THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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UPCOMING EVENTS FOR WPTLA

A **3-credit CLE** program will be held on **Fri, Feb 24, 2017** featuring Brendan Lupetin. The course, *Focus Groups 101: Everything You Need To Know To Get Started*, runs from 9:00 am-12:30 pm in the Gulf Tower in Pittsburgh. A lunch is available afterward.

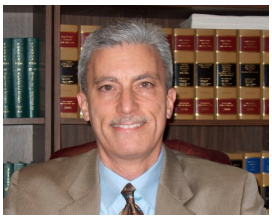
A **Washington County dinner** is being scheduled for **March,** at **The Meadows Casino.** Details will be available soon.

The **Annual Membership Meeting** is being scheduled for **April**, at a new location in the Pittsburgh area. Details will be available soon.

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

COMEBACK AWARD DINNER RECAP

*by Dave Landay, Esq. ***



Pictured above, from L to R: Harry Cohen, Tina Anthony, President Sandy Neuman, Robert Anthony, Nominating Attorney Todd Bowlus, Jodi Bowlus

WPTLA's annual Comeback Award Dinner was held on November 15, once again at the Duquesne Club. As usual, it was well-attended by friends and family of the Comeback Client of the Year, attorneys, business partners, and others.

This year, for the first time, there were two joint recipients: Robert & Tina Anthony. Husband and wife, they were aptly chosen by the committee from a slate of other well-deserving nominees.

Back in July of 2012, Mr. Anthony, a lumberjack, was working in the woods when he was violently struck in the middle of his shoulder blades by a large tree. Emergency personnel were summoned, he was immediately immobilized and taken to the emergency department of the nearby Titusville Area Hospital.

Although the standard of care required keeping a patient immobilized until a back fracture was definitively ruled out with clear imaging studies, the attending ER physician did the opposite, mobilizing Mr. Anthony. X-rays were taken, but were of poor quality. No repeat imaging was performed and Mr. Anthony was discharged to his home after two days of observation.

Due to this poor medical treatment, Mr. Anthony became a complete paraplegic with bladder incontinence and a neurogenic bowel.

Photo Courtesy Lorraine Eyler

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President
Sandra S. Neuman

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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.***

If you have read the last two President messages, you already know that the issue of jury selection is front and center in this year's agenda. In addition to wanting to arm our membership with written materials to help empanel a fair and unbiased jury, we have been waiting for a clear indication from our Supreme Court on the issue of striking prospective jurors for perceived biased. I am sure our readers are familiar with the *Cordes* case. However, because *Cordes* was a plurality opinion, courts have been reluctant to strictly follow the opinions that addressed this issue. Not surprisingly, the plaintiff bar and defense bar have defined, opposite positions on *Cordes* that can cause friction and contention during jury selection.

Clarity from our Supreme Court may soon be on the horizon. Earlier this year, the Supreme Court of Pennsylvania granted a Petition for Allowance of Appeal in the case of *Shinal v. Toms*, a medical malpractice case originating out of Montour County. One of the issues accepted for review involved jury selection. Specifically, the Court agreed to address the question of whether a plaintiff in a civil trial is "entitled to a for cause strike of prospective jurors with close familial, situational or financial relationships with the defendant's employer, whether direct or indirect, when the claimed negligence of the defendant occurred in the course and scope of the defendant's employment." In *Shinal*, the trial judge refused to strike four potential jurors who appeared to have a relationship to the hospital that employed Dr. Toms. It should be noted that prior to jury selection the hospital itself was dismissed as a party defendant but Dr. Toms, who was the Chief of Neurosurgery at the hospital, was not. The four challenged jurors were: (1) a secretary at the hospital's sleep lab; (2) a spouse of an administrative employee who had worked at the hospital for 35 years; (3) a customer service representative for the health plan administered by the hospital; and (4) a retired physician assistant who had worked at the hospital. The trial judge denied plaintiff's motion to strike these witnesses for cause because each said they did not know Dr. Tom personally and they thought they could be fair and impartial. Therefore, Plaintiffs were required to exhaust their peremptory strikes on these individuals, who arguably could be biased based on their ties to the hospital. The jury was empanelled and after hearing the case, ruled in favor of the defense. Plaintiffs appealed, arguing that because they were forced to use their peremptory strikes on jurors that should have been dismissed for cause, they were unable to empanel an impartial jury. The Superior Court, in a 2-1 decision authored by Judge Platt, affirmed. The Supreme Court granted allocator in March of 2016 and oral argument took place on November 2, 2016.

Considering the strong opinions authored by then Superior Court Judges Wecht and Donahue in *Cordes,* we should be cautiously optimistic that a solid opinion on this issue will be forthcoming and voir dire across the Commonwealth will become more uniform and fair. Keep your fingers crossed.

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

COMEBACK AWARD DINNER RECAP *(Continued from Page 1)*

Todd Bowlus, the nominating attorney, showed a moving video demonstrating how Mr. Anthony refused to let his condition limit his activities. After his injury, Mr. Anthony, with some help, retro-fitted equipment in his garage to be used in his logging business. He also fabricated parts needed for him to drive his side-by-side, allowing him to go out into the woods and bid on logging jobs which he then subs out to other loggers. He even made a hoist that lifts him up into his heavy equipment so he can still do some of the actual work.

Needless to say, Robert Anthony is the epitome of what the WPTLA Comeback Award stands for.

WPTLA made a $2,500.00 donation, an increase from our previous donations of $1,000.00, to Mr. Anthony's charity of choice, the Wounded Warrior Project.

On a very sad note, we recently learned of the death of Joseph Pasqualini, last year's Comeback Award winner.

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

Photos Courtesy Lorraine Eyler

Pictured above: #1 - Business Partner Cindy Miklos of Planet Depos, Matt Logue, Jason Schiffman, John Quinn; #2 - Mike George, Jason Matzus, Business Partner Don Kirwan of Forensic Human Resources, Dan Schiffman, Shawn Kressley; #3 - Eric Purchase, Business Partner Varsha Desai of Alliance Medical Legal Consulting; #4 - Business Partner Matt Hanak of Forensic Human Resources, President Sandy Neuman; #5 - Chad Bowers, Chris Miller, Dave Zimmaro; #6 - Beth Frederick, Troy Frederick, Vice President Bryan Neiderhiser; #7 - Comeback Awardees Kimberly Puryear (2013), Davana Feyrer (2012), Tina Anthony, Robert Anthony, Brenda Gump (2014), Karrie Coyer (2007/2008), Beckie Herzig (2001); #8 - Susan Geist, Bill Goodrich, Josh Geist

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OPPORTUNITIES TO MAKE A DIFFERENCE

*By: Bryan S. Neiderhiser, Esq. ***

As trial lawyers, we all take pride in the fact that our chosen vocation allows us to help people in their times of need. However, our responsibility to help others extends beyond the walls of a Courtroom. Our organization has committed to performing many community oriented activities that will enable our membership to help others and give back. Specifically, the Community Outreach Committee has been working on three different opportunities for our members to become involved in our local communities. The first is a program designed to educate young people about the dangers of distracted driving. The second is the continuation of WPTLA's annual involvement in a Habitat for Humanity home. The third is performing pro bono legal services through the Pittsburgh Pro Bono partnership.

Those of us who represent individuals that were injured in motor vehicle collisions are eminently aware of the fact that distracted driving is an ever increasing problem in our society. People are increasingly attached to their telephones and distracted driving is no longer limited to dialing or talking on the telephone while driving. Instead, many people are now checking email, sending texts, reading text messages, etc., all while driving a vehicle. Research has proven the increased dangers associated with driving while distracted, even if just for a few seconds.

As many of you are also aware, attorney Joel Feldman, and his wife Diane Anderson, created a program aimed at educating people about the risks of distracted driving. This program, entitled End Distracted Driving (EndDD), has reached more than 300,000 students and drivers in 45 states. WPTLA has agreed to join the ranks of those presenting the EndDD program by doing so in high schools throughout western Pennsylvania. A link to all of the program materials can be found at: http://www.enddd.org/trial-lawyer-911-campaign/. This is a 100% turnkey program and all of the materials necessary to make a presentation at a high school can be found at that link. This link also includes form letters of introduction that can be used to get your "foot in the door" with local high schools. Personal contacts, health teachers, and driver education teachers are usually the best people to contact to schedule a presentation.

If each member of our organization would be willing to make at least one presentation at a local high school, WPTLA could truly make a difference in this regard. We urge each of you to please take the time to look through the materials on the link above and then make a presentation to a high school in your area. The following is a link to a map that shows where every presentation of this program has been made: http://www.enddd.org/nationwide-presentations/. However, even if a program was presented to a school in the past, the audience would likely be different, as new students become new drivers every year. With that said, I would like to maintain a "master list" of schools in which WPTLA has presented the program, so we will not duplicate our efforts. If you are interested in presenting this timely and worthwhile program, please contact me directly at bneiderhiser@marcusandmack.com or 724-349-5602. Several WPTLA members have already contacted me and expressed a willingness to make a presentation!

Next, we are planning to participate in another Habitat for Humanity project in Beaver County later this winter or in early spring of 2017. The vision of Habitat for Humanity is "A world where everyone has a decent place to live." Habitat partners with people from communities around the world to build or improve places that people can call home. The Western Pennsylvania Trial Lawyers Association has participated in five different Habitat for Humanity projects in Beaver County dating back to 2011. Obviously, we would love to keep this tradition going. Committee member, and Board of Governors member, Greg Unatin has agreed to spearhead our effort to collaborate with the local Habitat organization in Beaver County and establish a date and location for us to serve with Habitat. Currently, we believe that within the next month we will know the particulars of a date and location for our organization's participation. We will notify our membership of the date and location of the Habitat home by email, so please check for an email from Laurie Lacher with the details. Remember, expertise in home construction is not necessary, Rather, a willingness to work and help others is all that you need!

The third opportunity for community outreach being offered through WPTLA is performing pro bono legal services through the Pittsburgh Pro Bono partnership. The Pittsburgh Pro Bono partnership needs the assistance of attorneys and paralegals who are willing to volunteer their time to provide legal assistance to low-income families and individuals. Last year, WPTLA became a member of the Pittsburgh Pro Bono partnership and agreed to perform protection from abuse (PFA) hearings, custody conciliations and assist in landlord tenant disputes. Volunteers are always needed for these pro bono opportunities. In addition, volunteers are needed for a special project which provides legal services for homeless people in our communities called H.E.L.P. Through H.E.L.P., pro-bono services were provided

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OPPORTUNITIES … *(Continued from Page 4)*

to 24 homeless people in the region in 2015. The Pro Bono Partnership gives us opportunities to fulfill that goal which guides our work and our lives - to help people who are facing some of the most trying times in their lives. Brief CLE trainings for these Projects are held throughout the year. The Partnership also has experienced mentors who can provide training and assistance to new volunteers as needed. Save the contact information below, and when you know the time is right, reach out to do your part.

Projects That Need Help

H.E.L.P. :
Steve Zuchelli – Steven.zuchelli@bipc.com

Custody Conciliation Project:
Nette Oliver – aco@muslaw.com

Protection from Abuse Project:
Mary Ann Troper-Malley – troperma@nlsa.us

Landlord Tenant Project Expansion:
Nette Oliver – aco@muslaw.com

*** Bryan is a WPTLA Member from Marcus & Mack, P.C..*
Email: bneiderhiser@marcusandmack.com

THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

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ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 29, 2016-2017

	Article Deadline	Publication Date
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: Harry M. Paras

Firm: Law Offices of Harry M. Paras

Law School: Dickinson School of Law, Carlisle, PA

Year Graduated: 1980

Special area of practice/interest, if any: Mediation and Arbitration

Tell us something about your practice that we might not know: Being a good mediator, like being a good trial lawyer, requires hard work and preparation.

Most memorable court moment: When Judge Livingstone Johnson told opposing counsel to stop talking because he wanted to hear more of my mellifluous voice fill the Courtroom.

Most embarrassing (but printable) court moment: Turning around after a closing argument to find my wife and two children sitting in the back of the courtroom.

Most memorable WPTLA moment: Lecturing WPTLA members about how to get better at mediation.

Happiest/Proudest moment as a lawyer: After a good verdict, my client crying like a baby and hugging me.

Best Virtue: Integrity

Secret Vice: Coin collecting

People might be surprised to know that: I love French and Indian War history and have collected many of Artist Robert Griffing's prints depicting the era

Favorite movie: Last of the Mohicans and Gladiator

Last book read for pleasure, not as research of a brief or opening/closing: "The Quartet" by Joseph Ellis

My refrigerator always contains: Provolone cheese

My favorite beverage is: 7 & 7 (Seagram's)

My favorite restaurant is: Monterey Bay Fish Grotto

If I wasn't a lawyer, I'd be: Teaching history at a local college.

PENNSYLVANIA SUPREME COURT TO ISSUE OPINION ON JURY SELECTION

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

In 2014 the Pennsylvania Superior Court issued a plurality opinion in *Cordes v. Associates of Internal Medicine,* 87 A.3d 829 (Pa. Super. 2014), *en banc*, *appeal denied*, 102 A.3d 386 (2014). The opinions authored by then Judge Wecht and Judge Donahue set forth an analysis of Pennsylvania law that championed the protection of a litigant's ability to empanel a fair and impartial jury, free from bias and perceived prejudice. *Cordes* was a medical malpractice case that was tried in Beaver County. During voir dire, the court required the litigants to make any challenges for cause and exercise peremptory challenges after each prospective juror was questioned. Plaintiff exercised all four of her peremptory challenges prior to encountering three jurors who appeared to have a relationship or tie to the defendants. The jurors each had an admitted connection to a defendant, either through employment or a familial link (one juror's parents were current patients of a defendant and another's spouse was a current patient of a defendant). Despite these ties to a party, each juror proclaimed he or she could be unbiased. The trial judge therefore refused to strike the jurors for cause and all three were empanelled. After a defense verdict, plaintiffs appealed, alleging error on behalf of the trial judge for refusing to strike these jurors for cause.

In the *Cordes* opinions, Judge Wecht and Judge Donahue wrote extensively about the need to empanel a jury with "a clean slate and an open mind" and "the importance of insuring that not only is a jury impartial in fact, but one that appears to be free of the taint of partiality to a disinterested observer." Judge Donahue accurately wrote that too often trial courts "inexplicitly find it necessary to shoehorn certain prospective jurors into the jury box when faced with information that at the very least gives the appearance of an inability to be impartial." In practice, we know all too well, at least in Allegheny County, the final question of the court clerk during voir dire: "But, not withstanding your [relationship to the defendant; employment by the defendant; identified or inferred bias], after hearing all of the evidence, could you be fair and impartial?" If the prospective juror answers this question affirmatively, the overwhelming majority of the time he will not be excused for cause, at least pre-*Cordes,* even if there is a reasonable basis to suspect bias. However, because *Cordes* was a plurality opinion, it is not binding and some courts have refused to apply the analysis and reasoning set forth in the opinions in support of a rule requiring trial judges to exclude jurors with potential or perceived bias. There have been other appellate opinions addressing jury selection but to date, our Supreme Court has not specifically addressed the issue post-*Cordes.* However, the Court is poised to do so in the case of *Shinal v. Toms,* 122 A.3d 1066 (Pa. Super. 2015), *alloc granted*, 897 MAL 2015 (March 23, 2016).

The *Shinal* case is a medical malpractice case that originated in Montour County. Mrs. Shinal had brain surgery performed by defendant Steven Toms, M.D., the Chief of Neurosurgery at Geisinger Clinic. During the surgery Ms. Shinal's carotid artery was perforated leaving her with significant impairments with vision and ambulation. The Shinals sued Dr. Toms and Geisinger alleging lack of informed consent and negligence. Jury selection took place in February of 2013 but because of the large number of prospective jurors who had ties to Geisinger, a jury could not be seated and the trial judge was forced to continue the case. Between the first attempt to empanel a jury in February and the second attempt in May, the trial judge dismissed Geisinger as a party defendant based on a partial motion for summary judgment. The case proceeded against Dr. Toms only on an informed consent claim. During the voir dire, the trial court refused to strike four prospective jurors who would have conceivably been dismissed under *Cordes*. The four challenged jurors were (1) a secretary at Geisinger's sleep lab; (2) a spouse of an administrative employee who had worked Geisinger for 35 years; (3) a customer service representative for the health plan administered by Geisinger; and (4) a retired physician assistant who had worked at Geisinger for years. Because each of these witnesses indicated that they did not know Dr. Tom's personally and had not worked with him personally, they were not stricken for cause. To remove them from the panel, plaintiffs exhausted their peremptory challenges. The case went forward and a defense verdict was rendered. Plaintiffs appealed, raising several issues, one of which was whether the trial court erred in refusing to dismiss the above-referenced jurors for cause. In addressing this issue, the plaintiff/appellant relied heavily on *Cordes.* The Superior Court, in a 2-1 opinion written by Judge Platt and joined by Judge Allen, affirmed the trial court, concluding that the relationship of these prospective jurors to a non-party did not give rise to a close situational, familial or employment relationship. Judge Platt further highlighted that *Cordes* was not a binding or controlling precedent. The majority in *Shinal* then took the unprecedented step of concluding that because the plaintiffs did not request additional preemptory challenges after exhausting them on the challenged jurors, the issue was not properly preserved for appellate review.

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PENNSYLVANIA … *(Continued from Page 6)*

Judge Lazarus wrote a brief dissenting opinion indicating that "for the reasons set forth in *Cordes v. The Associates in Internal Medicine*, I respectfully dissent. Accordingly, I would reverse the denial of appellant's post-verdict motion and remand this matter for a new trial." A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was granted on March 23, 2016 and three issues were accepted for review.[1] The issue of whether and when to strike a juror for cause was accepted as follows:

> "Is the plaintiff in a civil trial entitled to a for cause strike of prospective jurors with close familial, situational or financial relationships with the defendant's employer, whether direct or indirect, when the claimed negligence of the defendant occurred in the course and scope of defendant's employment?"

Oral argument was held on November 2, 2016.

Considering Judge Platt specifically addressed the plurality status of *Cordes* and the Supreme Court has accepted this issue, I am optimistic that we will get clear direction from a majority of the court on whether there exists a per se exclusion for jurors who have a familial, financial or situational relationship to one of the defendants. However, one of the key factual differences between *Cordes* and *Shinal* is the fact that the institutional defendant with the relationship to the jurors was dismissed in *Shinal* prior to the jury being empanelled. Hopefully the Court will clearly set forth the test to be applied under both circumstances – when the defendant with the relationship to the juror is a party defendant and when the relationship is with the employer of the defendant.

Our ability to successfully represent our clients wholly depends on our ability to empanel a jury with a clean slate and an open mind. Let us hope our Supreme Court clearly and definitively adopts and incorporates the best portions of the well researched and well written opinions of Judges Wecht and Donahue from *Cordes*.

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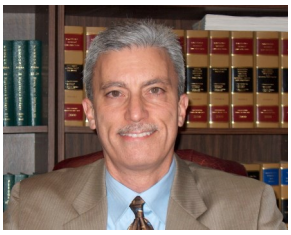
[1] The other two questions accepted for review are as follows: (2) Can a panel of the Superior Court create new law and require counsel in a civil trial to motion the court to allow an additional preemptory challenge each time a for cause challenge of a potential juror is denied and/or object continuously after the initial Motion to Strike the potential juror for cause is denied in order to preserve the issue for appeal? (3) May a court in a medical malpractice trial alleging lack of informed consent by the surgeon ignore Pennsylvania common law and Medical Care Availability and Reduction of Error Act, 40 P.S.§§ 1303.101, *et seq.*, and charge the jury that information received from the non-physician "qualified staff" at the hospital can be considered in deciding of whether the surgeon obtained the informed consent from the patient for surgery?



WHAT TO DO WHEN YOUR PERSONAL INJURY CLIENT IS IN BANKRUPTCY

*By: Dave Landay, Esq. ***

BACKGROUND

There are two types of consumer bankruptcies. First, there is a Chapter 7, which is a straight bankruptcy where the debtor is completely discharged of certain debts. Second, there is a Chapter 13 reorganization, where the debtor pays back his debts over time at a very reduced rate.

Any personal injury attorney who is representing a client (debtor) who has or may be filing bankruptcy, has to be aware of the ramifications. If the client files for bankruptcy after the date of his injury, then his cause of action is a potential asset which must be disclosed to his creditors in his bankruptcy filings. If he later receives a tort settlement or award, depending on his bankruptcy exemptions, discussed below, he may have to turn over some or all of his net settlement to the bankruptcy trustee.

Chapter 13 cases present special problems. Even if the bankruptcy has already been filed and is pending on the date of the injury, the plaintiff's receipt of the net settlement funds may constitute "disposable income" which must be applied toward the plan payments. 11 U.S.C.§1322, 1325(b). If, however, the net settlement funds are exempt, as discussed below, there is a split of authority as to whether they still constitute "disposable income." One Western PA bankruptcy judge has found that the net settlement funds are only exempt to the extent reasonably necessary for the support of the debtors or their dependents. *Claude v. Claude*, 206 B.R. 374 (W.D. PA. 1997). However, a local bankruptcy attorney has advised me that the judges here do not consider exempt assets as "disposable income."

PROCEDURE

If a bankruptcy case is pending, the plaintiff's attorney must be appointed as Special Counsel by the court. Usually, if the attorney sends a copy of his fee agreement to the bankruptcy attorney, he will then file a motion with the Bankruptcy Court. These motions are never opposed because a personal injury lawsuit could generate additional funds for the creditors.

The Bankruptcy Judge will then issue an order employing plaintiff's attorney as Special Counsel. The court's order may or may not approve the amount of the contingency fee. The court's order may also prohibit the plaintiff's attorney from retaining other professionals (e.g., expert witnesses) without prior court approval. Any settlement is also subject to court approval. Hence, any settlement should be contingent on receiving this approval.

BANKRUPTCY EXEMPTIONS

If the plaintiff's net settlement exceeds his bankruptcy debt, then he gets to keep the excess. He may also be entitled to the following exemptions and keep these funds as well:

A. "Personal bodily injury" payment 11 USC 522(a)(II)(D)

1. Limited to $22,975.00 (as of April 2016).

2. By statute, this does not include compensation for pain and suffering or actual pecuniary loss. This is a troubling exemption since it appears to only include payment for scarring or loss of life's ordinary pleasures.

3. The legislative history gives loss of a limb as an example of bodily injury that will result in exempt compensation.

4. Case law suggests that payment for personal bodily injury, even if not permanent, can be exempt (and the plaintiff/debtor can keep these funds) if the injury is significant, appreciable or cognizable. For example, in addition to loss of a limb, bone fractures, dislocation and cartilage tears have satisfied this requirement. In re: *Shumac*, 425 B.R.139 (Bankr. W.D. PA. 2010). As another example, a plaintiff that suffered herniated discs and was still not working had sustained a personal bodily injury sufficient to exempt his settlement funds. *Walsh v. Reschick*, 343 B.R.151 (Bankr. W.D. PA. 2006).

5. One local bankruptcy judge determined that all of plaintiff's settlement was for pecuniary loss and, thus, not exempt, when the judge calculated that the wage loss claim exceeded the settlement. *Walsh v. Kelin*, 341 B.R. 521 (W.D. PA. 2006).

6. If spouses file bankruptcy as joint debtors, the non-injured spouse's loss of consortium claim is arguably exempt because it is derived from the injured spouse's personal bodily injury. In re: *Shumac*, 425 B.R.139 (Bankr. W.D. PA. 2010). This permits the spouses to exclude from their joint bankruptcy up to an additional $22,975.00, provided that the injured spouse's injuries were significant enough to constitute a "personal bodily injury."

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WHAT TO DO … *(Continued from Page 8)*

7. Uninsured motorist claims (and presumably underinsured motorist claims) payments are also potentially exempt if they are payments for a "personal bodily injury." In re: *Martinez-Whitford* (1996 B.C.D.C.Mass) 199 BR. 74, 36 C.B.C. 2.d 1130.

B. Loss Of Future Earnings 11 USC 522(D)(11)(E)

1. Payment for the plaintiff's loss of future earnings or an individual of whom the plaintiff is or was a dependent, "to the extent reasonably necessary for the support of the debtor any dependent of the debtor" are exempt from bankruptcy.

2. Apparently, this is not an actual pecuniary loss, but a potential future pecuniary loss.

3. The only limit on the exemption is the amount necessary for support.

C. Miscellaneous (Wild Card) Exemption 11 USC 522(d)(5) (Review Schedule C of the Bankruptcy Petition)

1. If the plaintiff has not already used up this exemption, he may claim:

A. $1,225.00 (as of April 2016).

And

B. Up to $11,500.00 (as of April 2016) of any unused amount of the residential exemption (11 USC 522(d)(1).

2. Even if the plaintiff cannot satisfy the "personal bodily injury exemption" above, he can still take this exemption as long as he hasn't otherwise used it up for other items.

D. Wrongful Death Benefits 11 USC 522(d)(11)(B)

If the plaintiff debtor was a dependent of the decedent, he can exempt wrongful death benefits to the extent necessary for his support or the support of any of his dependents.

PRACTICE POINTERS

1. If your client files for bankruptcy after the date of his injury, make sure he notifies his bankruptcy attorney to include this as an asset on his bankruptcy schedules and to claim any available exemptions. A debtor may freely amend his schedules any time before his case is closed. Fed. R. Bankr. P.1009(a). This includes a schedule of exemptions, which may be amended at any time unless the amendment would cause prejudice to another party or is filed in bad faith. In Re: *Luna*, 2003 Bankr. LEXIS 1222 (2003).

2. For Chapter 13 cases, make sure your client notifies his bankruptcy attorney that he may receive a settlement even if the bankruptcy was filed before the date of his injury. The net settlement proceeds could be considered "disposable income," affecting the amount of the client's payments under his reorganization plan.

3. Make sure you are appointed as Special Counsel, even if you settle the case without filing suit, and always get court approval before settling.

4. Coordinate with the bankruptcy attorney how he will be claiming the exemption(s) for the personal injury claim proceeds, since he may not be familiar with this aspect of bankruptcy law. You can look up the bankruptcy schedules and other documents filed for your client at www.pacer.org. You will need an account, but it's free. There are minimal charges for downloading the documents.

5. Keep in mind that you were hired for the benefit of the bankruptcy estate (i.e. creditors) as well as the debtor (your personal injury client). Before settling the case, document all significant injuries and medical treatment, how long the client has and will suffer from these injuries, including whether they are permanent, any loss of future earnings as well as past earnings and the extent of any loss of consortium. You should seek advice from the debtor's bankruptcy attorney before including terms in the settlement that may benefit the debtor to the detriment of the creditors, however.

6. If trying the case to verdict, ask for special interrogatories separately detailing the plaintiff's items of damages, including loss of past and future earnings.

Save the Date!

Saturday, Oct 21, 2017
5K Run/Walk/Wheel

New Location: North Park

BY THE RULES

*By: Mark E. Milsop, Esq.***

Some Good News

Some of you may recall that in a previous issue of the Advocate, I had offered some concerns about the Superior Court's decision in *Shearer v. Hafer*, 2016 PA Super 61, 135 A.3d 637 (Pa. Super. 2016). There, the Superior Court held that a Plaintiff's attorney was not entitled to sit in on neuropsychological testing. The good news is that the Pennsylvania Supreme Court has agreed to hear Allowance of Appeal.[1] I hope to update all of you once the case has been decided.

In addition to this case, the Pennsylvania Supreme Court has granted Allowance of Appeal on a number of other cases raising issues of concern to trial lawyers who represent injury victims. Hopefully this signals a more robust court.

Minor's Petitions

I have become aware of recent changes to the Armstrong County Local Rules affecting Minors' Petitions. The Armstrong County Local Rule for Minors' Petitions is Rule 2039. The amended rule really has three significant features that differ from what most practitioners are accustomed to. Those features are:

- Both parents must sign off on the Petition or the non Petitioning parent must be served;
- Suit must be filed on the Defendant and service effected before the Petition will be heard;
- Furthermore, it is the intent of the Rule that no Petitions be filed in Orphans Court without suit.

Although not unusual, the rule further calls for a hearing and the minor to be present at the time of hearing.

More specifically Local Rule Rule 2039(b) provides:

> (b) The Court will not entertain a petition under Pa.R.C.P. 2039 unless the minor's guardian has commenced an action in this Court by filing either a praecipe for writ of summons or a complaint, with subsequent service of the writ or the complaint.

In my experience, this type of requirement is unique to Armstrong County. However, I have learned that the Prothonotary who sits in motions court is vigilant about this requirement. Although at least one judge made some allowance when the rule was new, it is quite possible that future motions will be denied for failing to abide by these requirements.

The comment to this rule reveals that it is based upon a 1950 Philadelphia County Case, *Roche v. Scavicchio*, 70 Pa. D&C 75 (Phila. 1950)[2]. There, the Court found that it was compelled to dismiss a petition to settle a minor's action where a writ had been filed, but no service was made and no Complaint was filed. The Court reasoned that Pa.R.C.P. 2039 contemplated the filing of an "action" and that an unserved writ and the absence of a Complaint resulted in the absence of an action. The Court further found that the ability to try the case was a prerequisite to the ability to grant a petition to settle.

Pa.R.C.P. 2039(a) does provide that:

> (a) No action to which a minor is a party shall be

[1] The grant of Allowance of Appeal can be found at *Shearer v. Hafer*, No. 248 MAL 2016, 2016 Pa. LEXIS 2014 (Sep. 13, 2016) The Per Curiam Order granting Allowance of Appeal provides:

> **AND NOW**, this 13th day of September, 2016, the Petition for Allowance of Appeal is **GRANTED**.
>
> The issues, as stated by Petitioners, are:
>
> a. Whether the Superior Court should be reversed because it erred in affirming the trial court's order granting [Respondents'] request for a protective order where Mrs. Shearer has the right to have counsel present and to audio record all portions of a defense neuropsychological examination pursuant to the clear language of Pa.R.C.P. 4010[?]
>
> b. Whether the Superior Court should be reversed because it erred in affirming the trial court's order granting [Respondents'] request for a protective order where Mrs. Shearer has the right to have counsel present and to audio record all portions of a defense neuropsychological examination and where [Respondents] have not shown good cause to justify stripping Mrs. Shearer of these protections granted to her under Pa.R.C.P. 4010[?]
>
> In addition to the issues framed by Petitioners, the parties are directed to address the following question: Whether the Superior Court erred in holding that the appeal was properly before it under the collateral order doctrine of Pa.R.A.P. 313?

[1] This decision is somewhat elusive to be found. It could not be found via Lexis or Casemaker, but could be found on the Legaleagle website.

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BY THE RULES *(Continued from Page 10)*

compromised, settled or discontinued except after approval by the court pursuant to a petition presented by the guardian of the minor.

However, the remainder of the rule includes other subsections and the limitation in the analysis of the 1950 Philadelphia Court of Common Pleas, is that the rule does not require an action. In addition, nothing in Rule 2039 or the *Roche* decision would preclude an independent Petition being entertained in the orphans court division.

Obviously Armstrong County Local Rule 2039 is concerning since where an action has not already been filed and served, the requirement to do so results in unnecessary expense and unnecessary delay which may ultimately diminish the net benefit to the minor. As such, it hoped that the Armstrong County approach will not be emulated in other counties.

Another issue is the presence of a requirement that a non-joining parent be served with petition. This provision may also constitute a source of expense and delay. Certainly in the case of an intact working relationship between parents, this may prove to be a small non-demanding step. However, where there is acrimony between the parents or indifference to the minor by one parent such a requirement can become expensive, time consuming and also emotionally troubling to the involved minor. Moreover, in some cases, the identity or whereabouts of a parent may not even be known.

It is respectfully suggested that the best practice would be to require only joinder or service upon a parent who has shared legal custody of the minor. Furthermore, there should be provision that a parent whose whereabouts are truly unknown, need not be notified.

** *Mark is a WPTLA Member from the firm of Berger and Green. Email: mmilsop@bergerandgreen.com*

UPCOMING EVENTS

Friday, Feb 24, 2017	**3 Credit CLE Program & Lunch** *Focus Groups 101: Everything You Need to Know to Get Started* Grant Room, Gulf Tower, Pittsburgh CLE 9:00 am - 12:30 pm Lunch 12:45-1:45 pm Board Meeting follows
March, 2017	**Washington County Dinner Meeting** The Meadows Casino, Washington
April, 2017	**Annual Membership Meeting** Election of Officers & Board of Governors Pittsburgh
Saturday, Apr 29, 2017	**Habitat for Humanity Event** New Brighton, Beaver County 9:00 am - 3:00 pm
Friday, May 5, 2017	**Annual Judiciary Dinner** Heinz Field, Pittsburgh Cocktails 5:30-7:00 pm Dinner and Program 7:00 pm

COMP CORNER

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

A Brief Update on *Protz*

The Supreme Court held oral argument on *Protz v WCAB* on November 1, 2016. Two briefs had been filed by both sides and numerous amicus briefs were also filed. These included briefs by the Pennsylvania Association for Justice, a self-insurance association and the Insurance Federation.

Protz was assigned as the appellant and Derry Area School District the appellee, as there were cross-appeals accepted by the court. The bulk of the questioning was done by Justices Wecht and Donahue. Your author does not have a sense as to how the court will rule.

Interesting Firefighter Cancer Case

The Commonwealth Court has recently interpreted section 108(r) of the Worker's Compensation Act. This section deals with cancer suffered by a firefighter caused by exposure to a known carcinogen. The case is *City of Philadelphia Fire Department v. WCAB (Sladek)*, 579 C.D. 2015. Sladek alleged he developed malignant melanoma as a result of exposures on the job to IARC Group 1 carcinogens. The claimant prevailed in his claim petition before the Worker's Compensation Judge and the WCAB.

On appeal the Fire Department argued three things. First, it argued that claimant failed to meet his burden of proof that malignant melanoma qualifies as an occupational disease under section 108(r). Second, it argued that the Worker's Compensation Appeal Board erred in finding that the claimant's malignant melanoma was not caused by work exposures. Lastly, it argued the Board should have considered whether the claimant's expert satisfied the standards in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) ("the Frye test…is part of [Pennsylvania Rule of Evidence 702] and under *Frye*, novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community").

The court analyzed the interplay between section 108(r), section 301(e), and the changes to section 301(f) made by Act 46. It stated, "In sum, to establish that a firefighter's cancer is an occupational disease, the firefighter must show that he has been diagnosed with a type of cancer 'caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen.'" If the firefighter establishes that the cancer, is an occupational disease the claimant then can utilize the statutory presumptions in section 301(e) and (f).

In reaching its decision, the Commonwealth Court focused on the interpretation of section 108(r). It concluded that claimant's burden of proof includes showing that the cancer that exists is caused by exposure to Group 1 carcinogens existing in the workplace. It ordered a remand of the case for the claimant to show whether or not malignant melanoma is a disease caused by exposure to such factors.

*** Tom is a WPTLA Member with the firm of Abes Baumann, P.C.*
Email: tcb@abesbaumann.com

LOCAL VERDICTS

President Sandy Neuman is collecting verdicts to be published to our members in an effort to combat the common refrain that local juries never give money to plaintiffs. Verdicts reported by our members will be published here. Please continue to submit verdicts to Laurie at laurie@wptla.org.

Dave Landay had a slip and fall case in October 2016 in Allegheny County, before Judge McCarthy. The verdict was $50,000, reduced by 13% for comparative negligence.

Erin Rudert had a motor vehicle collision case in November 2106 in Allegheny County, before Judge O'Brien. The verdict was $34,000, but molded to $35,463.62 to account for delay damages.

We Need Article Submissions!!

This publication can only be as good and the articles that are published, and those articles come from our members. Please contact our Editor, Erin Rudert with any ideas you have, or briefs that could be turned into articles. Erin can be reached at 412-338-9030 or er@ainsmanlevine.com

HOT OFF THE WIRE

*By: James Tallman, Esq.***

Summary judgment was proper where expert testimony was properly excluded regarding broken chair: *Nobles v. Staples*, 2016 Pa. Super. LEXIS 646 (Nov. 8, 2016) – Superior Court upheld summary judgment where trial court determined that expert report was not admissible under Pa. R.E. 702 because there was nothing in his report to show that he applied any scientific expertise to reach his conclusion that the chair was defective.

In *Nobles*, a City of Philadelphia Police Officer sued Staples after a chair, in which he was sitting, snapped causing him to fall and suffer head, neck, back and shoulder injuries. Shortly after his fall, Plaintiff photographed the broken chair. The chair, however, was then disposed of by another police officer. Plaintiff maintained that the chair had been purchased from Staples. The case progressed through discovery. Prior to trial, Staples filed two motions in limine. One sought to bar testimony that the chair had been purchased at Staples and one seeking to bar Plaintiff's expert testimony.

On appeal, the Superior Court focused on the motion in limine seeking to bar Plaintiff's expert testimony. The appellate court held that the trial court properly treated the motion in limine as a motion for summary judgment. The appellate court also agreed with the trial court that Plaintiff's expert opinion lacked any scientific basis for the conclusion that the chair was defective and/or malfunctioned. The court rejected Plaintiff's argument that by breaking under normal use within 3 years of purchase it necessarily failed to meet the furniture manufacturer standards for office chairs and, therefore, was defective. The court rejected this as circular reasoning not supported by any actual scientific measurements or data and, essentially, res ipsa loquitor. The Superior Court affirmed the trial court's dismissal of the action. This case highlights the importance of preserving evidence.

Superior court holds the finding serious injury does not mandates new trial on pain and suffering as a matter of law: *Smith v. Gee*, 2016 Pa. Super. Unpub. LEXIS 2980 (Aug. 17, 2016) – Superior Court affirmed judgment of trial court denying plaintiff's motion for new trial after verdict where jury found serious impairment of bodily function but awarded only $500 in pain and suffering damages.

Plaintiff appealed from the trial court's judgment after a jury trial, in this motor vehicle accident case. Plaintiff was a passenger in the vehicle driven by her daughter, when they were rear-ended by defendant. Defendant stipulated to liability. Plaintiff was limited tort. Following a jury trial, the jury found that the plaintiff had sustained a serious impairment of bodily function, but awarded damages of only $500 for pain and suffering. Medical expenses were stipulated.

In its non-precedential decision, the Superior Court applied existing case law to the limited tort arena that where the jury is presented with conflicting testimony on the degree of injury sustained, a seemingly low or unfair jury verdict will not be overturned. In this case, the court found numerous factors to support the low verdict such as plaintiff's preexisting conditions, her inconsistencies in reporting of injuries, her omission of details about a post-accident vacation, and pictures of plaintiff in high-heels. In light of such evidence, the jury's verdict could not be said to bear no reasonable relation to the loss suffered by the plaintiff based on uncontradicted evidence or to "shock one's sense of justice." The trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

District Court for the Middle District of Pennsylvania holds that Federal Motor Carrier Safety Regulations ("FMCSRs") do not preempt common law claims. *Ramos-Becerra v. Hatfield*, 2016 U.S. Dist. Ct. LEXIS 136705 (M.D. October 3,2016) court denied motion for summary judgment.

Plaintiffs in *Ramos-Becerra* suffered catastrophic injuries when he was struck by the defendant's tractor-trailer, while lawfully on the shoulder of Interstate 81. The defendant driver fled the scene, but was subsequently arrested and charged with numerous crimes, including DUI. His BAC was .17. The defendant driver had a history of alcohol related offenses and a criminal conviction for grand theft auto. In addition to suing the driver, Ricky Hatfield, plaintiff also sued J.B. Hunt Transport, Inc.

J.B. Hunt filed a motion for summary judgment. One foundational issue of the motion for summary judgment was the applicability of the FMCRs and whether they preempt Pennsylvania common law. The court began its analysis by reviewing the various forms of preemption. It then noted that the Court of Appeals for the Third Circuit has yet to address the issue. Other federal courts, however, have addressed the issue and have rejected the argument that the FMCR preempts common law claims. The court concluded that the FMCR does not explicitly require preemption and that feder-

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

al law expressly leaves room for state regulation. Further, the court found that Pennsylvania common law for negligence and negligent hiring do not conflict with the FMCR. Based on this ruling, the court held that regardless of J.B. Hunt's duties under the FMCR, it could be liable under Pennsylvania common law.

One limit for claimant who asserted negligence and negligent entrustment: *State Farm Mut. Auto Ins. Co. v. DeMarco*, 70 Beaver Co. L. J. 105 (2016) – Trial court granted motion for summary judgment in declaratory judgment action for insurer limiting claimant to one limit.

The claimant was injured in car accident. The driver was not the owner. The claimant received policy limits the State Farm policy insuring the driving. The claimant asserted a second claim to State Farm against owner of the vehicle for negligent entrustment. State Farm filed a declaratory judgment action arguing that paid the entire amount of third-party liability coverage available when it paid the policy limits based on the driver's negligence. The trial court noted this to be an issue of first impression. The trial court analyzed the issue as one of contract interpretation and not whether plaintiff had separate claims for negligence and negligent entrustment. The trial court found the policy language limiting liability coverage to "$25,000 per person" not to be ambiguous. Thus, claimant was entitled to only $25,000 even though he had two separate claims against separate entities.

Derivative tort claims not controlled by forum selection clause in UIM policy: *Cid v. Erie Ins. Group.*, 2016 Pa. Super. Unpub. LEXIS 3824(Pa. Super. Oct. 20, 2016) – Superior Court reversed trial court grant of preliminary objections enforcing UIM forum selection clause.

Plaintiff filed claims against Erie for breach of contract, fraud, bad faith, abuse of process, and civil conspiracy, arising out of Erie's handling of claims for UIM benefits from two separate accidents. The case was filed in Philadelphia county. Erie filed preliminary objections asserting a forum selection clause that required UIM claims to be filed in Montgomery county. The trial court granted the preliminary objections and transferred the case to Montgomery county. Plaintiff appealed.

On appeal, the Superior Court analyzed the forum selection clause. The clause was limited to claims regarding "whether or not anyone we protect is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle." All other claims were to tried in a court of competent jurisdiction. Thus, the Superior Court held that the forum selection clause did not extend to the derivative claims at issue and reversed the trial court decision.

UPDATE: En banc panel of Superior Court reverses petit panel decision in *Valentino v. Phila. Triathlon*, 2016 Pa. Super. LEXIS 663 (November 15, 2016).

In the Spring issue of *The Advocate*, the decision in *Valentino v. Phila. Triathlon*, 2015 Pa. Super. LEXIS 862 (December 30, 2015) was reported. In the earlier *Valentino*, in a 2 – 1 decision ((J. Olson dissenting), the court held that a wrongful death claim by a spouse was not barred by the waiver of liability signed only by the decedent husband. The decedent husband drowned during the swimming portion of the Philadelphia Triathlon. He had signed a broad waiver of liability which constituted an express assumption of the risk by the decedent.

In the Superior Court's recent 6 to 3 decision, the majority of the en banc panel held that the spouse's right recover on a wrongful death claim was derivative of the decedent's right to recover. In *Valentino*, the decedent had waived his right to recover. The en banc panel held, therefore, the spouse's right to recover for wrongful death was barred by the waiver of liability.

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

New Location Needed for Annual Comeback Award Dinner

The Board of Governors would like to enhance this dinner for 2017 to include outside contributors to the Awardees Charity of Choice, and hopefully turn this truly inspiring dinner into an awesome event.

That entails moving the event to a larger location. The Comeback Award committee is asking for recommendations on Pittsburgh locations that may be suitable.

If you have been to an event recently in a downtown location that holds 150-200 people, and you think it might be appropriate for our event, please contact our Executive Director, Laurie Lacher, at 412 -487-7644 or laurie@wptla.org

Stay tuned for more details!

TRIVIA CONTEST

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

Trivia Question #9

The New England Patriots, with Tom Brady as their quarterback, have won (currently) a total of 24 playoff games. Of the other 31 NFL franchises, how many *franchises* have won more playoff games in their history than the Patriots with Brady?

Please submit all responses to Laurie at laurie@wptla.org with "Trivia Question" in the subject line. Responses must be received by Friday, March 3, 2017. Prize for this contest is a $100 Visa gift card. Winner will be drawn March 4, 2017. The correct answer to Trivia Question #9 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 #8 - **How many cervical vertebrae do giraffes have? Answer: 7**. Even though giraffes have much longer necks, they only have 7 cervical vertebrae, the same number as humans. In fact, almost all mammals have 7 cervical vertebrae, regardless of neck length.

Congratulations to Question #8 winner Dave Landay, of David M. Landay, Attorney at Law.

C/O Robert W. Eyler
83 Westminster Place
Pittsburgh, PA 15209
reyler@comcast.net

January 7, 2017

Sandra S. Neuman, President
Western Pennsylvania Trial Lawyers Association
909 Mt. Royal Boulevard – Suite 102
Pittsburgh, PA 15223-1030

Dear Sandy:

The Steelwheelers would like to once again thank the Western Pennsylvania Trial Lawyers Association for its incredible support of the Steelwheelers through the President's Challenge 5K over the past sixteen years.

The great success of the run again this year can be attributed to the efforts of Sean Carmody, the President's Challenge Committee, Laurie Lacher and the generosity of the members of the WPTLA. As we have said before, the Steelwheelers may not be here today if it were not for the WPTLA and the President's Challenge 5K.

This 16 year relationship has continued to allow us to focus on providing competitive sports opportunities for people with disabilities. The money raised is used to fund competition and equipment for the wheelchair basketball and quad rugby and hand cycling teams. The rugby team hosted the 14th Annual Steel City Slam Quad Rugby Tournament in Slippery Rock in November and is preparing to go to Florida for a tournament and for the postseason. Our tournament is a favorite among rugby teams and provides the only opportunity for our families to see us play locally and has provided Slippery Rock students a chance to volunteer and be exposed to the sport. In fact, for the past 4 years, we have had students who volunteered at the tournament seek us out to help the team at practices and travel with the team to assist. The tournament would have never been possible had it not been for the support of the WPTLA.

The members of the Steelwheelers thank you for your contribution and for continuing to be the life blood of the Steelwheelers through the President's Challenge 5K.

With great appreciation,

The Pittsburgh Steelwheelers

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

...Through the Grapevine

Our condolences to the family and friends, especially the Schiffman Firm, on the recent passing of Joseph Pasqualini, our 2015 Comeback Awardee.

Member Mark Smith has changed the name of his firm to The Law Office of Mark A. Smith. All other information remains the same.

Our condolences go out to junior member Anthony Lombardo, on the recent passing of his mother.

Congratulations to Judge Scanlon of Scanlon ADR, one of our Business Partners, on the birth of his grandson this past Fall.

Best wishes to Board of Governors member Laura Phillips on her upcoming nuptials.