THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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ANNUAL JUDICIARY DINNER HELD MAY 4th

WPTLA hosted its Annual Judiciary Dinner on Friday May 4, 2018 at Heinz Field. The event was attended by 16 members of the Judiciary as well as members of our Association and guests. The highlight of the dinner is the recognition of members of the Judiciary who have either retired or began senior status. The dinner also allows us to celebrate the good work that we do. The dinner's highlights are outlined below.

RECOGNITION OF RETIRED AND SENIOR JUDGES

As of the beginning of 2018, 10 Judges from Western Pennsylvania either retired or assumed senior status. We recognized each of them. The Judges who were recognized included:

The Honorable John M. Cascio

The Honorable Kim R. Gibson

The Honorable David Stewart Cercone*

The Honorable Jolene Grubb Kopriva

The Honorable Thomas R. Dobson

The Honorable W. Terrence O'Brien

The Honorable Damon J. Faldowski*

The Honorable Christopher J. St. John

The Honorable D. Michael Fisher*

The Honorable Kenneth G. Valasek

CHAMPION OF JUSTICE AWARD

Each year, we recognize one of our own who has distinguished him or her self throughout his or her career not only as an excellent attorney, but by preserving the rights of injury victims in the civil justice system. This year's awardee was Joseph P. Moschetta of Washington County, Pennsylvania.

During his acceptance of the award, Joe related many of the highlights of his efforts to establish his practice upon completion of his legal education in the early 1960s. After graduating from law school, Joe returned to western Pennsylvania and established a maritime and personal injury practice. Although his father was also an attorney, Joe was expected to work to develop his practice. During his career, Joe was involved in the formation of PAJ (then the Pennsylvania Association of Trial Lawyers) and served as President of the Western Pennsylvania Trial Lawyers Association from 1971 to 1972. Joe was previously honored by PAJ with its Milton D. Rosenberg Award.

Joe had temporarily agreed to interrupt his practice to serve as an appointed judge in Washington County in 2005 when the Court was *(Continued on Page 2)*

Each year, we recognize one of our own who has distinguished him or her self throughout his or her career not only as an excellent attorney, but by preserving the rights of injury victims in the civil justice system.

shorthanded and faced a significant backlog. During that time, Joe gained a reputation for being able to effectively resolve cases and, when all was said and done, was able to conclude 125 cases on the docket. Joe has also been very active in the Washington County Bar Association. Joe's words at the dinner were inspirational for all of us to do more to serve the justice system.

The award was presented by Champion of Justice Committee member Christopher Miller. The committee also included Larry Kelly and Greg Unatin.

PRESENTATIONS RELATED TO WPTLA'S COMMUNITY SERVICE

One of WPTLA's key functions is to serve the Western Pennsylvania region through relevant community service. Each year, WPTLA fulfills this purpose by sponsoring a high school essay contest on a timely legal issue and awards three scholarships to winning high school students. In addition, WPTLA has hosted a 5K each year to benefit the Pittsburgh Steelwheelers.

Annual Essay Contest:

This year's essay contest topic was based upon the case of *Kennedy v. Bremerton School District*. That case involved an assistant football coach at a public school who was fired after refusing to stop his practice of praying at the 50 yard line with players after each game and offering inspirational talks, often related to faith. The essay scholarship contestants offered a variety of points of view on this difficult issue, which pitted the Free Exercise Clause of the First Amendment of the United States Constitution against the Establishment Clause. This year's winners were:

Hunter Evans, of Claysburg-Kimmel High School

Molly Forrest, of Quaker Valley High School

Riley Smith, of North Allegheny High School

The awards were presented by committee chair Charles Garbett. The Essay Contest Committee also included: Chad Bowers, Phillip Clark, Mark Milsop, Erin Rudert, Nat Smith, James Tallman, and Kelly Tocci.

Annual President's Challenge 5K Proceeds Presentation:

This year's annual 5K was once again a great success after seeing a change of location to North Park. As a result, WPTLA was able to present a check in the amount of $29,000.00 to the Pittsburgh Steelwheelers. The Pittsburgh Steelwheelers is a nonprofit organization which provides opportunities for wheelchair athletes to participate in sports such as wheelchair basketball and wheelchair rugby. Those in attendance were amazed by a video showing how physically rigorous (and sometimes rough) these activities can be. After the video, Matt Taylor of the Steelwheelers briefly addressed those in attendance, thanking WPTLA for all that we have done through our 5K.

Fall 2017 marked the 17th annual running of the 5K. Our 5K is unique that in addition to the usual walking and running categories, there is, appropriately, a wheeling category. The 2018 5K will be held again in North Park on Saturday October 20, 2018. Registration information will be available at WPTLA.org.

The check was presented by Committee member David Zimmaro. Other members of the committee included Sean Carmody, Katie Killion, and Chad McMillen.

Daniel M. Berger Community Service Award:

Each year, WPTLA recognizes a local charity and its leaders for work in Western Pennsylvania. Along with the exposure the charity receives at the Judiciary Dinner, a financial donation is made by the organization with additional support from Berger & Lagnese, NFP Structured Settlements, and Planet Depos.

This year's recipient was Girls on the Run, an organization that empowers and inspires girls to be joyful, healthy and confident using a fun, experience-based curriculum which creatively integrates running. Girls on the Run operates on the belief that every girl deserves to be empowered. Their program involves girls from third through eighth grade. During their involvement in Girls on the Run, girls prepare to run a 5K while also planning and executing a community service project and learning through a curriculum geared toward understanding themselves, valuing relationships as well as teamwork and understanding their relationship with the world at large.

Attendees at the dinner saw a video that included statistics on the importance of the organization's work and the nature of their program and heard from its local council director Meredith Colaizzi. For those who did not attend the dinner or would like to see the video again, it can be found at https://www.gotrmagee.org/Our-Impact

The award was presented by Committee Chair Paul Lagnese. Paul was assisted by members Drew Leger, Tony Mengine, Bryan Neiderhiser and *(Continued on Page 4)*

One of WPTLA's key functions is to serve the Western Pennsylvania region through relevant community service.

PRESIDENT'S MESSAGE

Thank you to all of you for a wonderful and fruitful Presidency of the Western Pennsylvania Trial Lawyers. It has been an honor and a privilege to represent all of you. It bears noting that all of the inner-workings, mechanics and longevity of our organization would not be possible without the leadership of our Executive Director, Laurie Lacher, and Lorraine Eyler. Laurie and Lorraine truly keep things moving, on track and organized. They are the true lifeblood of our organization. Next time you see them – stop and say thanks for all that they do!

One of the most important things that we did this year was to take a survey of membership, as a chance to check in and see what we are doing right, and what could use a little work. As promised, here is a breakdown of some of the notable findings:

- We sent the survey to current and former members. No former members responded. As for current members, we emailed over 500 members, and we received 94 responses.
- The majority of our members (42%) work in firms with 2-5 attorneys.
- 81% of our membership has been in practice for more than 10 years.
- In response to questions about why people have joined WPTLA or what people view as the most important benefits of their membership, a large portion responded that they use WPTLA for networking opportunities, a desire to maintain plaintiff's bar interests and for CLE opportunities.
- As you might have noticed if you answered the survey, many questions pertained to venue selection, menu selection, cost of events, time of events, usefulness of events. I can assure you that we have gone over that data with a fine-toothed comb. This type of data is super helpful to those of us planning our events. President-Elect Bryan Neiderhiser and I reviewed all of the "event oriented" responses with Executive Director Laurie Lacher, which they will use for planning next year's events and so on. We also got a lot of very useful suggestions on new venues to try for dinner meetings, so we hope to put those to good use.
- We also asked a lot of questions about CLE programs. Again, a lot of the information garnered from these questions will be put to use in planning upcoming CLE events and programs. Most notably, the lion's share of respondents indicated that they like CLE programs put on by our own members and Past Presidents the best. We also got a lot of good feedback on possible CLE program topics; we will endeavor to implement some of the suggestions. We will strive to give the people what they want! Stay tuned!

It's never easy to ask a large group of people about their thoughts on the state of an organization, but I am glad we did it. It's nice to know where we stand, what people are preferring, and what could use improvement. By and large, all of the feedback was largely positive, and I'm happy to report that we are generally meeting the needs of our membership.

Good luck to President-Elect Bryan Neiderhiser, one of the nicest and most organized people you'll ever meet. He will serve our organization well!

By: Elizabeth Chiappetta, Esq., of Robert Peirce & Associates, P.C.

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ANNUAL JUDICIARY DINNER HELD MAY 4th ... FROM PAGE 2

Greg Unatin in identifying and selecting such a worthy recipient of this annual award.

HONORING OUTGOING PRESIDENT ELIZABETH CHIAPPETTA

Incoming WPTLA President Bryan Neiderhiser recognized outgoing president Elizabeth Chiappetta. During the recognition, Bryan spoke highly of Liz's leadership and devotion during the past year. He specifically recognized her efforts at preparing and undertaking a membership survey that provided valuable information that will help us for years to come recognize how to best serve our membership.

As a final note, the Executive Committee was grateful for the hard work of our Executive Director, Laurie Lacher, and her assistant, Lorraine Eyler, in coordinating all of the details needed to assure such a large and successful event. Also important to the success of the dinner were my fellow Judiciary Dinner Committee members Dave Landay, Bryan Neiderhiser, and Laura Phillips.

See page 21 for photos of the event.

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

mmilsop@bergerandgreen.com

Correspondence Received about the Annual Judiciary Dinner

W.P.T.L.A.

Thank you again for selecting me as one of your scholarship winners. The W.P.T.L.A. dinner was wonderful & I was honored to attend.

Sincerely,

Hunter Evans

Western Pennsylvania Trial Lawyers Association
Laurie J. Lacher, Executive Director
900 Mt Royal Blvd, Suite 102
Glenshaw, PA 15223-1030

May 9, 2018

Dear Laurie,

*Your recent donation of **$2,000.00** will support **ten full program scholarships** for girls who will request to join Girls on the Run in the fall. On behalf of Girls on the Run of Magee-Womens Hospital of UPMC, thank you for the generous Daniel M. Berger Community Service Award from WPTLA. Sincere thanks also to Berger & Lagnese, NFP Structured Settlements, Planet Depos for their contributions to this award.*

This spring season 1,200 girls in our area are learning life lessons including implementing a community impact project. To receive the Daniel M. Berger Community Service Award truly fits the mission, vision and goals of the Girls on the Run program. We are grateful that WPTLA has selected Girls on the Run as part of your philanthropic contributions. The Judiciary Dinner was a wonderful opportunity to speak to members of WPTLA about Girls on the Run and we were honored to be part of such a special event.

With gratitude,

Meredith Colaizzi
Council Director

UPCOMING EVENTS

CLE LUNCH 'N LEARN

Thur, Jul 12, 2018

Grant Building, Pittsburgh

ANNUAL "RETREAT"

Tues, Aug 28, 2018

Wigle Whiskey, Pittsburgh

Wed, Aug 29, 2018

Grant Building, 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

BEAVER DINNER & CLE

Mon, Oct 29, 2018

Wooden Angel, Beaver

COMEBACK AWARD DINNER

Wed, Nov 28, 2018

Cambria Hotel, Pittsburgh

ERIE v. BRISTOL – WHEN DOES THE STATUTE OF LIMITATIONS BEGIN TO RUN ON UM/UIM CLAIMS?

In *Erie Insurance Exchange v. Michael Bristol and RCC Inc.,* the Pennsylvania Supreme Court was called upon to determine when the statute of limitations begins to run on an uninsured motorist claim. 174 A.3d 578, 579-580 (Pa. 2017). In a 6 to 1 majority opinion authored by Justice Sallie Mundy, the Court held that the statute of limitations principles governing contract law apply, and the running of the statute is commenced only upon an alleged breach of a contractual duty by the insurer. *Id*. at. 580.[1]

This case arose from a July 22, 2005, hit-and-run incident, which occurred while the injured victim, Michael Bristol ("Mr. Bristol") was working as a lineman for RCC, Inc., in Montgomery County, Pennsylvania. *Id*. At the time of the incident, RCC, Inc., was insured under a Commercial Auto Fleet Policy through Erie Insurance Exchange ("Erie"), which carried Uninsured/Underinsured ("UM/UIM") Motorist Coverage *Id*. An arbitration clause included in the UM/UIM Endorsement required binding resolution of disputes over liability and the amount of damages but reserved other disputes, including the applicability of any statute of limitations, to the courts. *Id*.

Mr. Bristol's attorney put Erie on notice of his UM claim by letter dated June 19, 2007. Erie responded with a reservation of rights letter dated July 9, 2007. *Id*. Subsequently, both parties selected arbitrators and Erie obtained a statement under oath from Mr. Bristol. *Id*. at 581. In September 2012, the parties exchanged correspondence concerning Mr. Bristol's intervening, but unrelated, incarceration and the need to await his release to schedule further proceedings. *Id*. No further action was taken until Erie filed an action for declaratory judgment on May 29, 2013, seeking a determination of whether Mr. Bristol's UM claim was barred by the four-year statute of limitations under §5525(a)(8). *Id*.

On September 11, 2013, Erie filed a motion for summary judgment asserting the statute of limitations had started to run on the date of the incident because Mr. Bristol was unable to identify the vehicle involved in the hit-and-run. *Id*. The trial court agreed and granted Erie's motion. *Id*.

On appeal to the Superior Court of Pennsylvania, the trial court's grant of summary judgment was affirmed in an unpublished memorandum opinion by Judge Judith Olson. *Erie Ins. Exch. v. Bristol*, 151 A.3d 1161, 2016 WL 3062309 (Pa. Super. 2016). Relying on their previous decision in *Boyle v. State Farm Auto. Ins. Co.,* the Superior Court held*, inter alia*, that the statute of limitations begins to run on UM claims when an insured sustains an injury as a result of a motor vehicle accident and knows the owner or operator of the other vehicle is uninsured. *Id*. at *4 citing *Boyle*, 456 A.2d 156, 162 (Pa. Super.1983).

As an issue of first impression, the Pennsylvania Supreme Court granted an allowance of appeal to determine "when the statute of limitations begins to run on an uninsured motorist claim under an insurance policy". *Bristol*, 174 A.3d at 579 and 585. On his appeal to the Supreme Court, Mr. Bristol argued that the trigger for the statute of limitations to begin running for a cause of action based in contract could only be the occurrence of a breach of that contract. *Id*. at 583. Mr. Bristol urged the Supreme Court to overrule the Superior Court's line of cases, which deemed the existence of a claim for UM coverage, rather than the accrual of a cause of action for breach of contract, to be the circumstance triggering the commencement of the statute of limitations. *Id*. Mr. Bristol also argued that the Superior Court's holding in *Boyle* was contrary to the overwhelming majority of other states, which had considered this issue. *Id*. Finally, Mr. Bristol warned of potential adverse policy implications, which included incentivizing insurers to draw out extra-judicial actions, negotiations, and investigations in an effort to exhaust the statute of limitations. *Id*.

Conversely, Erie argued to the Supreme Court that the lower court decisions were consistent with a long line of prior Superior Court decisions holding that UM claims are commenced for the purpose of the statute of limitations when the claimant's rights have vested (i.e. when the insured knows of the uninsured status of the other owner/operator). *Id*. at 584. Erie urged the Supreme Court to formally endorse the prior line of Superior Court precedent and hold that the statute of limitations for UM or UIM claims begin to run upon the existence of the claim. *Id*. To the extent that their proposed rule deviated from the application of traditional contract principles, Erie argued that Pennsylvania courts had long viewed insurance contracts as "special cases" and requested that the Court apply this logic to the current issue by making a special exception to the general rule. *Id*. citing *Brakeman v. Potomac Ins. Co.,* 371 A.2d 193, 196-97 (Pa. Super. 1977) (noting traditional contract principles may have to yield in consideration of the relationship between the insurer and insured). Erie also argued its own set of policy considerations to the Court. Specifically, Erie believed that failing to start the running of the statute of limitations at the time when the *(Continued on Page 6)*

[1] *There was a dissenting opinion by Justice David N. Wecht. However, Justice Wecht's dissent was entirely focused on his belief that the issue before the Supreme Court had been forfeited and/or waived by Mr. Bristol because he failed at both the trial court and the Superior Court level to address that issue. See Pa. R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").*

insured knew the UM claim existed would result in "no limit" to the amount of time a claimant could extend a claim. *Id*.

At the outset of their opinion, the Supreme Court noted that the parties and the appellate courts all agreed that the applicable statute of limitations for UM/UIM claims was the four-year limitation period for contracts set forth in 42 Pa. C.S. 5525(a)(8). The Court began their analysis of when that statute began to run by examining 42 Pa. C.S. 5502(a), which establishes the method of computing periods of limitation. *Id*. The Court found the language of §5502 provided a clear mandate that the time period by which a matter must be commenced was to be computed from the time the **cause of action accrued**. *Id*. (emphasis in original). In construing this language for general contract purposes, the Court continued to adopt the majority view that the accrual of the right of action was the start of a limitations period. *Id*. citing *Ctr. Concrete Co. v. AGI, Inc.*, 559 A.2.d 516, 518-519 (Pa. 1989). Thus, when applying these general contract principles to the UM/UIM context, the Court found that "the statute of limitations would begin to run when the insured's cause of action accrued, i.e., when the insurer is alleged to have breached its duty under the insurance contract". *Id*. at 586.

The Court was not persuaded by Erie's argument that the line of Superior Court cases beginning with *Boyle* had established a valid basis to deviate from this general rule. *Id*. Instead, the Court determined that deviations from general contract principles were only valid when they were grounded in the specific language of a controlling piece of legislation. *Id*. In the case *sub judice,* the Court found that the construction of the PA Motor Vehicle Financial Responsibility Law (PA MVFRL) was not at issue and therefore no valid rationale existed for deviating from the general rule that in contract cases it is the alleged breach of a duty, which starts the running of the statute of limitations. *Id*.

Next, the Supreme Court reviewed decisions from outside jurisdictions concerning when the statute of limitations begins to run on UM/UIM claims. The Court found three (3) views on the issue:

1) the statute begins to run on the date of any breach by the insurer (the position advanced by Bristol);

2) the statute begins to run on the date the insured knows or has reason to know the tortfeasor is uninsured or underinsured (the position of the Superior Court advocated by Erie); and

3) the statute begins to run on the date of the accident.

Id. at 587. The Court found that the overwhelming majority of jurisdictions had adopted the first position. *Id*. The majority view was based upon the determination that cases involving UM claims are grounded in the contractual relationship between insured and the insurer and therefore, a breach of that contractual duty would be the only proper triggering mechanism for the running of the statute of limitations. *Id*.

Finally, the Supreme Court addressed the public policy concerns expressed by the parties. The Court found that the policy arguments on both sides centered on the potential for insureds or insurers to manipulate a delay for tactical advantage during the claims process. *Id*. While noting that the apprehensions about delay expressed by both sides "may be of concern", the Court did not feel that they justified departing from the normal breach of contract principles linked to triggering the statute of limitations.[2] *Id*. at 589.

Following its analysis of the issue, the Court reiterated its holding that the proper circumstance to start the running of the limitations period for UM claims is an alleged breach of the insurance contract by the insurer. *Id*. The Court specifically

(Continued on Page 7)

[2] *On this issue, the Court noted: "that an insured would rarely be advantaged by delay in the submission of a claim and insurers are charged with acting in good faith [and] deviations from these norms may be addressed on equitable grounds or in other ways based on particular facts."*

Legislative Meet 'n Greet

scheduled for

Thursday, Sept 20, 2018

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

Save the Date!

overruled the *Boyle* decision and its progeny to the extent that any of those cases were at odds with their holding. *Id*. The Court then applied their decision to the facts of Mr. Bristol's case, concluding that the statute of limitations could only have been triggered by Erie's denial of the UM claim or its refusal to arbitrate, which is when "the cause of action accrued". 42 Pa. C.S. § 5502(a). *Id*. at 590. Because Erie had never denied coverage or refused to arbitrate the claim, the Court found that Mr. Bristol's UM claim had never accrued a cause of action to initiate through the court. *Id*. Thus, the trial court had erred in granting summary judgment to Erie on the basis that the statute of limitations had expired. The Order of the Superior Court affirming that decision was reversed and the case was remanded for further proceedings, consistent with the Supreme Court's opinion. *Id*.

Overall, the Supreme Court's decision in *Bristol* should be seen as a win for injury victims insured by policies containing UM/UIM coverage. For starters, the decision may allow these injured parties and their attorneys to breathe new life into UM/UIM claims that were previously thought to be barred by the statute of limitations. While the ruling was not made retroactive, it would seem to be binding authority upon any court in the Commonwealth being asked to interpret the statute of limitations period for UM/UIM claims following the date of the Supreme Court's decision, November 22, 2017. As such, be on the lookout for UM/UIM claims that may be affected by this decision. You may find yourself with a viable cause of action on a claim that was previously excluded under the old rule.

The decision also overrules a long line of appellate precedent, which answered the question of when the statute of limitations begins to run on UM/UIM claims in favor of the insurance industry. Under the former rule, UM/UIM insurers could ignore well-established principles governing the statute of limitations for a contract claim while taking advantage of the grey area created by caselaw regarding when the UM/UIM statute of limitations began to run. Despite being the breaching party to an insurance contract, the old rule enabled UM/UIM insurers to utilize tactics, such as extended investigations, extra-judicial actions, negotiations, or even agreeing to a period of postponement, in an effort to turn the statute of limitations into a quasi-offensive weapon against their insureds' UM/UIM claims. Thanks to the Supreme Court's decision, insurance companies can no longer use these tactics to take advantage of the uncertainty created by the now-overruled Superior Court line of cases. Instead, the rule of law set forth in *Bristol* correctly favors the non-breaching party to the contact claim, the injured victim. If the UM/UIM insurer has not breached the contract, a cause of action has not accrued and the statute of limitations has not started to run.

The *Bristol* decision should also "aid" the insurance industry in remembering to honor their often-forgotten duty of good faith and fair dealing toward their insureds. Under the decision, insurers are very likely to stop employing tactics designed to delay or prolong the determination of UM/UIM claims because doing so will now be to their detriment as opposed to their advantage. By holding that the statute of limitations does not begin to run until a breach by the insurer has occurred, the *Bristol* decision forces insurance companies to remain proactive with the investigation and resolution of UM/UIM claims. The decision will also help to keep insurers' focus on the validity of their insureds' UM/UIM claim rather than attempting to exploit loopholes in favorable caselaw in the hopes of procedurally dismissing an otherwise legitimate claim.

The Court's decision, while certainly a victory for injured victims, is not without its difficulties. Perhaps the most glaring is what happens in cases where the insurer does not breach the contract for the UM/UIM claim. Based on the Court's ruling, if the insurer does not breach the UM/UIM cause of action never "accrues" and the claim could go on indefinitely because the statute of limitations would never begin to run. This is likely to create confusion and uncertainty for Plaintiffs' attorneys in an area of the law where those concepts are never welcome, the statute of limitations. For example, how do we properly advise a potential client when they ask us whether or not the UM/UIM statute of limitations has exhausted on their claim? Under the *Bristol* opinion, the answer to that question is almost always going to be "it depends", which is a somewhat frightening concept when you are dealing with a statute of limitations question. The important thing is to be aware of the uncertainty created by the rule so that you can effectively counsel clients on its potential effect on their UM/UIM claim.

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

shawn@dmlawpgh.com

Thanks to the Supreme Court's decision, insurance companies can no longer use these tactics to take advantage of the uncertainty created by the now-overruled Superior Court line of cases.

Get a Jury to Say "Yes" by Reminding Them They Can Say "No"

Do you want to improve your chances of a jury or judge (or anyone for that matter) saying "yes" to your request? Then commit these four words to memory and practice adding them to the end of every request you make – "BUT YOU ARE FREE." It's that simple.

The "but you are free" (BYAF) approach has been proven to be one of the most effective compliance-gaining techniques known to social scientists. The BYAF compliance-gaining technique operates by telling the target that he or she is free to refuse the request. The most important aspect of this technique is verbally acknowledging the target's personal autonomy and freedom to say "no."

Christopher J. Carpenter, an associate professor of communications at Western Illinois University, conducted a meta-analysis (statistical analysis for combining data from multiple studies) of 42 studies of the effectiveness of the BYAF technique.[1]

The initial demonstration of the "but you are free" (BYAF) technique was conducted by Gueguen and Pascual (2000).[2] One of the experimenters approached individuals walking alone in a shopping mall in France. In the control condition, the experimenter made a simple direct request: "Sorry, Madam/Sir, would you have some coins to take the bus, please?" In the experimental condition, the experimenter added: "But you are free to accept or to refuse." Those in the experimental condition were substantially more likely to comply with the request. Moreover, those who gave in the experimental condition *gave twice as much* as those in the control condition. Gueguen and Pascual repeated variations of this experiment always with statistically significant results demonstrating the effectiveness of the BYAF technique.[3]

Carpenter's research resulted in the location of 13 articles for a combined sample size of 23,790. His study demonstrated conclusively that the BYAF technique was an effective means of increasing compliance rates in most contexts. In fact, the sample-size weighted odds ratio was 2.03, which means the participants in these studies were more than twice as likely to say "yes" when the request included the BYAF than when it did not. **Thus, adding "but you are free" to the end of any request literally doubles your chances of gaining compliance**. Furthermore, Carpenter found that the BYAF technique worked equally well whether the initial request was pro-social (e.g. request to donate to a charity) or self-interested (e.g. asking a jury to award money).

In regard to the practical application of this technique, Carpenter's study found that so long as the target's right to say "no" was emphasized, the exact wording of the technique could be varied with similar results. For example, "but obviously do not feel obliged" was just as effective as "but you are free."

The evidence then is clear that incorporating the BYAF technique will improve your chances before judges when you argue motions and before juries when you request a verdict in your favor. Best of all, it is easy to do and feels right. Rather than trying to force the jury to do what you want (which no one likes), explain why you are right and why the evidence in light of the law requires an appropriate plaintiff's verdict and then simply note that "it's up to you" or "you are free to choose what is right and fair" etc. Combining the BYAF technique with a reminder of the great power the jury possesses to make a just decision that will stand for all time is a particularly potent appeal.

In sum, I highly recommend you find ways to incorporate the BYAF technique into your arguments before judges and juries...but you are free to do what you want!

By: Brendan Lupetin, Esq.,

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The evidence . . . is clear that incorporating the BYAF technique will improve your chances before judges when you argue motions and before juries when you request a verdict in your favor.

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[1] *Carpenter, C.J. (2012). A Meta-Analysis of the Effectiveness of the "But You Are Free" Compliance-Gaining Technique, Communication Studies, 64, 1, 6-17*

[2] *Guguen N. and Pascual A. (2000), Evocation of freedom and compliance: The "But you are free of... " technique, Current Research in Social Psychology, 5, 264-270.*

[3] *See, Guguen N., Pascual A., Jacob, C. and Morineau, T. (2002). Request solicitation and semantic evocation of freedom: An evaluation in a computer-mediated communication context. Perceptual and Motor Skills, 95, 208-212.*

Guguen N. and Pascual A. (2005), Improving the Response Rate to a Street Survey: An Evaluation of the "But You Are Free To Accept Or To Refuse" Technique, The Psychological Record, 55, 297-303.

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Pascual, A., and Guguen, N. (2002). La technique du Vous etes libre de ... " : Induction d'un sentiment de liberte et soumission a une requete ou le paradoxe d'une liberte manipulatrice. Revue Internationale de Psychologie Sociale, 15, 45-82.

MEMBER PICTURES & PROFILES

Name: Bradley E. Holuta

Firm: Supinka & Supinka, PC

Law School: University of Pittsburgh

Year Graduated: 2012

Special area of practice/interest, if any: Personal Injury, Black Lung

Tell us something about your practice that we might not know: Outside of my practice, I teach "Legal Aspects of Healthcare" at the University of Pittsburgh at Johnstown.

Most memorable court moment: My very first court appearance after passing the bar exam. It was Motions Court in Somerset County on a snowy Wednesday morning, the day before Thanksgiving. The court crier does an extended and folksy "hear ye, hear ye" type of introduction which I still find very special. It was probably the most overly-rehearsed argument on an uncontested motion to compel in history.

Most embarrassing (but printable) court moment: Depositions in medical malpractice cases which involve various forms of "cosmetic" surgery that went awry.

Most memorable WPTLA moment: I am new to WPTLA and am excited to become involved.

Happiest/Proudest moment as a lawyer: Finding out that I passed the bar exam, and any time a client goes out of his/her way to say "thank you." It reminds me of why I do what I do.

Best Virtue: My character .

Secret Vice: BBQ Kettle Cooked Chips

People might be surprised to know that: I was a cello performance major at Cleveland State and still perform with the Johnstown Symphony Orchestra.

Favorite movie: It's A Wonderful Life (Jimmy Stewart grew up in my town of Indiana, PA)

Last book read for pleasure, not as research for a brief or opening/closing: "The Whistler" by John Grisham

My refrigerator always contains: Milk

My favorite beverage is: Angry Orchard Cider or Milk

My favorite restaurant is: Spaghetti Warehouse (formerly on Smallman Street in Pittsburgh), or any place with all-you-can eat chicken wings.

If I wasn't a lawyer, I'd be: Music teacher or airline pilot

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En banc **Commonwealth Court Decision Interpreting *Protz II***

The Commonwealth Court recently decided the case of *Whitfield v. WCAB (Tenet Health System Hahnemann, LLC)*, 608 C.D. 2017. This is the Commonwealth Court's first decision since it issued its decision in *Thompson v. WCAB (Exelon Corporation)*, 168 A.3d 408, and a more expansive one.

Whitfield was originally injured in 2002. She received total disability benefits beginning September 29, 2002. In June of 2006, she underwent an Impairment Rating Examination under the Fifth Edition of the AMA Guides. Litigation commenced regarding converting her to partial disability. The Judge ordered the conversion and the decision was upheld by the Workers' Compensation Appeal Board. Claimant did not raise the constitutionality of the IRE during the initial litigation.

In November of 2015 after the Commonwealth Court issued its decision in *Protz I*, the Claimant filed to reinstate her compensation to total disability based on the Commonwealth Court's decision. Said petition was filed within three years of the last payment of partial disability. Defendant argued that *Protz I* had no retroactive effect, that Claimant waived the constitutional issue by not raising it in the prior litigation and that the law of the case doctrine precluded the current challenge. The Workers' Compensation Judge denied the petition and the Appeal Board affirmed in a 4 to 3 decision.

On appeal to the Commonwealth Court, the Claimant argued that her case was similar to the Thompson case. She argued that justice and public policy require retroactive application of *Protz II*, stressing the remedial nature of the Workers' Compensation Act. Defendant again argued Claimant had waived the constitutional issue by not raising it in the prior litigation. It also argued that employers have relied on the finality of the IRE process despite the fact that even before the IRE section was determined to be unconstitutional, there was no finality until more than three years had expired from the last payment.

The Court conducted a thorough analysis and looked to the cases it had decided between the decisions in *Protz I* and *Protz II*. The decision in *Whitfield* essentially abrogates the Commonwealth Court's decisions decided between *Protz I* and *Protz II*. However, this writer suggests that *Whitfield* is a mixed bag for Claimants.

The argument about waiver appears to be dead. Furthermore, in seeking to be placed back on benefits as a result of an unconstitutional IRE, "It does not make sense to require Claimants to show their physical condition worsened." Slip Opinion page 26. Query: What to make of footnote 21 where the Court states "Instead, Claimant must still show she is totally disabled after all this time to be entitled to reinstatement." Further query: How do we compare footnote 21 to the conclusion where the Court states "A Claimant must testify that her work-related injury continues, and the WCJ must credit that testimony over any evidence that an employer presents to the contrary." Is the burden of proof medical? Is it the Claimant's testimony only? What happens if an employer produces medical evidence the Claimant is not totally disabled?

One of the good things in the decision is that the Claimant need not meet the requirement for reinstatement noted in *Stanek v. WCAB (Greenwich Collieries)*, 756 A.2d 661 (Pa. 2000). There a Claimant seeking reinstatement after the exhaustion of 500 weeks of partial disability was forced to demonstrate total disability essentially from all employment. Clearly, Commonwealth Court establishes a lower burden of proof, although one that remains poorly defined.

Perhaps the worst feature of the decision is that Claimant is reinstated to benefits as of the date she filed her petition. The 500 weeks of benefits Whitfield received remains in effect. Therefore, if the Defendant were to offer a job to the Claimant she would receive neither total disability nor partial disability even if it was minimum wage. If an Earning Power Assessment were performed and successful litigated she would not receive any benefit. This case would likely be applied to people who have filed to reinstate within the 500 week period, thereby effectuating a credit for the partial disability weeks already received.

The Commonwealth Court issued decisions in two other cases in an unreported manner. In one of those cases, PAJ Stalwart Nariman Datsur, who represents the Claimant, has indicated he will be seeking allowance for appeal. He will also seek amicus support from PAJ.

If you have cases in the pipeline, please contact PAJ about amicus support. The committee is coordinating the Brief writing for this issue. It already has cases in the pipeline, but every case will probably be taken up by the committee until the Supreme Court addresses the *(Continued on Page 11)*

issues posed.

Pennsylvania Construction Company is facing a huge fine

Recently, the Occupational Safety and Health Administration (OSHA) has proposed fines of $222,152 against Hua Da Construction, a Philadelphia company. OSHA has claimed that the employer engaged in multiple unsafe activities. The citations were as a result of an investigation done in 2017. The citations were for risking employee exposure to unsafe use of ladders, compressed gas cylinders, and issues working at height. It was also cited for problems with tripping and falling, the risk of puncture wounds, and electrical shocks. Apparently, the company had received similar citations the previous year.

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

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Attn: Junior Members

If you have a scholarly article germaine to our members, submit it to Editor Erin Rudert at er@ainsmanlevine.com for publication.

Name Change of our Business Partner

In order to process the large demand for services, Dr. Jared Yevins has started a separate company to better serve the needs of attorneys and law firms in need of his medical-legal case consulting expertise. Although he will continue to service chiropractic patients through his office in Sewickley, **all legal consulting will be done under Litmus, LLC**.

Litmus provides and manages solutions to identify and report on objective permanency in otherwise difficult to manage soft tissue spine cases, helping the attorney and ultimately their client to receive fair and consistent judgments and settlements for their injuries.

Should you have any specific questions about this change or the services of Litmus, please contact Dr. Yevins directly at 724-809-6931

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LITMUS

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 31, 2018-2019

	ARTICLE DEADLINE	TARGET PUBLICATION DATE
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

TRIVIA CONTEST

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

Trivia Question #15

This creature's namesake comic strip may have ended publication in 1975, but he lives on as the official 'possum of the state of Georgia.

Please submit all responses to Laurie at laurie@wptla.org with "Trivia Question" in the subject line. Responses must be received by September 7, 2018. Prize for this contest is a $100 Visa gift card. Winner will be drawn the week of September 10, 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 #14 – **What is the shortest, grammatically correct sentence in the English language? Go.**

Congratulations to Question #14 winner Drew Leger, of the Law Office of Andrew J. Leger, Jr.

RETREAT EVENT PLANNED

Mark your calendars for August 28-29, 2018. We'll meet on Tues 8/29 at Wigle Whiskey on Pittsburgh's North Side for dinner and a whiskey tour and tasting. Hear from former WPTLA Member turned whiskey distillery owner Mark Meyer on the hows and whys of Wigle.

On Wed 8/29 the Board of Governors will convene for their first meeting of the year at the Gulf Tower in Pittsburgh.

At 11:30, a 2 credit CLE program will begin featuring Past Presidents John Gismondi, Veronica Richards and Tim Riley. Lunch is included. Stay tuned for registration details!

COURT REPORTING AND TRANSCRIPTION

There are a number of interesting changes to the 4000 series of rules of the Rules of Judicial Administration relating to Court Reporting.

Rule 4004(B)(2) reduces minimum voice writing requirements. The voice writer is now required to only be able to record at 95% accuracy 180 words per minute. Interestingly, the standard is higher for a jury charge which is 200 wpm. The lesson? Talk fast at the peril of your record.

Rule 4007 allows a local judicial district to create a "Request for Transcript" form. (Therefore, when you need a transcript, check with the County Court reporters to see if they use a local form.) This has already been the practice in some counties, and the rule now specifically allows this. The rule also continues uniform rates for an original transcript in electronic format which are as follows: non-expedited $2.50/page expedited $3.50/page, daily $4.50/page and same day $6.50/day. A surcharge of $.25/page applies for a paper copy. The comment states that there is not an entitlement to expedited, daily, or same day transcripts and that their availability is subject to the capability of the county and the court reporter. Likewise, there is provision that the cost of a copy of a transcript is $.75/page for paper and $.50/page for an electronic copy.

For those who practice in the appellate courts, Rule 4012(D) is a welcome addition. It provides for an appellate court to enter an order compelling completion of the transcript with provision for disciplinary action.

Consistent with the new Records Public Access Policy, Rule 4014 allows for the redaction of personal, confidential information, financial data and other identifiers.

Federal ADR

In a series of orders dated February 16, 2018, March 14, 2018, and April 23, 2018, the United States District Court for the Western District of Pennsylvania has made significant changes to its ADR policies relating to Good Faith and Motions for Sanctions. Specifically, new Section 2.8 adds a definition of good faith based upon "the duty of the parties to meet and negotiate with a willingness to reach an agreement, full or partial on matters in dispute." Further, the parties will be deemed to act in good faith if the parties or representatives with full settlement authority "participate, consider and respond to the proposals" and respect each other by "not acting in a manner which is arbitrary, capricious or intended to undermine the mediation process."

The rules allow a party to attend with the intent to not make any demand or offer or with the intent to wait until the disposition of motions so long as they explicitly inform the mediator and all other parties in writing at least 15 days prior to the mediation. However, this will not exempt ADR participation, but the parties may opt to move forward with the mediation or proceed to Early Neutral Evaluation.

Appendix A to the Policies and Procedures outline a process for a motion for sanctions. The most significant provisions require service in advance of filing of the motion. The parties are to engage in "thorough" discussion. If the motion must be presented, a certification is required and a form provided. Provision is made for maintaining the confidentiality of the ADR process. Finally, the rule provides for a Notice of Intent after which the assigned judge may handle the motion or refer it to the ADR Judge or a designee.

New Policies 3.4 and 4.4 provide for the Court to extend the deadline for conducting the mediation or ENE beyond the 60 days after the initial scheduling conference where good cause is shown.

Changes have also been made to the process for presentation of an evaluation during an ENE which may be offered either in either a joint or separate sessions.

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

mmilsop@bargerandgreen.com

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

We are in need of an additional person to assist with issue layout, content 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 412-338-9030

***Trigg v. Children's Hospital of Pittsburgh of UPMC*, No. 1041 WDA 2017 (May 14, 2018) – Trial court must observe the questioning of prospective jurors during voir dire.**

Trigg involved an appeal following a jury verdict in favor of Children's Hospital of Pittsburgh. On appeal the plaintiff-appellants claimed that Allegheny County Civil Division's jury selection process deprived them of their right to a fair trial. In an opinion authored by Judge Kunselman, the Superior Court examined the jury selection process of Allegheny County, and to surprise of no Allegheny county practitioner, found the system to be flawed. In particular, the Superior Court found fault with the fact that the trial court does not observe the questioning of prospective jurors during the initial step of voir dire. The court explained:

By not contemporaneously observing the jurors' responses, when ruling on challenges for cause, the trial judge in this case deprived himself of any greater perception of the jurors' partiality than an appellate court can discern by reviewing the same, cold record. Thus, *McHugh's [v. Proctor & Gamble*, 776 A.2d 266 (Pa. Super. 2001)] rationale for reversing only in the face of palpable error does not apply here.

Id. Thus, the court reviewed the trial court's decision not to strike a particular prospective juror for cause under the *de novo* standard. The Superior Court went on to find that the prospective juror should have been stricken for cause as she had expressed biased based on the fact that she had a sister and brother-in-law who were doctors. Finally, the court determined that reversible error had occurred because the appellant had been forced to use a peremptory strike to remove the juror in question. The court remanded the case for a new trial. Notably, in concurring opinion, Judge Bowles urged the Court of Common Pleas to revamp its voir dire system.

***Cagey v. Commonwealth*, 36 WAP 2016 (Feb. 21, 2018) –** State Supreme Court unanimously reversed the Commonwealth Court's ruling that the state is immune from claims seeking to hold it responsible for dangerous guardrails.

The Pennsylvania Supreme Court granted allocatur to determine whether the Pennsylvania Department of Transportation ("PennDOT") is liable for injuries caused by negligently and dangerously designed guardrails erected on Commonwealth real estate. The state high court saw it as an opportunity to clarify the contours of the real estate exception to sovereign immunity, *see* 42 Pa.C.S. § 8522(b)(4). The court was especially keen on doing so in light of the Commonwealth Court's expansive treatment of the Supreme Court's decision in *Dean v. Dep't of Transp.*, 751 A.2d 1130 (Pa. 2000). In *Dean*, the high court had held that PennDOT has no duty to erect guardrails alongside Commonwealth roadways. *Id.*at 1134. In *Cagey*, however, the question was whether the Commonwealth owes a duty of care when PennDOT has in fact installed a guardrail alleged to be dangerous. Pursuant to the plain language of the Sovereign Immunity Act, 42 Pa. C.S. §§ 8521-8528 (the "Act"), the state Supreme Court found that the General Assembly waived PennDOT's immunity as a bar to damages caused by dangerous guardrails affixed to Commonwealth real estate. The court found *Dean* to be inapposite. Accordingly, the court reversed the decision of the Commonwealth Court.

***Sippey v. Metropolitan Group Prop. & Cas. Ins. Co.*, 2017 WL 5971126 (Bissoon, J. W.D. PA Dec. 1, 2017) – Daughter of named insureds was entitled to stacked UIM benefits even though not a resident relative.**

David Sippey was killed in a motor vehicle accident. The vehicle he had been operating was insured under a policy issued to his wife's parents by Metropolitan Group Property & Casualty Ins. Co. "Metropolitan." Mr. Sippey's estate made a claim for stacked UIM benefits under the policy. The insurer denied the claim for stacked UIM benefits on the basis that the plaintiff was not a "resident relative" at the time of the accident. A declaratory action was filed by estate. Metropolitan moved for summary judgment. *(Continued on page 15)*

See p. 5 for a detailed discussion of Erie v. Bristol, 174 A.3d 578 (Pa. 2017).

Neither the decedent nor his wife were named insureds but decedent's wife was listed as a household driver and the policy noted that she was married. Premiums were paid for stacked coverage. The District Court held that Sippey was entitled to stacked UIM benefits because (1) the policy was ambiguous as to the word "child," and (2) she was identified as a "household driver." The word "child" was not defined by the policy. The court reasoned that based on the Oxford dictionary definition, "child" can be the married adult son or daughter of an individual. The court also found that by listing her as a "household driver" she could still be resident of the household even though she lived elsewhere. The court held that the insurer breached the contract when it failed to treat Mrs. Sippey as a "relative" and pay her stacked underinsured motorist benefits.

Renfer v. Kopena **No. 3554 EDA 2016 (Pa. Super. Sept. 27, 2017) – Superior court affirms trial court ordering of deposition of defendant's treating doctor.**

Plaintiff-appellee filed suit against the defendant for injuries suffered in a rear-end car accident. At the scene of the accident, it was suspected that the defendant may be under the influence. The defendant, however, passed field sobriety tests and no criminal charges were filed. Subsequently, it was discovered that the defendant had ingested narcotics within 48 hours of the accident. In particular, the plaintiff was attempting to investigate whether the defendant was under the influence of Suboxone at that time of the accident. The defendant's medical records were produced in discovery and his treating physician's deposition was scheduled. The defendant filed for a protective order, which the court denied. The court ordered the deposition to go forward. The defendant appealed. The Superior Court affirmed the trial court's order compelling the deposition. The appellate court determined that the deposition would not violate the physician-patient privilege at 42 Pa. C.S. § 5929. The Superior Court also found that information that a doctor learns through observation and examination did not qualify as a communication that tended to blacken the character of the defendant. The trial did not abuse its discretion in compelling the deposition.

James v. Albert Einstein Med. Ctr., **PICS Case No. 17-1456 (Pa. Super. Sep. 12, 2017) -- Medical expert could testify outside of his or her primary specialty where he or she had practical work experience in or where his or her primary specialty overlapped with the specialty at issue. Judgment affirmed.**

In *James*, a medical malpractice case, the plaintiff-appellant appealed from a jury verdict in favor of the Defendants. The Superior Court affirmed. The case involved a failure to diagnose a neuroendocrine carcinoid tumor. The appellant raised a number of issues on appeal, including that a defense expert was permitted to testify outside the scope of his area of expertise. Specifically, the trial court permitted a doctor board certified in internal medicine and gastroenterology testify as an oncology expert and offer testify as to causation and damages. The Superior Court emphasized that "the decision of the trial judge to admit expert testimony may be reversed only where there has been an error of law or an abuse of the substantial discretion vested in the trial court. The Pennsylvania Supreme Court has repeatedly held that the standard for evaluating the qualifications of an expert witness under Pennsylvania law is a liberal one." The defense expert had testified that as a gastroenterologist he diagnosed cancer and that he had completed a fellowship in endocrine tumors. The Superior Court held that under the MCARE Act the trial had not committed an error of law or abused its discretion in allowing the challenged testimony.

Another notable issue on appeal was the whether the trial court improperly limited the decedent's mother's testimony. The court did not permit her to testify as to her pain and suffering as she was not a plaintiff. The Superior Court agreed with appellant that the mother was a proper wrongful death beneficiary regardless of whether she was a named plaintiff. The Superior Court, however, held that the mother was not entitled to pain and suffering damages. Thus, the trial court properly limited her testimony. The Superior Court explained: "It is well-settled that Pennsylvania does not recognize a

right of filial consortium." In support of this statement, the Superior Court cited *Machado v. Kunkel,* 804 A.2d 1238, 1244 (Pa. Super. 2002) and *Jackson v. Tastykake Inc.,* 437 Pa.Super. 34, 1217 (1994). The Superior Court ignored the more recent contrary decision in Rettger v. UPMC Shadyside, 991 A.2d 915 (Pa. Super. 2010).

***Roverano v. John Crane, Inc.*, 177 A.3d 892 (Pa. Super. 2017) – Fair Share Act applies in strict product liability actions.**

Roverano was an exposure to asbestos case. The jury found in favor of the plaintiffs and awarded plaintiffs in excess of $6.2 million. The defendants appealed. One issue on appeal was the trial court's determination that the Fair Share Act, 42 Pa. C.S. § 7102, did not apply to asbestos strict liability cases and that liability was to be divided equally among the defendants. The Superior Court disagreed. In reaching this conclusion, the Superior Court examined the text of the statute, as well as the legislative history. The appellate court found nothing to support the argument that the Fair Share Act did not apply either to asbestos cases specifically or to strict liability cases in general. Rather, the court held that it applied to tort cases where more than one defendant is found liable. Thus, liability is to be apportioned among liable defendants based on the Fair Share Act.

***Del Ciotto v. The Pennsylvania Hospital of the University of Penn Health System*, 177 A.3d 335 (Pa. Super 2017) - trial court erred in compelling arbitration for wrongful death claim where decedents relative did not sign nursing home arbitration agreement in his individual capacity. Judgment vacated**

In Del Ciotto, the decedent was eighty-eight years old with a medical history of dementia when he was injured as a result of a fire in his apartment building. After being hospitalized, the decedent was transferred to a ManorCare facility. Subsequently, the decedent's son signed an arbitration agreement with ManorCare. Approximately ten months later, decedent passed away. Thereafter, his son filed a wrongful death and survival action. ManorCare sought to compel arbitration based on the arbitration agreement the son had signed. The trial court distinguished the case from *Pisano v. Extendicare Homes, Inc.,* 77 A.2d 651 (Pa. Super. 2013), where the court held that non-signatories to an arbitration were not required to arbitrate their wrongful death claims. In *Del Ciotto*, the son had signed the agreement as his father's representative. The trial court order the case to arbitration. The son filed an appeal. On appeal, the Superior Court found that the son was bound by his signature on behalf of his father for purposes of the estate's survival action claim. The court reached a different conclusion as to the wrongful death claim. The Superior Court found that its holding in *Pisano* did apply to the facts. The arbitration agreement had three signature lines. The first was for the patient. Here, the patient's name had been printed. The second line was for the "Patient's Legal Representative". This line had been signed by the son-plaintiff. The third line was labeled "Signature of Patient's Legal Representative[ ] in his/her Representative capacity." The third line was blank. The Superior Court found this fact to be dispositive. The did not agree with the defendants that language in the agreement that the representative was signing as both a legal representative and in his or her individual capacity dictated that the son's signature on the second line meant he had signed in his individual capacity. The court reasoned that by not signing on the third line the son had elected not to agree to such language in the agreement. The court concluded its discussion of the issue by stating: "Given the importance of the individual rights being waived in an arbitration agreement we will not discount the fundamental significance of a signature in favor of contract language purporting to bind a signatory in an individual capacity unless a signature clearly signifies an intent to be so bound. Because Del Ciotto did not sign the arbitration agreement in his individual capacity, we hold that the trial court erred in requiring arbitration of the wrongful death claim." *Id.* at 357 (citations omitted).

By: James Tallman, Esq., of Elliott & Davis, P.C.

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CLE in ERIE

Mark your calendar for **Monday, Oct 1, 2018**, for a 3-credit CLE program in Erie. Credits will be Substantive and Ethics.

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!

Carolyn Boucek is delighted to return to Pittsburgh and begin her legal career. A native of Upper St. Clair, Carolyn graduated from the University of Pittsburgh in 2014 with a Bachelor of Arts in Philosophy and History and minors in Sociology and Theatre Arts. She earned her J.D. at Cornell Law School with a Concentration in Public Law. During her time at Cornell, Carolyn was a Managing Editor of the Cornell Journal of Law & Public Policy, Vice President of the Bioethics and Health Law Society, and a member of Achord & Satisfaction, Cornell Law's "Lawcappella" singing group. Before accepting an associate position with Meyers Evans Lupetin & Unatin, LLC, Carolyn interned in the Civil Division of the United States Attorney's Office for the Western District of Pennsylvania and held research positions at the Avon Global Center for Women & Justice and at Brigham Young University Law School in Corpus Linguistics. Her practice at Meyers Evans Lupetin & Unatin, LLC centers on helping plaintiffs recover after catastrophic injuries resulting from defective products, medical malpractice, and negligence. She is available by phone at (412) 281-4100 or by e-mail at cboucek@meyersmedmal.com.

Kerven Moon: I am a rising 3L student at the University of Pittsburgh School of Law.Originating from Union, New Jersey, I moved to Pittsburgh to pursue my legal career. At Pitt Law, I've had the opportunity to be a member of the Mock Trial team where I have competed in regional competitions. Additionally, I've interned with the U.S. Attorney's Office and I am currently a summer law clerk at Burns White law firm. I am highly interested in litigation and trial advocacy as a future career path. Prior to coming to Pittsburgh, I lived in State College, PA. While there, I spent two years serving as an Admissions Officer at Penn State University. This role was special for me as it was my first full-time position and I had the opportunity to recruit prospective students to my alma mater. I am a 2013 graduate of Penn State University earning a dual Bachelor's degree in Sociology and Crime, Law & Justice. Outside of academics and work, I am avid sports fan, with soccer being my favorite. I currently play recreationally, and officiate soccer at a professional and collegiate level. I can be reached at KervenMoon@gmail.com or via LinkedIn at https://www.linkedin.com/in/kervenmoon.

Carmen Nocera is a 3L at the University of Pittsburgh School of Law. He attended Slippery Rock University where he played varsity baseball, graduating in 2015 with a BS in Safety Management. Prior to law school, Carmen worked as a Safety Consultant in the construction industry.

In law school, Carmen is a member of the Mock Trial Team and is currently the Chair of the Moot Court Board. Carmen was a member of the Pitt Law team that went on to place third in the region in the American Association of Justice Mock Trial Competition. As the chair of the Moot Court Board, Carmen oversees the board that is responsible for administering the Moot Court Appellate Competition, Negotiation Competition, and Murray S. Love Mock Trial Competition. He will graduate in Spring 2019 with his J.D. as well as a certificate in civil litigation from the John Gismondi Civil Litigation Certificate Program.

Carmen is currently a law clerk at the law firm of Luxenberg, Garbett, Kelly & George, P.C. in New Castle, Pennsylvania. Upon graduation, Carmen will pursue a career as a trial attorney specializing in personal injury and criminal defense.

Carmen can be reached at can53@pitt.edu or (724) 333-3400.

My name is **Lars Peterson**. I am from New Brighton, PA and attended New Brighton High School. I obtained my Bachelor's Degree from Duquesne University with a Political Science major and a Spanish minor in 2016. I currently attend law school at the University of Pittsburgh and will be graduating in 2019. At Pitt Law I am a Managing Editor on the Pitt Law Review and a Legal Analysis and Writing Teaching Assistant for Professor Teeter. In my free time I enjoy watching and attending all of the Pittsburgh sporting events that I can and am a fan of all the hometown teams. I also enjoy playing soccer and detailing cars. My previous legal experience includes being a law clerk at Luxenberg, Garbett, Kelly & George, PC full-time during the 2017 summer and part-time throughout the 2017-18 school year and interning at the Allegheny County District Attorney's Office in fall 2015. This summer I will be a Summer Associate at Dickie, McCamey & Chilcote, PC. I plan to remain in the Pittsburgh area and practice law here upon my graduation. I can be reached via e-mail at Lap123@pitt.edu and via call/text at (412)-596-3086.

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

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

FACTUAL BACKGROUND

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

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

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

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

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

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

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

cgarbett@lgkl.com

I. The School District was justified in placing Kennedy on administrative leave In *Kennedy v. Bremerton School District,* the plaintiff was rightfully put on administrative leave by the school district because he promoted religion while acting in his official capacity as a representative of the school in spite of being offered reasonable accommodations by the school district to practice his religion.

II. Federal laws provide guidance for the school district

In this case, Federal law, which always takes precedence over state law, provides guidelines for how employers and employees should treat religious freedom. While a person's right to practice their religion is guaranteed by the First Amendment, other considerations apply in specific instances where an employer-employee relationship exists as understood under the Civil Rights Act of 1964, and particularly where students are involved, as directed by the Establishment Clause.

> *a. Title VII of the Civil Rights Act of 1964 requires employers, including schools, to reasonably accommodate the religious practices of an employee, unless doing so would create an undue hardship on the employer*

Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion. It generally *(Continued on Page 19)*

applies to employers with 15 or more employees, including federal, state, and local governments. Under this Act, employers must accommodate an employee's sincerely held religious beliefs or practices, unless doing so would cause an undue hardship.

In *Kennedy v. Bremerton School District,* the school district cannot discriminate against Kennedy for practicing his religion. Instead, the employer must offer reasonable accommodation for Kennedy to practice his religion.

b. The US. Constitution s Establishment Clause prevents employees from advocating a particular belief system in front of students

However, while Title VII of the Civil Rights Act of 1964 bars the employer from discriminating against the employee based on their religion, the Establishment Clause in the U.S. Constitution places restrictions on a school employee. The Establishment Clause under the First Amendment prohibits the government from making any law "respecting the establishment of religion." This includes any actions that may unduly prefer one religion over another or even over non-religion. This Clause clearly comes into play in this case because Kennedy is an employee of the school, which is a government office. The U.S. Department of Education offers further enlightenment of the issue.

As stated by the U.S. Department of Education, "When acting in their official capacities as representatives of the state, teachers, school administrators, and other school employees are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively participating in such activity with students." In addition, they cannot engage in personal prayer while in the presence of students because students may perceive such activity as promoting religion. While the U.S. Department of Education's guidance on this matter is not law, it is policy that is directly aligned with the Establishment Clause and should also be considered.

III. Kennedy's actions constituted promoting religion and were unconstitutional

The facts of the case show that Kennedy promoted religion in front of students. He prayed openly in front of students right after the football game had concluded by kneeling at the fifty-yard line of the field. He also prayed out loud, eventually developing these prayers into longer, more involved motivational speeches that were directly targeting students and football players. The messages were all religious in nature.

a. Kennedy was acting as a representative of the government

During Kennedy's prayers and religious motivational speeches, he was clearly acting as a representative of the state. He was currently employed by the school district. He was carrying out his job duties as assigned to him by the school, i.e. coaching football, while promoting religion. He was also wearing clothes that could be argued to be considered a work uniform, which in this case bore the school colors and logo.

b. Kennedy s actions continued in spite of warnings and reasonable accommodations made under Title VII

The school district made reasonable accommodations for Kennedy to practice his religion in a capacity that would not contradict the Establishment Clause. The school district offered to allow Kennedy the use of the football field after the game had concluded and the field was emptied of students. This shows that the school met its burden under Title VII of the Civil Rights Act of 1964.

IV. There is precedence showing that the school district's actions were justified

The courts have looked at numerous cases where there has been a need to balance religious freedom and freedom of speech with the Establishment Clause where employer and employees are concerned. These previous cases can offer insight into this case.

a. Reasonable accommodation eliminates the conflict between employment requirements and religious beliefs.

Courts have held that Title VII does not require the employer to satisfy all of the individual's requests; it only needs to eliminate the conflict with the individual's religious beliefs. In Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986), the U.S. Supreme Court held that Title VII does not require an employer to grant the employee a particular or specific accommodation they request since any reasonable accommodation by the employer is sufficient to meet the accommodation obligation. Thus, the employee may not be entitled to "the most beneficial accommodation." *(Continued on Page 20)*

WINNING ESSAYS ... (CONTINUED FROM PAGE 19)

In the case of Kennedy, the school district's offered accommodation varied only slightly from his original desire to pray on the field at the fifty-yard line. The school allowed him to carry out all of his religious activities in a delayed time frame.

Kennedy's actions go beyond simply wearing clothing that could be interpreted to promote religion. Kennedy actively and orally promoted religion directly to students, leaving no room for interpretation.

V. Kennedy's leave of absence was justified

The facts of the case and the federal law guidelines make it clear that Kennedy's leave of absence was justified. Kennedy's actions constituted promoting religion and continued in spite of offered reasonable accommodation by the school district.

Essay written by Hunter M. Evans, of Clayburg Kimmel High School, Claysburg, PA

25th ANNUAL ETHICS SEMINAR AND GOLF OUTING

36 attended the event held at the beautiful Shannopin Country Club in the early morning of Friday, May 25, 2018. The Ethics and Golf event returned to its original format, whereby there was one hour of ethics in the morning of the Friday of Memorial Day Weekend followed by an 18-hole scramble and a robust steak lunch.

The tournament was won by the winning team of Past President Bill Goodrich, WPTLA Member Gary Ogg, WPTLA Member Michael O'Day, and Mike Pitterich.

Their foursome's score total is currently under review by the Western Pennsylvania Golf Association and the Pennsylvania Disciplinary Board for accuracy.

Many cool prizes were available that day, and we would like to thank our Business Partners for supplying them, specifically Mark Melago and FindLaw, Chris Finley and Finley Consulting & Investigations, Don Kirwan and Forensic Human Resources, and Bill Goodman and NFP Structured Settlements.

Please note that **next year's event has already been scheduled for Friday May 24, 2019, at Shannopin Country Club**. The Ethics CLE program runs 7:30 to 8:30 a.m. with a full breakfast, and a shotgun start at 9 a.m. Until then, I bid you adieu.

By: Jack Goodrich, Esq., of Goodrich & Associates

Email: jack@goodrichpc.com

SAVE THE DATE!

PRESIDENT'S CHALLENGE 5K RUN/WALK/WHEEL

SATURDAY, OCT 20, 2018

BOATHOUSE AT NORTH PARK,

PITTSBURGH, PA

Sponsorships, donations, and prizes are currently being accepted. Contact our Executive Director, Laurie, for details at 412-487-7644 or laurie@wptla.org.

Thursday, July 12, 2018

Lunch 'n Learn CLE program featuring

WPTLA Vice President David M. Landay, Esq.

speaking on

Wills & Estates Basics for the Personal Injury Attorney

12:00 noon - 1:00 p.m.
registration opens at 11:30 a.m.

Gulf Tower, Grant Room, 8th Floor, Pittsburgh

PHOTOS FROM THE JUDICIARY DINNER

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Photo credit and many thanks to ***Monica Milsop***


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Thanks to those who attended the Annual Judiciary Dinner on May 4, 2018.

Pictured from L to R in #1: Past President Paul Lagnese, Girls On The Run's Meredith Colaizzi, Lauren Henzler and Molly Glowacki.

In #2: Past President Chris Miller and Past President and Champion of Justice Awardee Joe Moschetta.

In #3: Board of Governors Member and Scholarship Chair Chuck Garbett, Molly Forrest of Quaker Valley High School, and Hunter Evans of Claysburg-Kimmel High School .

In #4: Matthew Crawford, Judy Moschetta, Nicole Crawford Moschetta, Past President Stephen Moschetta, Past President and Champion of Justice Awardee Joe Moschetta.

In #5: Pittsburgh Steelwheelers Jeremy Bittner and Matt Taylor, Board of Governors Member and 5K Committee Member Dave Zimmaro, and President Liz Chiappetta.

In #6: Susan Geist, Past President John Quinn, Past President Josh Geist.

In #7: President-Elect Bryan Neiderhiser, Secretary Eric Purchase, President Liz Chiappetta, and Treasurer and Judiciary Dinner Chair Mark Milsop.

In #8: Elizabeth Georgi, Larry Chaban, FindLaw's Charlie Georgi, Eric Abes, Ed Abes, and Past President Rich Schubert.

I

Thanks to those who attended the 25th annual Ethics Seminar & Golf Outing on May 25, 2018.

Pictured from L to R in #1: Member John F. Becker, Past President John E. Becker, Member Drew Leger, and Forensic Human Resources' Don Kirwan.

In #2: Mark Aletto, Past President Rich Catalano, and Member Dick Kelly.

In #3: Jim Braunlich, Past President and Golf Chair Jack Goodrich, Past President Josh Geist, and Craig Koryak.

In #4: Member Mike George, Member Terry Ging, Past President Bernie Caputo, and FindLaw's Mark Melago.

In #5: Nick Turco, Past President and Ethics Speaker Rich Schubert, Member Chuck Alpern, and Member Larry Chaban.

in #6: Brian Gastaldi, Kirk Hannah, Board of Governors Member Phillip Clark, and Past President Mark Homyak.

In #7: Patrick Haughey, Member Barry Palkovitz, Member Bruce Gelman, and Bruce Horvitz.

In #8: The Honorable Richard Mancini, of the Court of Common Pleas of Beaver County, Member Sam Mack, Member Greg Rosatelli, and Past President and Ethics Speaker Larry Kelly.

In #9: the winning foursome of Michael O'Day, Michael Pitterich, Past President Bill Goodrich, and Member Gary Ogg.


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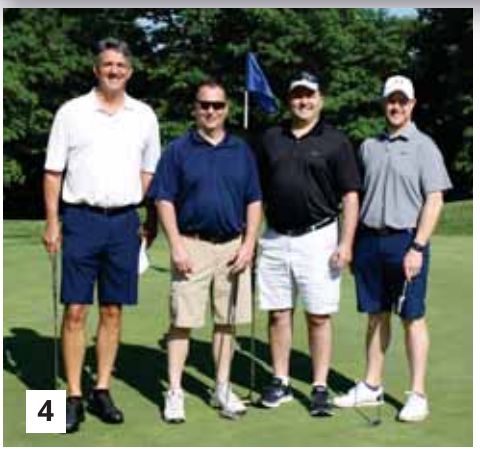
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*Photo credit and many thanks to **Lorraine Eyler***


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This list represents President's Club Members, who choose to pay an increased level of dues annually. This additional money helps the Association in serving the membership and their clients.

Thank you!

Steven M. Barth
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Todd Berkey
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Charles F. Bowers, Jr.
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Bernard C. Caputo
John A. Caputo
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Save the date of **Monday, Oct 29, 2018** for our annual Beaver Dinner and CLE. We'll be back at the famed Wooden Angel Restaurant for dinner, followed by a 1-hour CLE presentation by The Honorable James Ross of the Court of Common Pleas of Beaver County, The Honorable Dale Fouse of the Court of Common Pleas of Beaver County, and The Honorable Marilyn Horan of the Court of Common Pleas of Butler County. More information will be available soon.

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

Through the Grapevine....

Member George Farneth is changing his mailing address to his WV office, located at 845 Charles St, Wellsburg, WV 26070.

Congratulations to **Presidents Club Member Larry Chaban**, recipient of the Milton D. Rosenberg Award, and **Presidents Club Member and Treasurer Mark Milsop**, recipient of the George F. Douglas, Jr. *Amicus Curiae* Award. Both awards were presented at the 2018 PAJ Annual Summer Retreat at Nemacolin Woodlands, PA. Additional congratulations to **Presidents Club Member and Past President Josh Geist**, on becoming PAJ President. **Presidents Club Member and Past President Paul Lagnese** is the PAJ Vice President, and **Presidents Club Member and President Liz Chiappetta** is the PAJ Secretary.

Congratulations to **Presidents Club Member and Past President Rich Schubert** on receiving a judicial ranking from Martindale Hubbell, which is the highest possible designation granted by the organization, is bestowed upon those who have been recognized by both peers and judges in the legal industry, and denotes professional excellence in legal abilities and ethical standards.

Our deepest sympathies to the family, friends and co-workers of **Past President Bill Caroselli**, who passed in May.

Congratulations to **Member Katelyn Edwards** (formerly Dornburg), who was married in September.

Congratulations to **Presidents Club Member Tom Baumann** on being selected as one of America's Top 100 Attorneys.

Changes have been in the air at AlpernSchubert, P.C. **Emeritus Member Chuck Alpern** is now in semi-retirement. **Presidents Club Member and Past President Rich Schubert** is now partners with **Presidents Club Member Larry Chaban**, and one other attorney.

Member James Heneghan and **Presidents Club Member Doug Olcott** are now with Bordas and Bordas, PLLC. They can be reached at One Gateway Ctr, 420 Fort Duquesne Blvd, Ste 1800, Pittsburgh 15222. P: 412-502-5000

Congratulations to the following WPTLA Members who have been elected to the Academy of Trial Lawyers of Allegheny County: **Board of Governors Member Brittani Hassen**, **Presidents Club Member Christina Gill Roseman**, and **Presidents Club Member and Board of Governors Member Greg Unatin**.