THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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Fall 2016

UPCOMING EVENTS FOR WPTLA

Thursday, Dec 15 is the date for a 2 credit CLE program **featuring Business Partners Don Kirwan and Matt Hanak of Forensic Human Resources.** The program includes a continental breakfast, and will be held in the Gulf Tower in Pittsburgh.

Look for coming information on our **January Dinner when we welcome our Junior Members**, a 3-**credit CLE in Feb** featuring Brendan Lupetin speaking on focus groups, and our **annual Membership Meeting in the Spring**.

The **Annual Judiciary Dinner** is scheduled for **Friday, May 5** at **Heinz Field in Pittsburgh**.

2016 PITTSBURGH STEELWHEELERS 5K

*By: Sean Carmody, Esq.***

On September 17, 2016 WPTLA held the 16th Annual President's Challenge 5K Run/Walk/Wheel event benefitting the Pittsburgh Steelwheelers. Nearly 150 people registered to race, walk or wheel the 5K course along the North Shore Riverwalk. This year's event featured a new course change due to trail repairs. Place winners in each category received a Top Finisher Award. All youth participants received medals.

Past President Larry Kelly's 5K Firm Challenge Cup trophy was secured again by Edgar Snyder & Associates. This competition is open to all WPTLA members, their firms and families to compete for the 5K Firm Challenge Trophy. Four (4) person teams with at least one (1) WPTLA member and three (3) others who may be members of their firm or immediate family, competed for the Cup. A $1,000.00 prize will be donated to the winning firm's charity of choice. The defending champion Edgar Snyder team racers were followed by the Luxenberg, Garbett, Kelly & George team. The trophy will be prominently displayed at the offices of Edgar Snyder & Associates until it is up for grabs at next year's race.

I would like to thank all the sponsors, participants and volunteers who made the event a success this year. Committee members Rhett Cherkin, Chad McMillen, Dave Zimmaro, Bob Eyler and Executive Director Laurie Lacher all contributed greatly to the success of the event. This year's race raised approximately $25,000 for the Steelwheelers who use the proceeds for funding their basketball, rugby and competitive hand cycling seasons. Total proceeds over the life of this event exceeds $400,000. I hope to see you all at next year's race.

*** Sean is a WPTLA Member from the firm of Patberg Carmody & Ging, PC Email: scarmody@patbergcarmodyging.com*

Photo Courtesy Chuck Tipton

President
Sandra S. Neuman

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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Association Office:
909 Mount Royal Boulevard, Suite 102
Pittsburgh, PA 15223-1030
Tel: 412-487-7644
Fax: 412-487-7645
email: laurie@wptla.org
www.wptla.org

A Message from the President …

*By: Sandra S. Neuman, Esq.***

I'm sure we have all been to Pre-Trial Conferences where first we – and then our clients – are informed by the court that juries rarely find in favor of the Plaintiff. In addition to being given the grim statistics of plaintiff verdicts, we are often told how juries are generally conservative, especially in counties outside of Allegheny County. This message from the bench is obviously not news, as we've heard it for years in this context and in settlement discussions or at mediation. I am happy to report, however, that plaintiff verdicts seem to be on the rise, even in "conservative" venues such as Butler, Mercer, Indiana, Washington, and Beaver counties. Several of our fellow WPTLA members have had terrific success in medical negligence, nursing home negligence and auto liability cases, many receiving high six figure and seven figure verdicts! So what is causing the pendulum to swing?

In talking to several of our members who have obtained these results, it is clear there is a significant push by Plaintiff's counsel to impanel a fair and impartial jury. As advocates for our clients, we must arm ourselves with longstanding Pennsylvania precedent that demands reasonableness, common sense, and the ability to strike any juror who has given the appearance of prejudice or bias. Without a fair and impartial jury we can never expect a fair and adequate verdict.

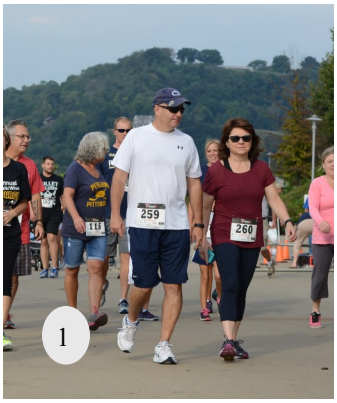
Our organization has to work together and coordinate a uniform response, reinforced with statistics, when we face statements of defense counsel or the judiciary regarding the likelihood of obtaining a defense verdict.

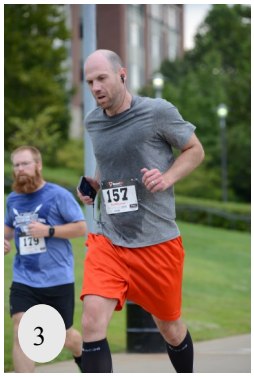
As I mentioned in my first address, I would like to disseminate a motion and brief on voir dire to bring this critical issue to the attention of the trial judges. I hope to have this on our website soon. I think it would also be very helpful to create a database of "recent verdicts" so that our members could quickly and easily obtain information about recent verdicts in and around Allegheny County. While I know there are jury verdict research services out there that collect and report this data for a fee, it would be helpful to have this information at our fingertips, with a potential personal contact, to access before we attend a Pre-Trial Conciliation or before we draft a demand letter. How great would it be to rebut the usual "we are a conservative venue" speech with a statement of "yes but I know a colleague of mine recently obtained a multi-million dollar verdict and the reason is because the parties and the court cared about impaneling a fair jury."

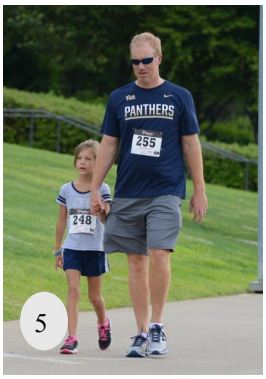
If you have had a verdict in the last 12 months, please consider sending information on the type of case, the venue, presiding judge, and the jury's verdict so that our members have access to the information. Information should be forwarded to Laurie Lacher at laurie@wptla.org. There is nothing like unbiased facts and statistics on recent verdicts to refute the mantra that juries do not and will not award big verdicts. They do! Our colleagues' recent success is proof positive of this fact. Let's look for continued ways to support each other and our clients in fighting the good fight for civil justice.

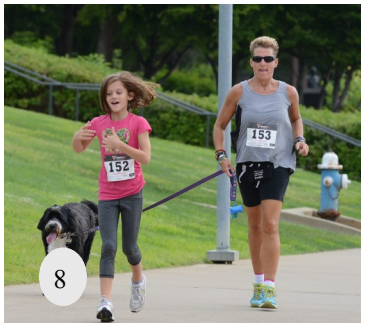
*** Sandy is a WPTLA Member from Richards & Richards, LLP Email: ssn@r-rlawfirm.com*

Photos from the President's Challenge 5K Run/Walk/Wheel Sept. 17, 2016









Congratulations to the WPTLA members pictured who competed in the 5K event:

In #1, Board of Governors Member Kelly Tocci and her husband Dave

In #2, Vice President Bryan Neiderhiser, flocked by his daughter and wife

In #3, John Leinert

In #4, Board of Governors Member Chuck Alpern

In #5, Past President Josh Geist with his daughter

In #6, Secretary Dave Landay

In #7, Emeritus Member Warren Ferry

In #8, 5K creator The Honorable Beth Lazzara, with her niece and dog

In #9, Dan Schiffman and Board of Governors Member Max Petrunya

In #10, the top Male WPTLA Member finishers, Curt McMillen, Board of Governors Member Guido Gurrera, and Board of Governors Member Chad McMillen.

Photos Courtesy Chuck Tipton

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RETREAT RECAP

*by Dave Landay, Esq. ***

On Tuesday, August 23, 2016, WPTLA once again kicked off its fiscal year with its annual retreat. This year, unlike the past several years, the retreat was held in Pittsburgh rather than Erie. The Cambria Hotels & Suites served as the hosting location.

The first board meeting of the year was held. Following the board meeting, a hotel shuttle whisked everyone to PNC Park for a Pirates' game. A catered tailgate with a variety of food and beverages was provided. After the tailgate, everyone sat in box seats behind home plate to watch the Pirates beat the Astros in a 7-1 victory. Those who stayed until the end of the game were treated to a complete game pitched by the Pirates' ace, Ivan Nova.

The following morning, a two credit CLE presented by Planet Depos was held at the Cambria Hotels. One hour was devoted to an informative discussion and demonstration on using technology to present evidence at trial. The other hour was devoted to answering common court reporting issues that arise during depositions and testimony.

As usual, the annual retreat was a success. The only thing missing was another bowling grudge match between Larry Kelly and Eric Purchase.

***Dave is a WPTLA Member from David M. Landay, Attorney at Law. Email: dave@davidlanday.com*

Pictured above, from L to R: Board of Governors Member Dave Landay, Board of Governors Member Mark Milsop, President Sandy Neuman, President-Elect Liz Chiappetta, Planet Depos' Cindy Miklos, Board of Governors Member Chuck Alpern, Board of Governors Member Max Petrunya, and Immediate Past President Larry Kelly.

Pictured below from L to R: Board of Governors Member Chuck Garbett and his wife Carole, and Treasurer Eric Purchase.

FUTURE LOST EARNING CAPACITY: THE INDUSTRIOUS PLAINTIFF

*BY: Keith R. McMillen, Esq. ***

Those who practice regularly in personal injury litigation routinely encounter the issue of future lost earning capacity. For purposes of this article, the discussion will be confined to the partial loss of future earning capacity claim, a claim that is somewhat more complex and trickier than the claim for total impairment of future earning capacity.

Should the case warrant, expert testimony is usually employed to prove this element of damages. The most common type of expert is that of an economist. The economist utilizes statistical tables, factors in fringe benefits and perhaps productivity, and comes up with a number quantifying the loss. Where Plaintiff's inability to perform job tasks is not so apparent, a vocational rehabilitation expert can be used. This kind of expert has the ability to review medical records permitting the rendering of an opinion as to what segments of the job market the Plaintiff is precluded. Although more difficult to locate, the better expert may be the one that is both an economist and a vocational rehabilitation expert. However the claim is proved, it is but the first step in the process.

Invariably, as more recent times have confirmed, the Defendant will retain his own expert in an attempt to rebut or minimize the Plaintiff's claim for impairment of future earning capacity. This is problematic for the Plaintiff, who by virtue of his personal industriousness and work ethic, is able to secure employment post accident where there is no real wage loss or perhaps even an increase in earnings. While some may argue that such a Plaintiff gains instant credibility with a jury and would never be labeled a malingerer, the reality is that this argument is just not that helpful in persuading a jury to make a substantial award for future lost earning capacity. The Defendant's expert is very happy to bring the post-accident employment to the attention of the jury and by implication, or perhaps more directly, suggest there is no future loss of earning capacity or that it is minimal. Recently, these kind of expert reports are being seen with greater frequency.

As many of you are likely aware, this kind of pre-accident vs. post- accident wage analysis is not a proper inquiry in analyzing a future lost earning capacity claim. The longstanding Pennsylvania Supreme Court case of *Bochar v. J.B. Martin Motors Inc.*, 97 A.2d 813 (Pa. 1953), provides a good starting point. In this decision, Plaintiff was a Bell telephone employee who performed a highly physical job including the climbing of telephone poles. Subsequent to being involved in a motor vehicle accident, Plaintiff was relegated to a desk job at Bell Telephone with no wage loss. The Defendant contended that the Plaintiff had failed to establish an impairment of earning capacity because Plaintiff's wages were higher after the accident thereby showing no deterioration of earning ability. The Supreme Court readily dismissed this argument by stating:

> "***A tortfeasor is not entitled to a reduction in his financial responsibility because, through fortuitous circumstances or unusual application on the part of the injured person, his wages following the accident are as high or even higher than they were prior to the accident.*** Parity of wages may show lack of impairment of earning power if it confirms other physical data that the injured person has completely recovered from his injuries. ***Standing alone, however, parity of wages is inconclusive.*** The office worker who loses a leg has obviously had his earning ability impaired even though he can still sit at a desk and punch a comptometer as vigorously as before. It is not the status of the immediate present which determines capacity for remunerative employment. Where permanent injury is involved, the whole span of life must be considered. Has the economic horizon of the disabled person been shortened because of the injuries sustained as the result of the tortfeasor's negligence? That is the test. ***And it is no answer to that test to say that there are just as many dollars in the patient's pay envelope now as prior to his accident. The normal status of a healthy person is to progress, and to the extent that his progress has been curtailed, he has suffered a loss which is properly computable in damages.***" (Emphasis added.)

The Pennsylvania Supreme Court cited extensively to *Bochar* in the case of *Dichiacchio v. Rockcraft Stone Products Co.*, 225 A.2d 913 (Pa. 1967), and gave the following simplistic illustration:

> An injured working man who was earning $100.00 a week before an accident and received $125.00 a week after the accident could still establish impairment of earning power if the facts indicate that, had it not been for this injuries, his pay envelope would have contained $150.00 a week.

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PRACTICE TIP:
CASE SETTLES, THEN CLIENT DIES! WHAT NOW?

*By: Alan Schnoll, Esq. ***

Recently, I encountered a problem that I had not seen in my nearly 40 years of practice. I settled a personal injury case a few weeks before trial. The client came to my office and signed a General Release, which was promptly sent to defense counsel. The client also signed a Schedule of Distribution setting forth how the settlement funds would be disbursed. In my mind the case was over and I anticipated receiving my fee.

Over the next few days, I fielded calls from my anxious client (and his live-in girlfriend) inquiring if the settlement check was in. About two weeks after the Release was signed, the girlfriend called to tell me my client had died! Although I was given written authority to endorse his name to the settlement check, I knew that this limited power of attorney extinguished with his death. A few days later, the settlement check, made payable to me and my client, arrived.

The client left no Will and was survived by one adult child and one minor child. The settlement was his sole asset at death. Under the facts, I was pretty sure the case was settled. The check would have to be reissued, but to whom? No personal representative had been qualified. Was the entire settlement now an asset of the estate? Would I, along with my client's unpaid doctors, have to stand in line with other potential creditors of the estate in order to get paid?

Fortunately, the Probate, Estates and Fiduciaries Code provided the answer. Section 3323 (20 Pa.C.S. § 3323) states:

> **§ 3323. Compromise of controversies.**
> (a)**In general**.--Whenever it shall be proposed to compromise or settle any claim, whether in suit or not, by or against an estate, or to compromise or settle any question or dispute concerning the validity or construction of any governing instrument, or the distribution of all or any part of any estate, or any other controversy affecting any estate, the court, on petition by the personal representative or by any party in interest setting forth all the facts and circumstances, and after such notice as the court shall direct, aided if necessary by the report of a master, may enter a decree authorizing the compromise or settlement to be made.
> **(b) Pending court action.---**
> **(1) Court order.--**Whenever it is desired to compromise or settle an action in which damages are sought to be recovered on behalf of an estate, any court or division thereof in which such action is pending and which has jurisdiction thereof may, upon oral motion by plaintiff's counsel of record in such action, or upon petition by the personal representative of such decedent, make an order approving such compromise or settlement. Such order may approve an agreement for the payment of counsel fees and other proper expenses incident to such action.
> **(2) Order not subject to collateral attack.--**The order of the court approving such compromise or settlement or an agreement for the payment of counsel fees and other expenses shall not be subject to collateral attack in the orphans' court division in the settlement of an estate.
> **(3) Filing copy of order; additional security.--**The personal representative shall file a copy of the order of the court approving such compromise or settlement in the office of the register of wills or clerk of the court having jurisdiction of the estate. When the personal representative has been required to give bond, he shall not receive the proceeds of any such compromise or settlement until the court of the county having jurisdiction of his estate has made an order excusing him from entering additional security or requiring additional security, and in the latter event, only after he has entered the additional security.

Since my case was pending with the Court, I provided the facts in a letter to the trial judge and enclosed an Order for his signature. The Order included a distribution of the settlement which was identical to the Schedule of Distribution approved by the client. The Order also indicated that the settlement check should be issued in my name alone. Small estates (having a gross value of $25,000 or less) can be settled without the expense of formal probate. Defense counsel had no objection to the issuance of the check in my name alone as long as the Court ordered this.

The judge asked for written approval of this procedure from my client's adult child. I submitted her Affidavit and I received the signed Order exactly as I had drafted it. Not only does the Court's order permit me to take the fee that I earned now, it insulates the settlement and the payment of fees and expenses of the case from collateral attack in any orphan's court proceeding.

*** Alan is a PAJ Member with the Law Office of Alan Schnoll, LLC.*
Email: alan.schnoll@gmail.com

YOUR CLIENT FIRES YOU AT THE ELEVENTH HOUR…NOW WHAT?

THE VALIDITY OF FEE RECOVERY PROVISIONS IN CONTINGENT FEE AGREEMENTS, THE REQUIREMENTS OF ATTORNEY'S CHARGING LIENS, AND WHAT "QUANTUM MERUIT" REALLY MEANS

By: Erin K. Rudert, Esq. **

There were two cases decided by the Superior Court this year addressing recoverability of attorney's fees following discharge of the attorney prior to settlement and the actions required for an attorney's charging lien. The first case, *Angino & Rovner v. Jeffrey R. Lessin & Assoc., et. al.*, 131 A.3d 502 (Pa. Super. 2016), was appealed to the Supreme Court and the Court accepted allocatur as to the fee issues. The case hasn't been argued yet – it is listed for argument on December 6, 2016 in Harrisburg. As the law stands right now, the only measure of recovery for a discharged attorney is *quantum meruit*, regardless of what the POA says. The issues currently on appeal to the Supreme Court will directly address fee provisions following discharge in contingent fee agreements. We will address the Supreme Court's decision following its release in a future issue of The Advocate.

The second case, *Kelly v. Vennare*, is an unpublished opinion available at 2016 WL 1062819, and addresses the current state of Pennsylvania law as to attorney's charging liens and what an attorney must establish to file an enforceable lien against his client. The Superior Court's analysis in *Kelly* may be affected by the Supreme Court's decision in *Angino*.

Angino deals with the proper measure for recovery of attorney's fees following discharge of the attorney prior to settlement of the case. The underlying case in *Angino* was an auto case. The injured person retained Angino as counsel. The fee agreement/Power of Attorney contained the following provision:

> If for any reason I (we) take my (our) case to another attorney or law firm including a former A & R attorney or handle it myself (ourselves), I (we) recognize that A & R has, in good faith, expended money and time for my (our) benefit and I(we) therefore agree to pay, or have my (our) new attorney pay, immediately upon severing the A & R attorney/ client relationship, all the out-of-pocket expenses incurred on my (our) case plus interest at the rate of 6% per annum from the date of each expenditure. In addition, when the case is successfully concluded, I (we) agree to pay or direct my (our) new attorney to pay as a fee 20% of the gross recovery to A & R.

The fee would have been 40% had Angino handled the case to conclusion. The third party case settled for the available policy limits and Angino handled the UIM case up through the selection of arbitrators and scheduling of the UIM arbitration. Essentially on the eve of arbitration, the client fired Angino and retained new counsel, Lessin. The arbitration was rescheduled some time later, and Lessin wrote a letter to Angino stating, "[s]ince you chose [client's] arbitrator and you have a 50% stake in the outcome of the case, I would like you to attend the same." Lessin's letter acknowledged Angino's 20% interest in the arbitration award, as Lessin was charging a 40% fee which seemed to imply that he would be splitting his fee with Angino. The arbitration award totaled $585,650 after reduction for the $100,000 previously received from the third party policy. Lessin refused to pay Angino anything, prompting Angino to sue his former client and Lessin to recover 20% of the arbitration award as his fee, as provided in the POA and agreed upon by Lessin when he took over the case.

The trial court, on cross-motions for partial summary judgment as to the POA issue, decided in favor of the client and Lessin. Angino elected to file a praecipe dismissing his breach of contract claim against Lessin relative to Lessin's agreement to pay 50% of the fee to Angino when Lessin took over the case. This was done to make the lower court's order on the cross-motions for summary judgment a final, immediately appealable order. No court in this matter reached the issue of whether Lessin's agreement to pay 50% of the fee to Angino was enforceable.

The Superior Court was asked to review one issue:

> Did the trial court err in granting Summary Judgment in favor of Mr. Zarreii and denying Summary Judgment to [Angino] where the facts are undisputed that Mr. Zarreii, an adult, knowingly and voluntarily entered into a contingent fee agreement with [Angino] that required the payment of a 20% fee if Mr. Zarreii [terminated] [Angino] and secured other counsel, particularly under the circumstances where [Angino] had prepared the underinsured motorist case completely to the point of selecting arbitrators and awaiting an arbitration hearing?

The Superior Court concluded that *regardless of language in the POA*, the only proper measure of an attorney's fee following revocation of contingent fee POA is quantum meruit. The Court stated that if the contingent fee agreement is terminated prior to the occurrence of the contingency, the attorney is not

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YOUR CLIENT FIRES YOU … *(Continued from Page 7)*

entitled to a percentage fee of any type because the contingency in the contract that triggers the obligation to pay the fee is not met. Requiring the client to pay a percentage of a later settlement to a discharged attorney is a contractual penalty that contradicts the client's absolute right to terminate an attorney-client relationship regardless of any contractual agreement. The percentage fee is described as a "penalty" to the client, a deterrent to discharge, and an impediment to the client's ability to retain new counsel if he so chooses.

The Court further said they would not apply contract principles to a fee recovery provision in a contingent fee agreement/POA because: 1) there is a long-standing line of PA cases that states the only proper basis for recovery is quantum meruit; and 2) the fiduciary and ethical obligations of an attorney to his client prevent an attorney from imposing this type of a "penalty" fee recovery provision on a client. The Court said that any fee recovery agreement in a contingency fee contract that provided for more than quantum meruit would be viewed as void and unenforceable.

Angino filed a petition for allocatur to the Supreme Court, which accepted the case on appeal limited to the following issues:

a. Did the trial court err in granting summary judgment in favor of Mr. Zarreii and denying summary judgment to Angino & Rovner, P.C. where the facts are undisputed that Mr. Zarreii, an adult, knowingly and voluntarily entered into a contingent fee agreement with Angino & Rovner, P.C. that required the payment of a 20% fee if Mr. Zarreii discharged the Angino & Rovner Law Firm and secured other counsel, particularly under circumstances where the Angino & Rovner Law Firm had prepared the underinsured motorist case completely to the point of selecting arbitrators and awaiting an arbitration hearing.

b. Are attorneys prohibited per se from including a reasonable fee recovery provision in contingent fee agreements that governs the termination of the attorney-client relations prior to the occurrence of the contingency.

c. Are discharged attorneys entitled only to the equitable remedy of quantum meruit for services rendered to former clients.

d. Is the quantum meruit equitable remedy for services rendered to former clients exclusive where a termination provision is included in a contingent fee agreement, and that provision is not challenged and established to be either excessive or unconscionable?

Kelly addressed the charging lien in the context of a case where an attorney worked on a matter for more than seven years without a written contingency fee agreement. It was a complex division of assets following the breakdown of a business, and the clients had no money to pay the attorney until they received their portion of the sale proceeds. The clients discharged the attorney, and the case was settled less than a year after they hired a new attorney. The former attorney filed a charging lien in the third party litigation, requesting that the Court equitably protect his fee at the time of resolution fo the matter. There was a threshold issue of the enforceability of a contingent fee agreement that was not in writing, but the Court concluded that there was sufficient evidence in the record of the agreement existing and the terms so as to make the agreement enforceable.

The Court first acknowledged that two type of attorneys' liens are recognized in Pennsylvania:

> As a matter of law, Pennsylvania courts recognize the right of a lawyer to an attorney's lien. Pennsylvania law recognizes two kinds of attorneys' liens: a charging lien and a retaining lien. Charging liens are divided into two subcategories: equitable charging liens and legal charging liens. An equitable charging lien gives a lawyer a right to be paid out of a fund in the control or possession of the court, which fund resulted from the skill and labor of the lawyer. Such payment may be applied only to the services provided in a particular case. A legal charging lien applies to funds of a client in the lawyer's possession which may be applied to all outstanding debts of the client owed to the lawyer. A retaining lien permits a lawyer to retain money, papers or other property in the lawyer's possession to secure payment of costs and fees from the client.
>
> Ethical Considerations in Attorneys' Liens, PA Eth. Op. 2006–300 (PBA)

The case that controls charging liens is *Recht v. Urban Dev. Auth. Of Clairton*, 168 A.2d 134 (Pa. 1961). There are 5 factors the Court will assess in determining whether a charging lien is permissible:

> [B]efore a charging lien will be recognized and applied, it must appear (1) that there is a fund in court or otherwise applicable for distribution on equitable principles, (2) that the ser

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> vices of the attorney operated substantially or primarily to secure the fund out of which he seeks to be paid, (3) that it was agreed that counsel look to the fund rather than the client for his compensation, (4) that the lien claimed is limited to costs, fees or other disbursements incurred in the litigation by which the fund was raised, and (5) that there are equitable considerations which necessitate the recognition and application of the charging lien.

In *Kelly*, the Court applied *Angino* and said that since the discharged attorney had not resolved the case and satisfied the contingency, the measure of his fee would be *quantum meruit*, as that is the only amount that can be recovered. The trial court had dismissed the case based on the lack of a written agreement, so the Court referred the case back to the trial court for consideration of the remaining *Recht* factors and determination of the *quantum meruit* fee amount, if the Court determined the charging lien was appropriate under *Recht*.

Both cases rely on the quantum meruit evaluation of the discharged attorney's work on the client's case. Quantum meruit literally means "what one has earned." In the case of a contingency fee attorney who does not track his hours and whose efforts may add value to a case disproportionate to the time actually spent working on the case, what that attorney has "earned" is not clear. Many times in the context of a quantum meruit conversation the thought turns to equation of hours works times an hourly rate plus costs expended. That calculation may understate (or overstate) the reasonable value of the attorney's services prior to discharge. An attorney may only have spent four hours preparing a brief and fifteen minutes arguing to the court in opposition to a summary judgment motion. If the attorney is successful in defeating the motion, that value of the attorney's efforts in preserving the viability of the case may be "worth" far more than the same amount of time spent reading medical records.

The Court in *Angino* cited Judge Joyce's concurrence in *Mager v. Bultena*, 797 A.2d9248 (Pa. Super. 2002), as follows:

> In Judge Joyce's opinion, deciding the reasonable value of an attorney's services requires the court to take into consideration the particular circumstances of the case before it, including the complexity of the litigation and the results achieved:
>
> [I]n the absence of a special agreement, an attorney is entitled to be paid the reasonable value of his services. In addition to the labor and time involved, other factors must be taken into consideration, such as the character of services rendered, the importance of the litigation, the skill necessary, the standing of the attorney, the benefit derived from the services rendered and the ability of the client to pay, as well as the amount of money involved. The question of reasonableness is within the sound discretion of the trial court. (Quoting *Robbins v. Weinstein*, 17 A.2d 629, 633 (Pa. Super. 1941).)

The Court concluded that Angino's efforts on behalf of his client were compelling evidence that Angino was entitled to an award of more than just his hours and expenses. The Court felt that Angino's equitable quantum meruit recovery, if one was viable, was to be based "on a fair assessment of the contributions of the discharged attorney to any eventual award in the case."

*** Erin is a WPTLA Member with the firm Ainsman Levine.*
Email: er@ainsmanlevine.com

FUTURE LOST EARNINGS … *(Continued from Page 5)*

The law in Pennsylvania is clear that the proper inquiry in a claim for future lost earning capacity is Plaintiff's pre-accident vocational goals, expectations and progress, not post-accident employment. This kind of argument necessarily punishes the industrious Plaintiff who has overcome adversity and gotten himself back into the job market at a similar or higher wage. It is of the utmost importance to not allow an expert, by implication or otherwise, get this kind of argument before a jury under the guise of "it's expert testimony." The first line of defense is to read the Defendant's expert report very carefully to determine if that kind of argument is showing up in the expert's report. If it is, either a Motion in Limine or a Motion to Strike the offending portion of the expert report should be promptly filed. So long as proper case authority is provided, the trial judge should be amenable to ruling in your favor. After all, such bogus expert testimony is violative of Pennsylvania Law, even if given the imprimatur of an expert witness.

** *Keith is a WPTLA Member with McMillen Urick Tocci & Jones.*
Email: kmcmillen@personallaw.com

TRIVIA CONTEST

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

Trivia Question #8

How many cervical vertebrae do giraffe have?

Please submit all responses to Laurie at laurie@wptla.org with "Trivia Question" in the subject line. Responses must be received by Monday, January 2, 2017. Prize for this contest is a $100 Visa gift card. Winner will be drawn January 3, 2017. The correct answer to Trivia Question #8 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 #7 - **How many times has an NHL team that made an in-season coaching change gone on to win the Stanley Cup in that season? (Hint: The Pittsburgh Penguins did it twice, so the answer it at least 2!) Answer: 6**. 2016 Pittsburgh Penguins; 2012 LA Kings; 2009 Pittsburgh Penguins; 2000 New Jersey Devils; 1971 Montreal Canadiens; 1932 Toronto Maple Leafs Source: https://www.nhl.com/news/penguins-only-sixth-team-to-win-stanley-cup-after-coaching-change/c-280922348

Congratulations to Question #7 winner Larry Kelly, of Luxenberg Garbett Kelly & George, P.C.

The Western Pennsylvania Trial Lawyers Association & the Pittsburgh Steelwheelers would like to thank the following for supporting our recent 5K event.

Steve Barth, Esq.
DelVecchio & Miller
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16th Annual
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HOT OFF THE WIRE

*By: James Tallman, Esq.***

Attorney not entitled to fee under fee agreement that paid investors that funded litigation out of contingency fee: *WFIC LLC v. LaBarre*, 2016 Pa. Super. LEXIS 530 (Sept. 13, 2016) – Superior Court upheld summary judgment and held that fee agreement was champertous and invalid.

The case on appeal in WFIC arose out of separate federal court litigation that began in 1999 between Polymer Dynamics, Inc. ("PDI") and Bayer Corporation. It was a "bet the company" lawsuit for PDI, in which it hoped to recover a least $100 million. A jury, however, awarded PDI only $12.5. The jury award was appealed by both parties. PDI could not afford to continue the litigation. PDI sought out investors and loans to fund the litigation.

Originally, PDI's trial counsel had a contingency fee agreement for 7.5%. In 2008, he amended fee agreement to a 1/3 contingency fee, with the understanding the PDI's counsel would pay the litigation investors from the increased contingency fee. The fee agreement gave priority to the investors. Thereafter, PDI's original counsel withdrew. In 2010, Bayer paid $14.4 million to PDI's counsel at that time to satisfy the verdict and interest. The funds were used to pay legal fees, taxes, loans, and litigation investors. PDI's original trial counsel did not receive any payment for attorney's fees.

WFIC LLC initiated that action on appeal after distribution of the $14.4 million paid by Bayer. WFIC alleged that the distribution was improper and violated WFIC's priority rights to the litigation proceeds. PDI's original trial counsel was a party to the WFIC action and asserted various claims, including breach of contract, unjust enrichment and quantum meruit. His claims were all ultimately dismissed on summary judgment and he appealed to the Superior Court.

On appeal, appellant-attorney argued that his fee agreement gave him a charging lien. The Superior Court refused to enforce that agreement as a charging lien to give it priority over other rightfully secured creditors. The Superior Court then went on to hold that the fee agreement was champertous. The court explained the champerty occurs when an individual funds a lawsuit, in which the individual has no interest, and in return shares in the recovery. Such an agreement is invalid and, therefore, the appellant-attorney was not entitled to a fee under it. Next, the court rejected appellant-attorney's unjust enrichment/quantum meriut claims based on standing. The court held that such claims could not be asserted against non-client investors, even though the non-clients received a benefit from his services. The court further held that even if appellant could assert a claim for unjust enrichment against the non-client investors, the court held that distribution of the funds to the investors was not unjust, as they were secured creditors and appellant was not.

Superior court applies *Althaus* factors to impose duty on UPMC: *Walters v. UPMC Presbyterian Shadyside*, 2016 Pa. Super 160 (July 21, 2010) – Superior Court reversed granting of demurrer based on defendants not having a common law duty.

Traveling radiologic technician was placed at UPMC by staffing agency Maxim. It was discovered by UPMC that the technician was stealing fentanyl and morphine syringes, injecting himself with the drugs, filing the used syringes with water and then placing the used syringes back on the shelf. UPMC discovered this conduct and banned the technician from all UPMC facilities. UPMC, however, did not report his conduct to the DEA, law enforcement, governmental agency, or any licensing agency. After the incident at UPMC, the radiologic technician obtained licensure and employment in multiple states over several years. During that time, the radiologic technician transmitted hepatitis C to the plaintiffs through contaminated needles. The plaintiffs alleged a number of claims against UPMC and Maxim, including that they each had duty to ensure that their agents/employees did not divert and substitute drugs and a duty to report his theft, diversion and substitution of drugs to governmental agencies to prevent future occurrences. The defendants filed preliminary objections arguing that they did not owe a duty to the plaintiffs as there was no relationship between the defendants and the plaintiffs. The trial court granted the defendants' preliminary objections and the plaintiffs appealed.

On appeal the Superior Court turned to the test for duty set forth in *Althaus v. Cohen*, 756 A.2d 1166 (Pa. 2000). The Superior Court distinguished *Walters* from other precedent involving a physician-patient relationship because in *Walters* the defendants had an employer-employee relationship with the radiologic technician. The court held that where the defendant stands in special relationship with the person whose conduct needs to be controlled, a duty may be imposed. The court found that this duty arose when the radiologic technician was the employee/agent of defendants. The court went on to find that the other *Althaus* factors, *i.e.,* foreseeability, risk to be prevented, social utility, costs of imposing a duty, and overall public interest all weighed in favor of imposing a duty.

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HOT OFF THE WIRE *(Continued from Page 13)*

District Court for the Middle District of Pennsylvania allows punitive damages claim against truck driver and employer: *Williams v. Nealis*, 2016 WL 2610029 (M.D. May 6,2016) Motion to dismiss punitive damages claim denied.

The plaintiff in *Williams* was seriously injured when a tractor trailer crossed over the center line and into the plaintiff's lane of travel and collided with plaintiff. The plaintiff filed suit against the driver and his employer. As part of his suit, the plaintiff alleged punitive damages against both defendants. The District Court held that the plaintiff was entitled to discovery to determine the operator's state of mind and appreciation of the risk of an accident and whether such risks were ignored, as well as determining facts of speeding, texting, or that he should not have been driving. Of course, after discovery, the defendants would be able to move for summary judgment so no actual prejudice.

Limited Tort threshold satisfied where knee pain interfered with ADL: *George v Howe*, 59 Northampton 211 (March 9, 2016) – Summary judgment by defendant in limited tort case denied.

Limited-tort plaintiff sought non-economic damages. Defendant moved for summary judgment. Court found there to be questions for the jury where the Plaintiff suffered knee pain that interfered with activities of daily living, which continued several years after the accident.

District Court for the Eastern District of Pennsylvania holds that allegations regarding UIM insurer's claims handling were sufficient to state a claim for bad faith under § 8371: *Kelly v. Progressive Advanced Insurance Co.*, Civ. Action No 15-cv-4457, 2016 WL 427355 (E.D. Pa. Feb. 4, 2016)

In *Kelly*, suffered significant injuries and lost wages as a result of a collision caused by a drunk driver. After the plaintiff settled with the third party for policy limits, he made a claim for underinsured motorist benefits. Plaintiff's insurer, Progressive, refused to pay the claim. Plaintiff filed suit alleging, *inter alia*, that the insurer acted in bad faith when it denied coverage and failed to make a reasonable settlement offer. Progressive maintained that there was no bad faith but merely a good faith dispute over the value of the claim. The District Court held that the plaintiff's allegations of the insurer's failure to pay the claim, investigate the claims properly, consider medical documentation or make a reasonable settlement offer, were sufficient to state a claim under § 8371.

Superior court holds that is not reversible error to bar mention of insurance in joint third-party/UIM trial: *Zellat v. McCullough*, No. 1610 WDA 2014 (Pa. Super. Jan. 26, 2016) post-trial motion denied as trial court did not abuse its discretion precluding mention of insurer.

In *Zellat*, the third party and under insured motorist claims (UIM) were tried together. The trial court, however, barred any mention of insurance. The jury found that the tortfeasor's negligence did not cause the plaintiff's injury. Plaintiff appealed. On appeal, the plaintiff argued, in part, that *Stepanovich v state Farm*, 78 A.2d 1147 (Pa. Super. 2013), mandated that the insurer be identified and mentioned at trial. The *Zellat* panel held that the abuse of discretion standard applied to the issue and it was not automatically reversible error to bar mention of the insurance company in a combined third-party/UIM trial. The court in *Zellat* then went on to determine that the plaintiff had not established that prejudice as result of the insurer not being mentioned. Thus, the trial court did not abuse its discretion.

*** James is a WPTLA Member with the firm of Elliott & Davis, P.C.*
Email: jtallman@elliott-davis.com

COMP CORNER

*By: Thomas C. Baumann, Esq.***

Supreme Court Addresses Judicial Fact-Finding in IRE Cases

Recently, the Pennsylvania Supreme Court rendered a decision in *IA Construction Corporation v. WCAB* (Rhodes) No.18 WAP 2015, addressing the ability of a Worker's Compensation Judge to reject testimony from an Impairment Rating Examination physician. In the *Rhodes* case, Claimant's counsel produced no countervailing evidence.

Rhodes was injured in 2005 in a vehicular accident. Unfortunately, he was required to litigate a Claim Petition to conclusion. As a result of the litigation the Judge made a specific Finding of Fact that the work related injuries included traumatic brain injury with organic affective changes, persistent cognitive problems, memory impairment, posttraumatic headaches, posttraumatic vertigo or impaired balance and musculoskeletal myofascial neck and back injuries. As a result of the work-related injury the Claimant underwent surgeries for the back injuries.

The carrier eventually sought to obtain an Impairment Rating Examination. The Bureau of Worker's Compensation designated M. Bud Lateef M.D to conduct the IRE. Dr. Lateef found a 34% impairment for the Claimant. Since the rating evaluation was requested beyond the statutory period, the carrier was forced to pursue a Modification Petition and took Dr. Lateef's deposition. In the deposition Dr. Lateef confirmed that he compressed the multiple conditions found by the Judge into three primary diagnoses: traumatic brain injury, herniated cervical disc and gait dysfunction.

Claimant did not present testimony on his own behalf. Claimant argued that Dr. Lateef improperly "lumped" the multiple injuries found by the Judge and the Claim Petition into three injuries. Claimant also argued that Dr. Lateef did not conduct a proper assessment of the Claimant's cognitive issues within the traumatic brain injury.

The Workers Compensation Judge found that by lumping the multiple injury into three categories that Dr. Lateef had not accounted properly for them. She also found that she was "unpersuaded" by his assessment of the Claimant's cognitive problem because he performed a very cursory exam and had a limited review of records forwarded to him by the carrier. The Judge therefore denied the request for modification.

The Worker's Compensation Appeal Board affirmed the opinion. It concluded that the Judge, as factfinder, could make the determinations she made.

Employer sought review with the Commonwealth Court which is found at IA *Construction Corporation v. WCAB* (Rhodes), 110 A. 3rd 1096 (PA.CMWLTH. 2015). The Commonwealth Court claimed that the Workers Compensation Judge did not have the ability to reject the IRE physicians opinions on the cognitive impairment as outside his area of specialization. The Commonwealth Court opinion also claimed that the Judge's factual findings regarding the un-persuasiveness of Dr. Lateef's testimony had to be supported by substantial evidence. Since the Claimant had not produced evidence, the Commonwealth Court concluded that there was no substantial evidence to support the Judge's findings.

The Claimant appealed to the Supreme Court framing the issue as "whether the Commonwealth Court overstepped its appellate function in making credibility judgments which is the sole function of the Worker's Compensation Judge." The author suggests that the Commonwealth Court's decision followed a long line of Commonwealth Court decision which appeared to override the fact-finding ability of the Workers Compensation Judge, most particularly seen in mental/mental cases. The Supreme Court granted Allocator on this issue.

Claimant argued that Dr. Lateef's testimony "had no special effect." The deference the Commonwealth Court ascribed to the IRE physician's testimony was misplaced. The employer argued that the Judge could not reject the testimony of the IRE physician without any contrary evidence produced by the Claimant. Interestingly, the Defendant did not seem to argue that the Workers Compensation Judge did not render a reasoned decision in its argument before the Supreme Court.

The Supreme Court then conducted an analysis of any potential differences between a credibility determination and the Judge's finding in the Rhode's case that she was unpersuaded by the IRE physician. It noted the case law determining that the Workers Compensation Judge is "the ultimate finder of fact." It noted its prior decision in *Diehl v. WCAB* (I.A. Construction), 607 Pa. 254 (2010), where it found that an IRE "is entitled to no more or less weight than the results of any other examination." This decision seems to have been ignored by the Commonwealth Court.

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COMP CORNER *(Continued from Page 15)*

The court specifically noted that "to the degree that the Commonwealth Court has fashioned, essentially, an uncontradicted medical evidence rule, we disapprove its decision."

The court concluded that the Judge's approbation for "lumping" medical conditions could not control in the case. It concluded that Dr. Lateef properly rated the conditions impairing the Claimant at the time of the evaluation. The case then turned on the fact that the Judge was unpersuaded by the IRE physician's opinion regarding an area in which he did not specialize. The court noted that the AMA guides required a detailed mental status examination for any neurological impairment. It noted that the AMA guides suggest neuropsychological assessment testing. The Supreme Court noted there was nothing in the IRE physician's deposition or report that met this standard. As a result, the Supreme Court concluded that the Workers Compensation Judge could properly find she was unpersuaded by the IRE physician's testimony.

PAJ member Dan Bricmont wrote an excellent amicus brief in this case. The author points out the Supreme Court quoted the brief twice. Kudos to Dan.

*** Tom is a WPTLA Member with the firm of Abes Baumann, P.C.*

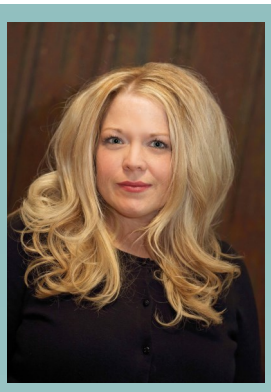
THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 29, 2016-2017

	Article Deadline	Publication Date
Vol 29, No. 2 Winter 2016	Dec 2, 2016	Dec 9, 2016
Vol 29, No. 3 Spring 2017	Mar 17, 2017	Mar 24, 2017
Vol 29, No. 4 Summer 2017	Jun 9, 2017	Jun 16, 2017

MEMBER PICTURES & PROFILES



Name: Katie A. Killion

Firm: Kontos Mengine Law Group

Law School: West Virginia University College of Law

Year Graduated: 2005

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

Tell us something about your practice that we might not know: I do some criminal defense work.

Most memorable court moment: Winning a substantial verdict for deserving clients.

Most embarrassing (but printable) court moment: Spelling Judge Strassburger's name wrong on a motion and him pointing it out in open court.

Most memorable WPTLA moment: Having a client that won the comeback award.

Happiest/Proudest moment as a lawyer: Helping to create a great law firm

Best Virtue: Loyalty

Secret Vice: Happy Hour

People might be surprised to know that: I am a natural redhead.

Favorite movie: Four Christmases

Last book read for pleasure, not as research for a brief or opening/closing: Without a Doubt

My refrigerator always contains: Strawberries

My favorite beverage is: Coffee

My favorite restaurant is: Cains Saloon

If I wasn't a lawyer, I'd be: Interior Designer/fixer upper

Western Pennsylvania Trial Lawyers Association
909 Mt. Royal Boulevard, Suite 102
Pittsburgh, PA 15223-1030

...Through the Grapevine

Past President **Jason E. Matzus** has opened his own firm, Matzus Law LLC. He remains at 310 Grant St, Ste 700, Pittsburgh 15219. P: 412-330-1006 Email: Jason@matzuslaw.com www.matzuslaw.com

A speedy recovery to **Andrew J. Leger, Jr,** who is recovering from back surgery.

Members **Kelly L. Enders** and **Rhett P. Cherkin** announce a change in their firm's name, to Caroselli Beachler & Colemen, LLC. Former member John McTiernan has been appointed a Workers' Compensation Judge by the Commonwealth of Pennsylvania Department of Labor and Industry.

Emeritus member **Warren D. Ferry** is now located at 7931 Tybee Court, University Park, FL 34201. P: 941-388-8312 (L) 724-822-4384 (C).

Best of luck to **Michael Louik**, of Rosen Louik & Perry, who has moved to an "Of counsel" status and semi-retirement.

Congratulations to Past President **Christopher M. Miller**, and his wife Karan on the birth of their daughter, Zoie Kathleen. This is their first child.

Our condolences and sympathies to members **Joseph A. George**, on the passing of his brother, Jason, and to **Howard J. Schulberg**, on the passing of his mother, June.

Member **Daniel K. Bricmont** has opened his own firm, and can be found at 606 California Ave, Pittsburgh 15202. P: 412-600-6466 Email: dan@danbricmont.com www.danbricmont.com

Our condolences and sympathies to the colleagues and friends of The Honorable Debra A. Pezze, of the Court of Common Pleas of Westmoreland County, who passed in October.

Congratulations to Past President **John E. Quinn** and Board of Governors Member **Matthew T. Logue** who have formed Quinn Logue LLC. Member **James R. Thornburg** joins them at 200 First Ave, Third Fl, Pittsburgh, 15222 P: 412-456-0600.