico@gmail.com

TRIVIA CONTEST

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

Trivia Question #14

What is the shortest, grammatically correct sentence in the English language?

Please submit all responses to Laurie at laurie@wptla.org with "Trivia Question" in the subject line. Responses must be received by June 15, 2018. Prize for this contest is a $100 Visa gift card. Winner will be drawn the week of June 18, 2018. The correct answer to Trivia Question #14 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 laurie@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 #13 – **What modern day phrase *hopefully* not used by the pilot during your next flight derives from the French word for "help me"? Answer: "Mayday," from the French "m'aider" or "m'aidez."**

Congratulations to Question #13 winner Joe Froetschel, of Gismondi & Associates.

MEMBERSHIP ELECTION DINNER

Join your fellow WPTLA members on Tuesday, April 17, 2018 at Carmody's Grille on Neville Island, in Pittsburgh. Carmody's Grille, owned by WPTLA Member Sean Carmody, features a scratch kitchen with fresh, hand breaded ingredients. We'll meet on the second floor for cocktails at a private bar at 5:30 p.m., and sit down for a buffet of homestyle favorites at 6:15. Immediately following dinner, we'll hold elections for our 2018/2019 Officers and Board of Governors.

CARMODY'S GRILLE

A board meeting precedes the cocktails.

4:30 p.m. - Board Meeting / 5:30 p.m. - Cocktails / 6:15 p.m. - Dinner

Roughly two years ago WPTLA joined forces with the Pittsburgh Pro Bono Partnership. The Pittsburgh Pro Bono Partnership is a collaboration of law firms and organizations striving to increase access to pro bono legal services throughout the Greater Pittsburgh area. When WPTLA joined the Partnership, we agreed to develop a signature project that would help assure the less fortunate in our community have access to quality legal services.

Our signature project was born last year when we received the opportunity to spearhead a new legal clinic in the distressed community of Homewood. Known as the "Wills Clinic," the new venture was designed to match volunteer attorneys with people who want but cannot afford to pay an attorney to draft a will, financial power of attorney, and health care power of attorney/living will.

We started with a partner, the non-profit community development and outreach organization Operation Better Block. Then we set up camp at Operation Better Block's office on the main street in Homewood. After just a few months, I'm happy to report the WPTLA Wills Clinic is not only up and running, but gaining momentum. Already, our organization has provided free legal services to 18 individuals. The clients of the Wills Clinic now rest assured their homes and other important possessions will pass to their heirs in the manner they choose and control.

And, our efforts are not unnoticed in the Pittsburgh legal community. Last October, the WPTLA Wills Clinic was recognized at the Partnership's annual meeting. Thanks to our work thus far, WPTLA is now in the focus of lawyers who would otherwise have no reason to know our organization exists.

The Wills Clinic is successful thus far because of numerous WPTLA members who do not hesitate to volunteer. Some exceptional folks have volunteered not just once, but on a recurring basis. Not surprisingly, Laurie Lacher is a spark plug keeping this project moving forward, helping to match volunteers with clients and scheduling meetings.

I recognize many of our members have never drafted a will or power of attorney. Do not let that stop you from volunteering. The Wills Clinic is not intended to serve clients with complicated estates. We do our best to screen clients with an initial questionnaire completed before any new client is matched with a volunteer. Also, seasoned estate attorneys are available to answer any question which may arise. The drafting process is practically a fill-in the blank affair. All of the forms necessary to draft a basic will, financial power of attorney, health care power of attorney, or living will are available on the members only section of the WPTLA website.

The following is a step by step list guide for volunteers of the WPTLA Wills Clinic:

1. Laurie Lacher will advise you of the date/time of your appointment and the name of each client, including your new client for whom you will draft a Will, Durable Power of Attorney and/or Healthcare Power of Attorney/Living Will, and the client who you will meet to execute similar documents prepared by a different volunteer attorney.

2. A few days before the date you are set to volunteer you should receive the following:

   a. A completed questionnaire for the new client. The questionnaire is completed by Gabriel DeMarchi, the person in charge of Operation Better Block and our valuable partner thus far;

   b. A completed Will, Durable Power of Attorney, and/or Healthcare Power of Attorney/Living Will for a second client. These documents were prepared by a fellow volunteer attorney.

3. **Client Meeting 1**:

   a. When you meet with your new client, review their answers to the questionnaire. The testator/testatrix should understand what assets are subject to inheritance, the identity of their heirs and how they want to dispose of their assets. (Note: If you prepare a Will and/or other documents before the scheduled meeting and bring it with you on a laptop/zip drive, Gabriel can print the documents so that execution can proceed during this first meeting with the client. However, the clinic and this checklist is designed to allow you time to return to your office and draft the Will, Durable Power of Attorney and/or Healthcare Power of Attorney/Living).

   b. Ask your client to provide a date and time when they are available to meet on the last Tuesday or Thursday of the following month to execute the documents you will draft at your office. Advise the client they will be meeting with a different attorney from our organization, unless you choose to return to the clinic to execute the documents. The way the clinic is designed, you *(Continued on page 15)*

are not obligated to oversee the execution of the documents you prepare.

4. **Client meeting 2 (execution):**

a. You will meet with a second client and oversee the execution of a Will, Power of Attorney, and/or Healthcare Power of Attorney/Living Will prepared by an attorney who volunteered at the clinic the month before. Briefly review each document with the client to make sure it accurately represents the client's intent as of the time of execution. Gabriel and another member of the OBB staff will witness the execution of each document and sign where necessary.

b. It is not necessary that you notarize the Will and/or Durable Power of Attorney at the time of execution. Rather, you as the attorney will sign the "Attorney Certification" at the end of the Will/Durable Power of Attorney. The forms are available at the WPTLA website and include not only a will designed for certification by the attorney, but also a will designed for notarization at the time of execution if a notary is available.

5. When you return to your office, and assuming you have a notary in the office, ask your notary to notarize your signature on the Attorney Certification for the executed Will and Durable Power of Attorney.

6. Prepare letters to the client and his or her primary/contingent personal representatives and POA agents. The letters should enclose the following:

(1) The Will, with the originals to the testator/testatrix and copies to the personal representative(s);

(2) Three copies of the Healthcare Power of Attorney/Living Will with instructions to the client to provide a copy to her identified representative and primary care physician; and,

(3) An original copy of the Durable Power of Attorney for the client and a copy to the agents of the power of attorney. **Note**: unless the agents (primary and contingent) were present at your meeting to execute the POA, you will need to send the Acknowledgment to each agent along with an envelope and/or instructions for the agents to return their signed Acknowledgment to the principal.

(4) It is not necessary that you retain a copy of the Will or other documents.

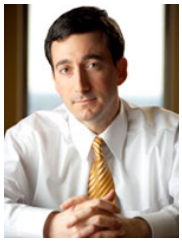
Many of you have more experience than I have drafting these important legal documents. Likewise, you may have a more efficient or practical strategy to accomplish the same goals. Feel free to employ whatever approach you prefer so long as it does the job.

If you would like to volunteer, please E-mail Laurie Lacher at laurie@wptla.org.

Thank you in advance for helping to make the Wills Clinic another feature which sets WPTLA apart from so many similar organizations.

By: Gregory Unatin, Esq.,
of Meyers Evans Lupetin & Unatin

gunatin@meyersmedmal.com



Comments from WPTLA Members that have volunteered for our Wills Clinic:

I volunteered to provide assistance to those (who) might not otherwise get an attorney to help them with these important decisions. WPTLA and Operation Better Block provided me with the necessary materials, equipment, office space, etc., to serve the client.

Access to the materials was easy on-line.

I volunteered to do pro bono work & to support WPTLA. I think these estate planning basics are best because you really only meet the client 1 or 2 times.

ESCAPE ROOM RECAP

On February 15, 2018, seven WPTLA members, four junior WPTLA members, and two business partners were locked in the bowels of the new Pittsburgher Building. With only one hour to escape their confinement, you will be comforted to know that—with mere minutes to spare—all involved were able to utilize their wits, reasoning, and ingenuity to secure their freedom.

While this sounds like the plot of the most recent indie horror film, it was actually the newest WPTLA member event at the Great Escape Room, Pittsburgh.

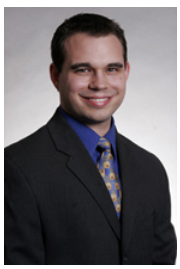
If you are unfamiliar with the ever-increasing trend of escape rooms, the participants are locked in a room surrounded by a number of different puzzles and must gather and collect clues to progressively work their way through the enigmas. With the two separate groups in identical rooms, the competitive nature of both teams led to a contest to see who not only could escape, but who could do so the fastest.

At the end of the day, the winning team consisted of Lindsay Offutt, Chris Finley, Marla Presley,- Laurie Lacher, Greg Unatin, Carmen Nocera, and Josh Lamm. As time was ticking down and with several puzzles left to solve, this group used their resourcefulness to "bypass" the remaining puzzles and used a very unconventional manner to gain their freedom. The other team, led by President Liz Chiappetta, and consisting of Cindy Miklos, Dave Landay, Steve Wildberger, Logan Lewis, Kayla Minor and yours truly, meticulously and cleverly worked their way through all of the puzzles. Despite the method of egress, both teams joined a minority of players, as only 35% of all individuals locked in the room escape in time. Thus once again, the trial lawyers were able to flex their mental muscles to do the organization proud.

Following the success of the escape room, everyone took a short walk through the driving rain to the Harris Grill where they met WPTLA members Larry Kelly and Matt Logue to enjoy food, drinks and swap stories about their victories. The only mystery that remains is whether a repeat performance will occur?

By: Joe Froetschel, Esq.,
of Gismondi & Associates

jrf@gislaw.com



25th Annual ETHICS & GOLF

Fri, May 25, 2018

Shannopin Country Club

1 Windmere Rd, Pittsburgh, PA 15202

7:30-8:30 a.m. – CLE & breakfast
(registration opens at 7:15)

9:00 a.m. – Golf Start

After golf – Steak Lunch & Awards

Registration available at www.wptla.org/events/

The Great Escape ROOM®
An Escape from the Ordinary!

Pictured above, from L to R in bottom row: Lindsay Offutt and Greg Unatin. In the middle row: Laurie Lacher, Jennifer Webster, Dave Landay, Liz Chiappetta, Marla Presley, Kayla Minor, and Logan Lewis. In the top row: Chris Finley, Steve Wildberger, Joe Froetschel, Carmen Nocera, and Josh Lamm. Thanks to Cindy Miklos for providing the photography!

MAKE A DIFFERENCE BY ENDING DISTRACTED DRIVING

In the Winter 2017 edition of The Advocate, I wrote an article discussing a new initiative that was being undertaken by the Community Outreach Committee. That outreach involved having WPTLA members actively attempt to educate young people about the dangers of distracted driving and try to curb the harm that it causes by making presentations in local high schools. I am extremely pleased to announce that WPTLA has decided to pursue that outreach initiative again this year by making EndDD presentations in local high schools. To make this outreach successful, we need your help.

Attorney Joel Feldman, and his wife Diane Anderson, created EndDD, a program aimed at educating people about the risks of distracted driving. This program, entitled End Distracted Driving (EndDD), continues to grow and has now reached more than 375,000 students and drivers in 45 states. WPTLA has agreed to continue the fight against distracted driving by presenting the EndDD program in high schools throughout western Pennsylvania for a second straight year. A link to all of the program materials is provided at the end of this article.* This is a 100% turnkey program and all of the materials necessary to make a presentation at a high school can be found at that link. This link includes form letters of introduction that can be used to initiate contact with local high schools. However, your personal contacts, health teachers and physical education teachers are often the best people to contact to schedule a presentation. This link also allows you to download the presentation as well as a script you can use to make the presentation.

The importance of this program cannot be overstated. As personal injury trial attorneys, we are reminded daily of the catastrophic consequences of distracted driving. I am sure that most, if not all, of us have represented someone whose life was turned upside down because of a driver who took his or her eye off of the road "for just a couple of seconds" to dial a number, read a text or change a radio station. Unfortunately, the combination of today's fast paced society, technology filled vehicles and the fact that cell phones are fixtures in our lives, is making distracted driving an ever increasing problem. Research has proven the increased dangers associated with driving while distracted, even if just for a few seconds.

"[T]he AAA Foundation for Traffic Safety has reported that distracted driving is the cause of more than 58% of teenage crashes."

To say that distracted driving is a problem, would be an overwhelming understatement. The EndDD website contains many statistics highlighting the dangers of distracted driving. One of those states:

> NHTSA Traffic Safety Facts, Distracted Driving 2015, DOT HS 812 381, March 2017 – In 2015, there were 3,477 people killed and an estimated additional 391,000 injured in motor vehicle crashes involving distracted drivers; 10% fatal crashes, 15% of injury crashes, and 14% of all police-reported traffic crashes were reported as distraction-affected; 9% of all drivers 15 to 19 years old involved in fatal crashes were distracted at the time of the crashes. This age group has the largest proportion of drivers who were distracted at the time of the fatal crashes; there were 551 nonoccupants (pedestrians, bicyclists, and others) killed in distraction-affected crashes.

Further, according to the EndDD website, the AAA Foundation for Traffic Safety has reported that distracted driving is the cause of more than 58% of teenage crashes. These statistics really highlight the importance of trying to explain the dangers of distracted driving to young drivers.

Last year, WPTLA members Joshua Rosen and Mark Smith took the time to speak to hundreds of young drivers about the dangers associated with distracted driving. Joshua Rosen made a presentation at Lower Merion High School in Ardmore, PA on October 28, 2016 and made another presentation at Norwin High School in North Huntingdon on May 15, 2017. Mark Smith gave the EndDD presentation at Steel Valley High School on May 16, 2017.

If each member of our organization would be willing to make at least one presentation at a local high school, we could impact thousands of students and positively alter the course for many young lives. If everyone took the time to make just one presentation, WPTLA could truly make a difference for young Western Pennsylvanians. I urge you to please take the time to look through the materials on the EndDD website and then make a presentation to at least one high school in your area.

The following is a link to a map that shows where every presentation of this program has been made: https://www.enddd.org/distracted-driving-presentations/. However, even if an EndDD presentation *(Continued on page 18)*

was given at a school in the past, I urge you to reach out to that school again since new students become new drivers every year. With that said, I would like to maintain a "master list" of schools in which WPTLA has presented the program, so we will not duplicate our efforts in any given year. If you are interested in presenting this timely and worthwhile program, please contact me directly at bneiderhiser@marcusandmack.com or 724-349-5602. Similarly, please let me know when you have finished making your presentation so I can accurately report WPTLA's efforts to Joel Feldman.

With Prom season just around the corner, many schools may be looking for programs designed to educate students about the dangers of distracted driving so this is the perfect time to reach out to a school and offer to make an EndDD presentation.

** The link to the program materials mentioned earlier:* https://www.enddd.org/trial-lawyer-campaign/

By: Bryan Neiderhiser, of Marcus & Mack. P.C.

bneiderhiser@marcusandmack.com

The staff of The Advocate is looking to add another member!

We are in need of an additional person to assist with the layout and development, and basic editing.

If you are interested, please contact our Executive Director Laurie Lacher at laurie@wptla.org 412-487-7644, or the Editor Erin Rudert at er@ainsmanlevine.com 412-333-9030

THE ADVOCATE

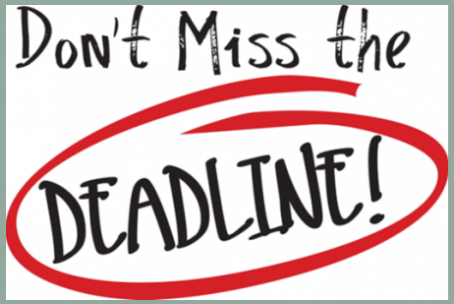
THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 31

2018-2019

	ARTICLE DEADLINES	PUBLICATION DATES
Vol 31, No. 1	Sep 7, 2018	Sep 21, 2018
Vol 31, No. 2	Nov 30, 2018	Dec 14, 2018
Vol 31, No. 3	Mar 8, 2019	Mar 22, 2019
Vol 31, No. 4	May 31, 2019	June 14, 2019



Mischief Afoot in Harrisburg

As many readers will know, the state legislature is still working to undermine the Supreme Court's decision in *Protz v. WCAB*. As readers will recall, this decision found the use of the AMA Guides to convert injured workers to partial disability to be unconstitutional. There are now Bills in both the House and the Senate seeking to abrogate the changes. In the most recent House Bill, Impairment Rating Evaluations would be reinstated utilizing the Sixth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. If a worker had an Impairment Rating of 35% or more, total disability benefits would continue. Otherwise, benefits would be converted to partial disability and the 500 weeks would begin to run for individuals not previously converted to partial disability. Interestingly, the Bill contains an odd retroactivity clause seeking to impose the new IRE's system on injured workers who incurred disability prior to the effective date of the new Act. It would effectively count partial disability benefits already paid to a Claimant as part of the 500 weeks.

The retroactivity provision would also appear to have constitutional problems. Numerous cases in Pennsylvania have described workers' compensation benefits as a property right and a substantive right. While statutes can have retroactive effect when they are merely procedural, the provision in the proposed Bill would clearly affect substantive rights. PAJ lobbyists have pointed out to the sponsors of this Bill consistently that it appears to be unconstitutional. The Bill has gone through several permutations designed to deal with the constitutional issue. However, in this writer's opinion, the most recent Bill still fails constitutional muster. As of this writing, no Bill has yet passed. PAJ continues to work on your behalf and those of your clients in seeking as a fair a Bill as possible.

Appellate Courts Taking up *Protz* Reinstatement Issues

As many readers will know, there is a lot of litigation going on seeking reinstatements to total disability for people who has been converted to partial disability based on an Impairment Rating. The general argument is there is no mechanism to return people to total disability from partial disability since the Supreme Court completely abrogated the Impairment Rating Evaluation section in the *Protz* decision. Since no Claimant can now prove he or she is entitled to total disability because of an Impairment Rating of 50% or more, the only logical conclusion is for the courts to determine the Impairment Rating section of the Act to be *void ab initio*.

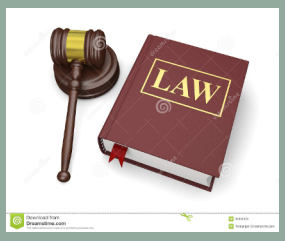
Numerous cases have reached the Workers' Compensation Appeal Board. Multiple cases are now pending before the Commonwealth Court. Many representatives have sought the help of the Amicus Committee of the Pennsylvania Association for Justice. To date, every request has been accepted. Multiple practitioners on the committee are involved with the Amicus Briefs that will be filed. The committee is coordinating the efforts of the multiple brief writers regarding the *Protz's* issues.

If any of you have such a case going up on appeal, please consider seeking amicus support from the committee. It is likely to be granted.

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

tcb@abesbaumann.com

CLE in ERIE



Mark your calendar for **Monday, Oct 1, 2018** for a multi-credit CLE program in Erie.

In partnership with the Erie County Bar Association, the program will be held at the brand new Erie County Bar Association Education Center.

More information will be available soon!

PLEADING CORPORATE LIABILITY

A couple of recent decisions addressed the issue of pleading in corporate liability cases. The first, *Ezrin v. Hospice Preferred Choice*, 16 CV 7103 (Lackawanna Cnty 2017) is a state trial court decision. There, the defendant was a nursing home. The plaintiff's decedent was a resident who sustained undocumented injuries to his arm and face which led to an overall decline in his condition. The plaintiff filed suit alleging a claim for corporate negligence. The defendant filed preliminary objections based upon insufficient specificity. Its position was that the plaintiff had not adequately set forth facts of actual or constructive notice.

According to the decision, written by Judge Nealon, the plaintiff had pleaded various standards of care applicable to a claim for corporate negligence. The plaintiff further set forth allegations that the defendant had increased its admissions of patients with higher acuity and medical complexity to obtain higher reimbursement rates. Continuing, the plaintiff stated that the defendant knew of the need for increased "staff, services, resources and supplies" and a need for competent and qualified staff. Despite this, it was alleged that the defendant allowed recklessly high ratios of patients to nurses and certified nurse aides.

In order to rule upon the preliminary objections before the court, Judge Nealon recognized that fact pleading required the complaint to set forth the essential facts upon which it is based upon, but need not cite evidence. Hence in assessing a particular complaint paragraph, it must be "read in context with all other allegations in the complaint to determine whether the defendant has provided adequate notice of the claim against which it must defend." *Ezrin* at 9.

Judge Nealon thereafter concluded that "a healthcare entity is chargeable with constructive notice when it would have discovered the deficient care if it had adequately monitored its staff or properly enforced its policies." *Ezrin*, at 5[1] Hence, the Court concluded that when the allegations of the complaint are "examined in their entirety rather than in isolation, they are sufficient to provide … adequate notice of the corporate negligence claim." *Ezrin*, at 9.

A similar result was reached in the United States District Court for the Eastern District of Pennsylvania in *McClure v. Parvis*, No. 17-3049, 2018 U.S. Dist. LEXIS 19083 (E.D. Pa. Feb. 6, 2018). There, the plaintiff had been turned away at her physician's office because she was fifteen minutes late for her appointment. The physician's office's parent company was the Trustees of the University of Pennsylvania. At the time, she was experiencing a severe headache and vomiting. The plaintiff was subsequently diagnosed with a large right parietal hemorrhage.

The plaintiff filed suit against her physician practice group and the trustees as well as other defendant. (The other defendants are not relevant to this discussion.) The plaintiff's claim included causes of action for corporate negligence against the physician's practice group and the trustees. The physician's office and the trustees filed motions to dismiss. The physician's group claimed that it was not subject to corporate negligence. Similarly, the trustees claimed that as a mere parent company, it was not subject to corporate liability. Ultimately, the court held that either entity could be held liable for corporate negligence.

In analyzing the issue before the court, Judge Savage found that the focus of the determination of duty was the relationship between corporate defendant and the plaintiff. In applying this principle to the case, Jude Savage found an allegation that the physician practice group was "responsible for caring for her" along with the presenting symptoms and the fact that she was turned away to establish a non-delegable duty.

As to the trustees, the court found the inquiry to be an individualized one. Hence, in the absence of a factual record, the motion to dismiss was denied.

These 2 cases do present a common theme. If the existence of duty based upon corporate negligence is pleaded along with the underlying facts of the case, the court will not require a detailed pleading of how or why the duty was breached.

PUBLIC ACCESS POLICY UPDATE

The rules of civil procedure have now been updated

[1] Judge Nealon also offered an overview of the law of corporate negligence following *Thompson v. Nason Hosp.*, 527 Pa. 330, 591 A.2d 703 (1991). In particular he traced the evolution of the law to allow claims of corporate negligence to proceed against entities other than hospitals. See e.g. *Scampone v. Highland Park Care Ctr., LLC*, 618 Pa. 363, 57 A.3d 582 (2012) (nursing homes); *Shannon v. McNulty*, 718 A.2d 828 (Pa. Super. Ct. 1998) (HMO); *Hyrcza v. W. Penn Allegheny Health Sys.*, 2009 PA Super 119, 978 A.2d 961(medical professional corporation).

to conform to the Public Access Policy. One notable update is new Rule 205.6 which requires any party or attorney filing a document to comply with Sections 7.0 and 8.0 of the Public Access Policy of the Unified Judicial System of Pennsylvania.

An additional amendment of note is to Rule 2028, Actions By and Against Minors. That section now provides that "The minor shall be designated by the initials of his or her first and last name." The Official Note to Rule 1018 Caption has been amended to cross reference this requirement.

Beaver County Public Access Policy Update

For those of you, who wish to update the chart provided in the last edition, please note that Beaver County Local Rule of Judicial Administration provides for the two version option to be utilized.

Delay Damages

The prime rate to be used for the calculation of delay damages pursuant to Pa.R.C.P. No 238 for the period of delay occurring in 2018 has been published. The applicable rate is 4 ½%.

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

mmilsop@bargerandgreen.com

SAVE THE DATE!

PRESIDENT'S CHALLENGE 5K RUN/WALK/WHEEL

SATURDAY, OCT 20, 2018

BOATHOUSE AT NORTH PARK,

PITTSBURGH, PA

PHOTOS AND QUOTES FROM THE PAST PRESIDENTS' DINNER


1

Photo credit to

Moonlight Photography

by

Amanda D'Amico

412-951-1804

amandamariedamico@gmail.com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Thanks to those who attended the Past Presidents' Dinner on Jan 30, 2018.

Pictured from L to R in #1: NFP's Bill Goodman and member George Kontos;

In #2: Board of Governors Member Erin Rudert, Jennifer Webster, and Board of Governors Member Matt Logue.

In #3: Past Presidents Jon Mack, The Honorable Beth Lazzara, and Al Lindsay.

In #4: Board of Governors Members Rich Epstein and Phil Clark, Past Presidents Mark Homyak and Cindy Danel.

In #5: Past Presidents Tim Riley and John Quinn.

In #6: Past President Veronica Richards, President Liz Chiappetta, Immediate Past President Sandy Neumann, and NFP's Maggie Alexander.

In #7: Board of Governors Member Troy Frederick and Past President Jon Mack.

In #8: President-Elect Bryan Neiderhiser, Past Presidents Jon Mack, Bill Goodrich, and Josh Geist, and member Bob Marcus.

In #9: Tony D'Amico and Board of Governors Member Mike D'Amico.

In #10: Past Presidents Jon Mack, Bill Goodrich, The Honorable Beth Lazzara, and member Bob Marcus


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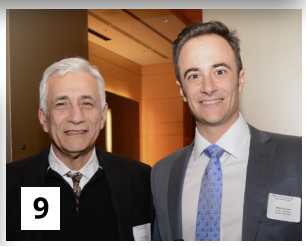
"How nice the venue was and how good the food was compared to most of those types of catered dinners."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"Thanks to ... the association for the wonderful gift. Very nice and useful. I am sure that I will lift a toast to all using them."


10

"I thought it was a really really nice event. Had a great time. It was great to see you all. And reconnect with a lot of the Past Presidents. I thought the Fairmont did a great job. But I just wanted to say 'thank you'."

Nominated Officers and Board of Governors Fiscal Year 2018 – 2019

(***Fiscal year runs July 1 – June 30)***

Officers:

President	Bryan S. Neiderhiser
Immediate Past President	Elizabeth A. Chiappetta
President-Elect	David M. Landay
Vice President	Eric J. Purchase
Secretary	Mark E. Milsop
Treasurer	Erin K. Rudert

Board of Governors:

Allegheny County

Steven M. Barth	Michael J. D'Amico	Gianni Floro
Joseph R. Froetschel	Lawrence E. Gurrera II	Brittani R. Hassen
G. Clinton Kelley	Katie A. Killion	Shawn David Kressley
Matthew T. Logue	Brendan B. Lupetin	John D. Perkosky
Max Petrunya	Karesa M. Rovnan	Jason M. Schiffman
James T. Tallman	Gregory R. Unatin	Jennifer L. Webster
David C. Zimmaro		

Beaver County

Charles F. Bowers III	Chad F. McMillen	Kelly M. Tocci

Blair County

Nathaniel B. Smith

Butler County

Matthew McCune

Indiana County

Troy M. Frederick

Lawrence County

Phillip L. Clark, Jr.	Charles W. Garbett

Mercer County

Richard W. Epstein

Washington County

Laura D. Phillips

Westmoreland County

Michael D. Ferguson

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

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

Through the Grapevine....

Congratulations to **Tom Hall** on his new position as Owner and President of The Law Offices of Hall & Copetas. P:412-532-8255 tdh@hallandcopetaslaw.com www.hallandcopetaslaw.com

Congratulations to **President-Elect Bryan Neiderhiser** on becoming a partner at Marcus & Mack, P.C.

Congratulations to **Ed Abes**, on on his recent induction as a Fellow of the College of Workers' Compensation Lawyers.

Emeritus Member Warren Ferry has a new email: wdf0523@gmail.com.

Bob Saunders' firm name and address has changed to: Law Offices of Robert L. Saunders, P.C., 13 Main St, Bradford, PA 16701.

Our condolences to **Past President Rich Schubert** on the recent passing of his mother.