THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

Volume 29, No. 3
Spring 2017

UPCOMING EVENTS FOR WPTLA

The **annual Membership Meeting** is being held on **April**, **18** at **Carmody's Grille** on Neville Island, in the Pittsburgh area.

Come and help your community on **Sat, April 29** as we work on a home with the **Beaver County Habitat for Humanity**.

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

Annual Ethics & Golf occurs **Thur, May 25** at **Green Oak Country Club in Verona**.

A **Lunch 'n Learn** is scheduled for **Thurs, Jun 1** in the **Gulf Tower**. Nora Gieg Chatha will discuss guardianships and updates to the PA Power of Attorney laws.

Fri, Jun 2 will be **CLE & Golf** at **New Castle Country Club**, featuring Business Partner Don Kirwan of Forensic Human Resources.

CHANGES TO THE COMEBACK AWARD CEREMONY PROCESS RE: COMEBACK AWARD DINNER

*By: Max Petrunya, Esq. ***

As an active participant in the Western Pennsylvania Trial Lawyers Association (WPTLA) for the last seven years, one event that stands out in the organization's lustrous history is the Comeback Awards. Our Comeback Award winners have shown that regardless of the injuries they have sustained, nothing is impossible. The WPTLA Comeback Award Ceremony is an opportunity to highlight not only the triumphs of the individual award winner, but also an opportunity to highlight the immense benefits that come with the assistance the Plaintiff's bar can provide in obtaining the help an individual needs on the road to recovery.

Each year, the Comeback Award recipient selects a charity to receive a monetary donation from the WPTLA. Traditionally, the WPTLA has accepted nominations for the Comeback Award in August, with the winner selected close to the event date.

This year, in an effort to garner more attention for the Comeback Award Ceremony, and in an effort to increase donations to the Comeback Award winner's charity, the WPTLA will be accepting nominations for the Comeback Award recipient in April, with our organization selecting its Comeback Award winner by June. This change in the process will allow the WPTLA to publicize the Comeback Award winner and Comeback Award Ceremony sooner, and open the award dinner to more members of the WPTLA and members of the general public.

It is our hope that with the additional publicity for this event, more firms and organizations will attend and the Comeback Award winner's charity will gain extra donations. I encourage all members of the WPTLA to remind their family, friends, and colleagues about this event and to come out and support the Comeback Award winner and their charity at this event. The more individuals that register for this event, the more money we can help raise for our Comeback Award winner's charity. This will help bring more attention to the continued need for trial lawyers in our community to assist individuals that have been injured through no fault of their own.

I look forward to seeing all of you at the Comeback Award dinner this year and hope that our new structure for the award dinner is a success. Nominations for this year's Comeback Award can be sent to our Executive Director, Laurie Lacher. If you have any questions, concerns, or suggestions about the award and/or this year's dinner, please do not hesitate to contact Max Petrunya (mpetrunya@peircelaw.com) or Laurie Lacher (laurie@wptla.org).

***Max is a WPTLA Member from Robert Pierce & Associates, P.C. Email: mpetrunya@piercelaw.com*

President
Sandra S. Neuman

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A Message from the President …

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

Throughout the past 20 plus years I've been a trial lawyer, there have been many occasions where anti-litigation messages through the Chamber of Commerce or other tort reform organizations have instilled panic or fear among those in our profession. It is certainly not new news that there is a large constituency that would like to put trial lawyers out of business. However, organizations such as ours and the Pennsylvania Association for Justice and the American Association for Justice have always worked to combat the dissemination of "fake news" as it relates to an explosion of "frivolous litigation," an alleged "medical malpractice crisis," or "out of control juries" that endanger business and healthcare. As trial lawyers, we know that these crises do not exist. The public does not and we are up against powerful insurance companies with unlimited resources to influence and control the message regarding lawsuit "abuses." Once again, civil justice is under attack and this time, with a republican controlled House and Senate, we need to be ready to take action.

As I am sure you are aware, the U.S. House has voted on three anti-civil justice bills that will now be sent to the Senate: HR 720, HR 725, and HR 985. The first, HR 720, the "Lawsuit Abuse Reduction Act," would make Rule 11 sanctions mandatory rather than discretionary. Currently, in Federal Court, the judge has the discretion to issue sanctions against any party who submits pleadings for an improper purpose that contain frivolous arguments. If passed, HR 720 would require the court to impose sanctions for "frivolous" conduct and such sanctions "must compensate the parties injured by the conduct in question." HR 725, the "Innocent Party Protection Act," would impact joinder and the ability to remand a case to state court after it was moved to federal court because of diversity of citizenship. The Act targets "fraudulent joinder" and provides that if the court determines that a defendant has been improperly joined, the claims against that party must be dismissed and the motion for remand must be denied. Last but not least, HR 985, the "Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act," is targeted at reducing class action and mass tort litigation. This bill seeks to amend the judicial code to prohibit federal courts from certifying class actions unless multiple, specific conditions are met. HR 985 further seeks to limit attorney's fees. As if these three bills were not bad enough, the House will soon be voting on HR 2125, the "Protecting Access to Care Act of 2017," which is aimed at further reducing medical malpractice cases. The bill would change the statute of limitations for minors, limit non-economic damages to $250,000.00, and limit contingency fees.

While we have all lived through threats of this type of legislation throughout our careers, the fact that the House and Senate may be politically aligned on these issues makes this current attack more precarious. Each one of us needs to support our pro-civil justice organizations and we must be relentless in changing the message by educating our clients and the public about the harmful impact these bills would have on their ability to file suit and be fully and adequately compensated. Enactment of these laws would undermine the sanctity of each citizen's right to his or her day in court. As the voice of victims across this Commonwealth, we must do what trial lawyers do best: stand up and vigorously fight for the preservation of the right to a trial by jury unfettered by artificial caps and regulations designed to limit full compensation for victims of negligence.

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

PLAINTIFFS'-ONLY DATABASE UP AND RUNNING!

*By: Christopher M. Miller, Esq. ***

The much anticipated Plaintiffs'-Only Database is now operational! This is just another advantage of being a member of WPTLA – a free resource to review information that you may need for your next case.

The Plaintiffs'-Only Database has 5 main categories presently – Complaints, Written Discovery, Motions/Briefs/Petitions, DMEs and a Miscellaneous section. The information compiled to date (MANY THANKS to all of you who have contributed to the Database) has been given a name and categorized within the appropriate section. The Database is relatively easy to navigate, and there is a "Search" function. However, a word of caution regarding the "Search" function – it will only recognize search words that are contained within the *titles* of the documents themselves, it does not recognize all words contained within the documents themselves. A more enhanced "Search" function is not possible at this time. So, if you can't immediately locate a particular document that you are looking for, take a few extra minutes and go within the particular category where you think the document should be located to make sure it isn't there and is just not being recognized.

Please check your emails from Laurie, as you should have received information concerning the Login process to the database. The Database is password protected, and all users will likewise be required to confirm that their practice is Plaintiff-Only by agreeing to the Affidavit that appears during the login process.

With that said, please take a few minutes to review the Database. If there are topics that you would like to see that *aren't* contained within the database, please feel free to email suggestions to myself, chris@dmlawpgh.com, or Laurie Lacher, laurie@wptla.org. Also, the same applies for any documents/info that you would like to contribute to the Database. Remember, the Database is only going to be as good as the documents/information that our members contribute to it.

So whether you are a young attorney looking for some basic information or a seasoned veteran who has a complex issue in a case, we hope that you find the Plaintiffs'-Only Database to be a useful resource!

*** Chris is a WPTLA Member from DelVecchio & Miller, LLC. Email: chris@dmlawpgh.com*

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In This Issue

Features

News

Columns

JUDICIARY DINNER PREVIEW

*By; Eric J. Purchase, Esq. ***

Each year, WPTLA gathers people from every aspect of our profession – judges, trial lawyers, business partners and spouses – to honor and celebrate the enormous contributions that members of the judiciary make to our community by recognizing those who have left the bench in the previous year. The annual dinner, called The Judiciary Dinner, is attended by luminaries of the western Pennsylvania legal community as well as the business men and women who have made a commitment to support the WPTLA and its mission.

The 2017 annual dinner will be held May 5, 2017, at Heinz Field and, by popular demand, is returning to its former venue in the East Club Lounge. Honorees at the 2017 dinner will include:

- The Honorable Carol Hanna, of the Court of Common Pleas of Indiana County
- The Honorable Bernard L. McGinley, of the Commonwealth Court of Pennsylvania
- The late Honorable Debra A. Pezze, of the Court of Common Pleas of Westmoreland County
- The late Honorable Robert A. Sambroak, of the Court of Common Pleas of Erie County

In addition, the WPTLA will present its most prestigious awards at the dinner. The Daniel M. Berger Community Service Award will be presented to Kirk Schronce, a Pittsburgh man who tends bar to support Hope Bilingual Academy, a school for under-privileged children in Nicaragua. Mr. Schronce has worked to fund the school since he and his wife founded it in 2013. Each year the school provides badly needed education to children whose families have average monthly resources of $100.

The Champion of Justice Award, which honors those retired members of the WPTLA whose career body of work exemplifies the ideals of the organization, will be presented to Attorney William Caroselli. Attorney Caroselli served at the highest levels of Pennsylvania's trial lawyer professional organizations; demonstrated skill and achievement in the courtroom, the results of which included two of the fifty largest verdicts and settlements in 2009; and has routinely been identified as among the very best and most highly regarded trial lawyers in Pennsylvania.

The three winners of the annual WPTLA President's Scholarship High School Essay Contest will be announced at the dinner and the Pittsburgh Steelwheelers will be recognized, as will the efforts of WPTLA members and supporters in the September President's Challenge 5K Run/Walk/Wheel.

The evening will begin with cocktails and hors d'oeuvres at 5:30 p.m. with dinner following at 7:00 p.m.

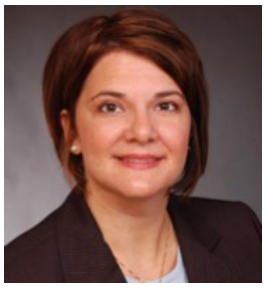
Invitations for the Dinner will be arriving in your mailboxes within the next several weeks. You can also get information and RSVP by contacting Laurie Lacher at laurie@wptla.org. Hope to see you all there!

JUDICIARY DINNER SPONSORSHIP

Member/Firm Sponsorship of the Annual Judiciary Dinner is now being accepted. Why is sponsorship important? Sponsorship monies are used to provide all of the judges and other guests with a gratis invitation. The monies are also used to recognize the three winners of the President's Scholarship Essay Contest with a $1,000 scholarship each. And they additionally fund, in part, the donation that accompanies the Daniel M. Berger Community Service Award. Other contributors to this donation are Berger & Lagnese, Bill Goodman of NFP Structured Settlements, and Cindy Miklos of CAM Group LLC and Planet Depos.

Sponsorship levels include Platinum, at $1,000; Gold, at $500; Silver, at $250; and, Bronze, at $100.

Sponsors are recognized in the evening's program, on video monitors throughout the venue, and on signs at the entrance. Payments can be made by check, to WPTLA, or by credit card. Please contact the association office for further details. Call Laurie at 412-487-7644 or email laurie@wptla.org.



GETTING YOUR CASE IN FOCUS

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

Any student of Don Keenan's *Reptile* knows that there has been significant attention paid to the use of focus groups through every stage of litigation. While focus groups have been around for decades, they have become increasingly more popular in the last few years. When used appropriately, focus groups can provide useful information from case selection to identifying which defendant bears most responsibility, what evidence is most compelling, what exhibits are most effective and what trial theme resonates with the average juror. A focus group can be conducted on just about any issue and can be as broad or as narrow as needed. If you've ever wondered whether your plaintiff is likeable, whether your animation on mechanism of injury is easily understood, or whether the defense being offered in your case comes across as credible, you can get feedback to all of these questions by utilizing a focus group.

Western Pennsylvania Trial Lawyers Association member Brendan Lupetin has been trying civil cases for over a decade. A staunch devotee to the Reptile, Brendan became very interested in utilizing focus groups to perfect themes and other issues in his civil trials. Approximately six years ago, Brendan began conducting focus groups for his cases and eventually branched out to running focus groups for his friends and colleagues. In 2011, Brendan formed the company Pittsburgh Focus Groups to meet the increasing demand and interest in qualify focus groups at an economical price. Through Pittsburgh Focus Groups, Brendan has conducted nearly two hundred focus groups encompassing almost every issue associated with trial. Because of his experience in the area, he was invited to provide a Continuing Legal Education program for our organization. On February 24, 2017, Brendan presented a three hour CLE to a full capacity room.

Throughout the CLE, Brendan provided very useful information on how to effectively conduct a focus group at any stage of litigation. The engaging presentation put to rest the notion that only cases with high six figure or seven figure damages warrant the time and expense of a focus group. As Brendan explained, small focus groups can be done very effectively and very economically. According to Brendan, who advocates for smaller focus groups of just three to six people for a two hour project, a focus group can be done for under a $1,000.00. He pays jurors $50.00 for a two hour session so the cost can be insignificant when compared to the information obtained from the focus group.

I asked Brendan at what stage of litigation focus groups are most effective: "Any time is better than no time but as a general rule, the earlier the better. It also depends on what the goal of the particular project is. Trial narrative and witness or exhibit projects work right up until trial. Discovery projects are best done at the very beginning." Brendan also emphasized that the information gleaned from focus group participants is invaluable. He explained "the biggest value is learning your blind spots so you can avoid land mines that you would never see coming."

The CLE was a huge success and the feedback from our membership was very positive. The comments included "very good, informative and down to earth," "great interaction with the audience," "excellent presentation and overall discussion of issues." A special thank you to Brendan for sharing his expertise with our organization and for his willingness to do a second CLE presentation on focus groups in the fall. Until then, if you have questions about running a focus group or you want to get unbiased feedback on one of the issues in your case, consider giving Pittsburgh Focus Group a call. You won't be disappointed!

*** Sandy is a WPTLA Member from Richards & Richards, LLP*
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Save the Date!

Saturday, Oct 21, 2017

WPTLA's President's Challenge
5K Run/Walk/Wheel
to benefit the
Pittsburgh Steelwheelers

New Location: North Park

Registration and sponsor details available soon!

ESSAY CONTEST

*By: Charles W. Garbett, Esq. ***

Each year our essay contest challenges our area high school students to address a legal question which is both timely and thought provoking. This year's topic draws its origins from professional football.

No, not deflate gate! This topic might be dubbed "Kaepernick-Gate."

As most of us recall, Colin Kaepernick of the San Francisco 49ers made headlines last season when he refused to stand for the National Anthem. He was not disruptive. He merely knelt on one knee in silence. He claimed he was making a statement protesting alleged police misconduct directed against minorities.

Just about everyone in the nation seemed to have an opinion about this protest "statement." Some defended his right to speak out in protest. Some wholeheartedly disagreed. Noteworthy, the "statement" was made on ***his employer's time***, while he could demand a much larger audience.

This year's question assumes that the employer is not a government body or agency. The question presented is:

> "Should a private employer have the right to discipline or fire an employee for speech or conduct criticizing the government or police when that speech or conduct is performed at work?"

The members of the committee are looking forward to reading this year's essays. This question looks so simple, but do not fool yourself. Consider it from both sides. What if your receptionist reported to work wearing a large "support tort reform" button or supporting a political candidate whom you found repulsive? The list can go on and on.

This year's winners will be announced at our annual Judiciary Dinner.

*** Chuck is a WPTLA Member from Luxenberg Garbett Kelly & George, P.C. Email: cgarbett@lgkg.com*

MEMBER PICTURES & PROFILES

Name: John E. Lienert

Firm: The Lienert Law Firm

Law School: Ohio Northern University – Pettit College of Law

Year Graduated: 2006

Special area of practice/interest, if any: Abuse/ Exploitation of Children

Tell us something about your practice that we might not know: I regularly conduct legal focus group sessions for my own cases as well as for other local attorneys.

Most memorable court moment: Receiving a $40,000 jury verdict in my first trial as lead counsel.

Most embarrassing (but printable) court moment: Realizing, just as I stood up to address the Court, that I had grabbed my navy blue sport coat instead of my black suit jacket while rushing out the door.

Most memorable WPTLA moment: Finishing in 1st place in the WPTLA/Steelwheelers 5k – Male Division.

Happiest/Proudest moment as a lawyer: Opening my solo practice.

Best Virtue: Helping others.

Secret Vice: Loaded nachos.

People might be surprised to know that: I am a high school basketball referee.

Favorite movie: Goodfellas

Last book read for pleasure, not as research for a brief or opening/closing: Are You Kidding Me? The Story of Rocco Mediate's Extraordinary Battle with Tiger Woods at the U.S. Open

My refrigerator always contains: Salsa

My favorite beverage is: Coffee

My favorite restaurant is: Pasta Too

If I wasn't a lawyer, I'd be: A Philosophy Professor and a Basketball Coach .

MEMBERSHIP CHANGES… TO DO US GOOD!

*By: Elizabeth Chiappetta, Esq.***

Recently, the Board of Governors of the Western Pennsylvania Trial Lawyers voted to increase the amount of yearly dues for President's Club and General members, decrease dues for junior members, and create a new level of membership, Emeritus. The amount of yearly dues had not been increased in some time, and the Board felt that the time was right for a slight change.

President's Club membership dues will increase from $250.00 to $275.00; General membership dues will increase from $125.00 to $140.00; and Junior membership dues will decrease from $35.00 to $25.00. The benefits of membership will remain the same, including an online membership directory exclusive to WPTLA members, which will feature contact information, a photograph, and links to email address, their firm's website and firm profile pages, where applicable. President's Club profiles will still remain public, and President's Club members will still enjoy three (3) free CLE credits included with their membership dues and special acknowledgment throughout the year.

The Board also recently voted to create an Emeritus membership, which will cost $75.00 for a year's membership. This is a new level of membership created for prior members who have now retired or taken on an "Of Counsel" role. We thought it best to maintain our relationships with long-tenured members who have decided to move to warmer climates (Hi Warren!) or those who are taking a smaller role to enjoy the fruits of their (hard) labor. These members will enjoy all of the benefits of a General member, but at a reduced price.

New to membership benefits is a Plaintiff's-Only Database, only accessible by members. This repository of information includes examples of Complaints, Interrogatories, commonly used defense expert reports, responsive briefs, motions in *limine,* and various other pleadings and documents relative to our practices. The database can be accessed through our website, and is password-protected. Information on how to access this database was just disseminated to membership last week via email. If you need additional information on how to access the documents, please reach out to Past President Chris Miller or Executive Director Laurie Lacher. And, we are always looking for additional documents, so if you have any documents you would like to contribute to the database, please email them in Microsoft Word or PDF format to Laurie Lacher. Great job, folks!

It is important to remember all of the benefits and events associated with maintaining membership in WPTLA – the President's Challenge 5K to benefit the Pittsburgh Steelwheelers, various CLE opportunities throughout the year, quarterly publication of The Advocate, a variety of member gatherings to network and meet with friends and colleagues, access to Business Partners and their services, the Comeback Award dinner and Judiciary Dinner, our two signature events, and community outreach opportunities.

We appreciate your continued commitment to WPTLA!

*** Elizabeth is a WPTLA Member from Robert Pierce & Associates, P.C.*
Email: echiappetta@piercelaw.com

Membership Meeting --------- Tues, April 18, 2017
Election of Officers and Board of Governors Members for 2017/2018 year
Carmody's Grille

Community Service ---------- Sat, April 29, 2017
Address TBA
Beaver County Habitat for Humanity

Annual Judiciary Dinner ----- Fri, May 5, 2017
Heinz Field
Pittsburgh

Annual Ethics & Golf ---------- Thur, May 25, 2017
1 ethics credit + golf
Green Oak CC
Verona

Lunch 'n Learn ---------- Thurs, Jun 1, 2017
1 subst. credit + lunch
Gulf Tower
Pittsburgh

CLE & Golf ---------- Fri, Jun 2, 2017
2 subst. credits + golf
New Castle CC

POLICE OFFICER TESTIMONY AS TO THE CAUSE OF A COLLISION – PERMISSIBLE OR NOT?

*By: Lawrence E. Kelly, Esq. ***

In a recent motor vehicle collision case, the investigating State Trooper proffered numerous opinions as to the cause of the collision, including that the Plaintiff was traveling too fast for conditions and that Plaintiff was likely traveling 20-25 mph faster than the 50 mph speed limit at the time of the collision. The State Trooper was not certified as an accident reconstructionist and only had the most basic accident investigation training administered as part of the Police Academy program. The Trooper had not personally witnessed the collision, but had responded to the scene and conducted a visual inspection that did not include measuring any portion of the roadway, the markings on the road, or the vehicles involved in the collision. The Trooper admitted that he must call a certified accident reconstructionist from the PSP if a reconstruction is to be done.

While police officers routinely respond to, investigate, and prepare reports of motor vehicle collisions, they are not all experts qualified to give opinions as to how a collision occurred or what caused the collision. The basic training received by police officers relative to accident investigation does little more than scratch the surface of the specialized field of accident reconstruction. In many circumstances, police officers will acknowledge during their deposition that they are not an accident reconstructionist and neither their report nor their testimony should be construed as an opinion as to what caused the collision. However, when a police officer expresses an opinion about how and why a collision occurred, you must analyze whether that opinion is properly presented to the jury at the time of trial or whether it can be excluded via motion in limine.

Set forth below is the legal argument presented in the motion in limine to preclude the Trooper's opinion testimony in the case described above:

The seminal case on whether or not a police officer, who did not witness the accident, can give opinion testimony as to speed or the cause of an accident is *Reed v. Hutchison*, 331 Pa. Super. 404, 480 A.2d 1096 (1984). In that case, the Court stated: "We begin our analysis by stating the general rule that in this Commonwealth an investigating police officer who did not actually witness a motor vehicle accident is not competent to render an opinion at trial as to its cause." *Id*. at 409, 480 A.2d at 1099.

The Court further stated that the caveat to the general rule is that when a police officer is "properly qualified as an expert witness" and a proper foundation for his testimony is established, an officer may, like any other witness, render an opinion on the question of causation. *Id*. at 410, 480 A.2d at 1099.

In the case of *Bennett v. Graham*, 552 Pa. 205, 714 A.2d 393 (1998), our Supreme Court stated, "[t]he test is whether the witness has a reasonable pretension to specialized knowledge on the subject matter in question. In the case of police officers, basic police training and experience per se has been deemed insufficient to demonstrate such specialized knowledge. 551 Pa. at 210, 714 A.2d at 395. In *Reed*, the investigating police officer was not an eyewitness to the accident and arrived on the scene two (2) or three (3) minutes later. The witness was deemed incompetent to testify that cut marks on the roadway gave rise to his opinion that the right front wheel of the vehicle became dislodged thereby causing the operator to lose control of the vehicle. In Reed, the accident reconstruction training of the police officer included the basic training that he received at the police academy. The Court found that training to be insufficient to allow the police officer to render an opinion as to the cause of the accident if as was in that case the police officer was not a witness to the accident.

After making the determination that the police officer was not qualified to render the opinion, the Court went on to grant a new trial. The Court cited Justice Musmanno: "It was . . . highly prejudicial . . . that this statement should be brought to the attention of the jury with all the prestige and authoritativeness which naturally attaches to an impartial police report." *Johnson v. Peoples Cab Co.*, 386 Pa. 513, 516,126 A.2d 720, 721 (1956); *Reed*, *supra*, 480 A.2d at 1100.

So, too, in Bennett, the Court ordered a new trial citing again *Johnson v. Peoples Cab Co.*, "for the proposition that police statements carry with them a naturally high level of prestige and authoritativeness which when brought to the attention of the jury are highly prejudicial." 714 A.2d at 397. In Bennett, the police officer attempted to offer testimony as to which vehicle ran the red light. The police officer's training included the basic training at the academy as well as 20 years of experience in responding to a "few hundred" accidents. 714 A.2d at 395.

In determining that the police officer's testimony was inadmissible, the *Bennett* Court noted, "A police officer who does not personally witness an accident is not competent to testify as to the cause of the accident because the opinion expressed would be grossly speculative and an invasion of the jury's exclusive prerogative." 714 A.2d at 395.

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SPECIAL NEEDS TRUST FAIRNESS ACT OPENS NEW DOOR FOR PERSONAL INJURY PLAINTIFFS

*By: Nora Gieg Chatha, Esq. ***

On December 14, 2016, President Obama signed the Special Needs Trust Fairness Act into law which amended federal law to enable disabled individuals to establish their own first-party payback Special Needs Trusts under 42 U.S.C. § 1396p(d)(4)(A).

Prior to the passage of the Special Needs Fairness Act, federal law required disabled adults who were capable of handling their own affairs (and thus without legal guardians) to rely upon their parents, their grandparents or the courts to establish a first-party funded non-pooled payback Special Needs Trusts for their benefit.

This requirement was at odds with the fact such Trusts were effectively being funded by such disabled individuals with assets legally belonging to them (i.e. not third-party funds). This requirement was also inconsistent with the law governing the creation of Pooled Special Needs Trust under 1396p(d)(4)(C), which has always allowed disabled individuals to create their own first-party funded Pooled Special Needs Trust with non-profits. It is believed that this inconsistency was due a drafting oversight in the law since its enactment over 20 years ago.

A first-party funded Special Needs Trust is an invaluable planning tool that enables disabled individuals who receive assets outright, including through a gift, inheritance, personal injury settlement or child support, etc. to protect such assets for their future use while remaining eligible for essential means-tested government benefits like Supplemental Security Income and Medicaid (also known as Medical Assistance).

The Special Needs Fairness Act has removed a major obstacle and inequitable hurdle for the establishment of Special Needs Trust by competent, disabled adults and will greatly simply their planning. Such individuals previously needed to seek court involvement and incur unnecessary delays and legal and court costs to establish first-party funded Special Needs Trusts. With the passage of this Act, such individuals are now able to set up their first-party funded Special Needs Trusts special needs trust without having to petition the court sand incur unnecessary legal costs, loss of privacy.

The Special Needs Fairness Act will amend Section 1396p(d)(4)(A) of the Social Security Act to exclude first-party funded Special Needs Trust as a transfer for less than fair consideration and countable asset as follows:

"A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter."

This amendment will apply to trusts established on or after the date of the enactment of the Special Needs Fairness Act, and thus while greatly beneficial to the prospective establishment of such Special Needs Trust won't necessarily remove obstacles faced by individuals who had previously established Trusts in contravention of then-existing laws.

This change is also similar to the recently enacted Achieving Better Life Experience (ABLE) Act and the ABLE accounts it allows certain disabled individuals to create. While ABLE accounts are another useful planning tool they do have many restrictions that inapplicable to Special Needs Trusts.

*** Nora is a WPTLA member from Tucker Arensberg, PC.*

21st Annual Ethics Seminar & Golf Outing

Thursday, May 25, 2017

Green Oak Country Club, Verona, PA

Ethics Seminar - 11:30 a.m.
Golf - 1:30 p.m.
(modified shotgun start)
Dinner Buffet - following golf

Registration available at www.wptla.org/events/

LITIGATION FUNDING AND HOTEL CLUB SANDWICHES

*By: Dean Lipson, Partner, Covered Bridge Capital LLC.***

You settle into your hotel room after a long day of travel and pull out the room service menu. The turkey club is shouting your name. Then you see the price and the shout falls to a whisper. According to TripIndex, a survey of 150 major hotels revealed the average price of a club sandwich ordered from room service runs about $16. That's *before* a common service fee of 15% and an "in-room dining" charge typically ranging from $5-$12. Include tax and that turkey club could set you back $25 or more. The hotel folks know you're tired, hungry and willing to overspend just to avoid having to put your shoes back on. It's an unabashed money-grab, right? Not so according to Robert Mandelbaum of PKF Hospitality Research who says room service actually is not profitable. It may be hard to swallow that that $25 club sandwich doesn't pay for itself but it doesn't according to Mandelbaum. For hotels, room service is inefficient. Keeping a kitchen open and staffed 24/7 is an expensive proposition. It costs a hotel more to produce a club sandwich under this scenario than it does for a restaurant operating during normal dining hours with predictable customer flow. So what's the connection to litigation funding? The answer is our assumptions about pricing. Without knowing anything other than price, we assume the club sandwich that sells for $25 at the hotel is a rip off because we can get the same sandwich for $8 at the diner. But, what we don't know is that the diner makes money when it sells a club sandwich and the hotel does not, even though it charges 300% more. So here's what we do know: price reveals only so much about a transaction. In the case of litigation funding, some, if not many, see it as a $25 turkey club and are outraged. If Wells Fargo charges 7.5% APR for a personal loan, why are funding companies charging 4 to 10 times that? The short answer is good luck getting a personal loan from Wells Fargo. The long answer is that the two transactions are hardly analogous:

	BANKS	**FUNDERS**
Risk	Minimize their risk of nonpayment by demanding that a borrower produce sufficient collateral	Assume considerable risk of nonpayment by making repayment contingent upon the successful outcome of a legal claim
	Lend on a recourse basis meaning the borrower is obligated to repay the bank in full regardless of the sufficiency of the collateral	Transact on a nonrecourse basis meaning the plaintiff owes no obligation to the funder if the plaintiff's claim fails to yield a sufficient recovery.
Cost of Funds (Spread)	Pay their depositors less than 1% and then turn around and lend those funds to borrowers. Thus a bank lending at 7.5% has a spread that is roughly 7%.	Pay their capital sources upwards of 15% to compensate for the high risk. Thus, a funder transacting at 7.5% has a spread that is **NEGATIVE** 7.5%.
Underwriting	Take as much time as they need and obtain as much information they need to properly underwrite the risks associated with a particular borrower	Almost always make a determination without full information and do so within an abbreviated time frame.

Here's the bottom line: If you're a guest in a hotel that offers a turkey club for $25, know that it's offered for your convenience and that it's probably priced appropriately. When it comes to litigation funding, the same applies. Of course, in the latter context, we're talking about real lives and that changes the calculus a bit. This article is meant to help explain why litigation funding is priced differently than a conventional bank loan. To state the obvious, there is no parallel between the weary traveler contemplating room service and the injured individual contemplating how he or she will survive in the wake of serious physical and financial duress.

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WHEN PRE-SETTLEMENT FUNDING MIGHT BE THE RIGHT CHOICE FOR YOUR CLIENT

*By: Erin Rudert, Esq. ***

Many attorneys I know view pre-settlement funding as the devil in disguise and will do anything to dissuade their client from getting involved with "those loan sharks." I used to have the same perception and was anti-funding across the board, regardless of the case. Over the past several years, however, I found myself *recommending* funding to clients on certain case-by-case bases because the financial consequences of their injuries were placing them in a no-win situation.

Take a very typical client who was working full time, as was her husband, and they needed every penny of their dual income to get by. They had no savings. They shared an older car, which was paid off. It was totaled in the collision and the amount they received for the payout for the car wasn't enough to buy a replacement vehicle. They used it as a down payment for a replacement used car, but still had to get a loan and take on a car payment. The injured wife was restricted from working by her doctors for just long enough hat her absence wasn't FMLA protected, and her employer filled her position. She was released to return to work, but had no job to go back to. She had STD benefits through her employer, but they ended when she was released to return. Since she couldn't go back, she lost her employer-paid health insurance and had to get on her husband's health insurance to continue treating, which is costing them $112 every 2 weeks. So now they've lost her income and had to take on a car payment and pay an additional health insurance premium. She's looking for a job, but there are no guarantees she'll find one quickly, and they're stretched to the point now where they've maxed out two credit cards and borrowed money from her parents to make their house payment.

No bank will ever lend them money and even if they have equity in their home, their current financial situation might preclude them from even accessing that through a home equity loan or something similar. They've already incurred personal debt that they owe back regardless of the success of the case, including credit card debt, which is going to rack up major interest as they are running a balance and will have to continue running that balance even after she goes back to work. If her income returns, that financial hole of 6 months of building debt takes years to fill.

In this type of a case, I would suggest to this client that she look into pre-settlement funding and explain to her why. Her case will probably take at least another 6 months to resolve, and if she gets a job, that's great, but if not, she and her husband are at risk of facing foreclosure or bankruptcy when they shouldn't have to deal with either. They also shouldn't have to settle their case and turn around and pay off high interest credit card balances that have been incurring 20+% interest compounded monthly. In this situation, it's not the difference between ordering room service or having the inconvenience of going to a restaurant. It's the difference between eating something that may appear to be overpriced or starving to death while you wait for the restaurant to open.

When we're handling 100+ cases at any given time, we need to stop and consider how each client is truly being affected by his or her injuries. Pre-settlement funding results in a line item repayment out of the client's settlement, which can be an impediment to resolution if the client is not properly informed of the repayment obligations and why they are repaying X amount. However, in the right case, with the right client, a recommendation that the client look into pre-settlement funding might be the best thing you can do for the client as his or her attorney.

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Community Outreach Opportunity!

Habitat for Humanity®

Come and work with us on Saturday, April 29 in Beaver County at the Habitat for Humanity Work Day.

Contact the association office to volunteer.



Medicare Recipients with Liability Settlements Affected by CMS Set-Aside Rules

Long-anticipated news from the Centers for Medicare and Medicaid Services (CMS) came this month affecting Medicare recipients who have received liability settlements, including structured settlements. Those recipients now will be required to establish report on, and financially exhaust Liability Medicare Set-Asides (LMSA) for the payment any medical claims related to the liability settlement before Medicare will resume payment of those claims. Otherwise, Medicare may deny such claims. The rule will become effective October 1, 2017.

The news came in the release of a CMS notification regarding enforcement of its Medicare Secondary Payer (MSP) statute. MSP occurs when a payer other than Medicare has primary responsibility for paying a medical claim. At Medicare's founding in 1966, this related to those with Workers' Compensation, Federal Black Lung benefits, and Veteran's Administration (VA) benefits. In an effort to shift costs from the government to other parties with primary responsibility, Congress in 1980 made Medicare the secondary payer to certain primary plans and situations, notes CMS.gov.

The most recent notification clarifies federal policy related to liability awards and structured settlements. Just as is the case with Workers' Compensation Medicare Set-Aside Arrangement (WCMSA), these financial arrangements require that specific proceeds from liability award settlements be earmarked for use for future medical needs directly related to the injury, illness, or disease. Once the allocated funds have been exhausted, Medicare will continue payment.

Medicare beneficiaries who receive settlements, judgments, awards or other payment from liability insurance, no-fault insurance, or workers compensation are collectively referred to as Non-Group Health Plan (NGHP) or NGHP insurance, or other primary payer obligations will be required to meet Mandatory Insurer Reporting (NGHP) guidelines established in Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA), CMS notes.

According to a February 3 issue of Healthcare Learning Networks MLN Matters from CMS, "Under the new rule created to comply with a Government Accountability Office (GAO) final report, CMS will establish two new set-aide processes: Liability Medicare Set-aside Arrangement (LMSA) and a No-Fault Medicare Set-aside Arrangement (NFMSA). An LMSA or NFMSA is an allocation of funds from a liability or an auto/no-fault related settlement, judgment, award, or other payment that is used to pay for an individual's future medical and/or future prescription drug treatment expenses that would otherwise be reimbursable by Medicare ... Medicare is precluded from making payment when payment has been made or can reasonably be expected to be made under a workers compensation plan, an automobile or liability insurance policy or plan (including a self-insured plan), or under no-fault insurance ... Medicare does not make claims payment for future medical expenses associated with a settlement, judgment, award, or other payment because payment has been made for such items or services through use of LMSA or NFMSA funds. However, Liability and No-Fault MSP claims that do not have a MSA will continue to be processed under current MSP claims processing instructions."

Medicare recipients, who have received insurance claims or liability settlements, including structured settlements related to injuries, must use either Liability Set Aside (LSA) or No-Fault Set-Aside (NFSA) funds to pay for medical services or items in question.

NFP Structured Settlements has followed this matter closely and will continue to do so as needed. In the meantime, NFPSS clients and plaintiff's attorneys who have questions about Liability Medicare Set-Asides (LMSA) are advised to learn more, or call NFP Structured Settlement and speak with one of our advisors or attorneys.

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www . nfpstructures.com \ 800 - 229 - 2228

COMP CORNER

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

The AMA Guidelines Facing Criticism from Workers' Compensation Experts

Recently, scholars associated with workers' compensation have offered criticism of the AMA Guides for the Evaluation of Permanent Impairment. According to the website "Business Insurance," an article was published by the Journal of the American Medical Association authored by John F. Burton, Jr., Dean of the School of Management and Labor Relations at Rutgers University, Emily A. Spieler, Professor at West Virginia University College of Law, Peter S. Barth, Professor at the University of Connecticut, Dr. Jay Himmelstein of the Center for Health Policy and Research at the University of Massachusetts, and Dr. Linda Rudolph of the California Department of Industrial Relations. The article in the Journal of the American Medical Association criticized the AMA guides as failing "to provide a comprehensive, valid, reliable, unbiased and evidence-based system for the rating of impairments; that the impairment ratings do not reflect perceived and actual loss of function and quality of life; and that the numerical ratings represent legal fiction, not medical reality." The article went on to claim that "the ratings are improperly used as a substitute for a full assessment of the impact of impairment on work and non-work capabilities and that therefore workers receive inappropriate compensation."

Traditionally, criticism of the AMA guides have come from labor sources and organizations focused on representing injured workers. The fact that criticism of the guides is now coming from academic sources is both revealing and important. The article in question can be found at the Journal of the American Medical Association website, jama.ama-assn.org.

Important Supreme Court Case on IRE's

The Supreme Court of Pennsylvania has issued a decision in *Duffey vs. WCAB (Trola-Dyne, Inc.)* No. 4 MAP 2016. This case will have a significant effect going forward where the claimant alleges additional injuries beyond the description of the injury on the Bureau documents.

In Duffey, the claimant suffered injuries to his hands in the nature of electrical burns. After he had received 104 weeks of benefits, he was scheduled for an Impairment Rating Evaluation. He was determined to have a 6% whole body impairment rating. Apparently, the claimant was forwarded a Notice of Change of Status by the carrier.

Within the 60 day window, the claimant filed a Review Petition challenging the validity of the rating evaluation. He alleged that the evaluation did not rate his full work-related disability, which he claimed included posttraumatic stress disorder and an adjustment disorder. Claimant took testimony from treating physicians to support the additional diagnoses. The employer presented the testimony of the impairment rating physician as well as that of a psychiatrist.

The Workers' Compensation Judge found the claimant's evidence to be credible and added psychological conditions to the description of injury. Furthermore, the Judge determined that the IRE was invalid because the additional diagnoses had not been addressed during the impairment evaluation.

The Worker's Compensation Appeal Board reversed the Judge, and concluded that "a physician evaluator may properly limit an impairment rating evaluation according to the accepted injuries as reflected in a Notice of Compensation Payable."

The claimant then filed an appeal with the Commonwealth Court. The Commonwealth Court supported the Appeal Board's determination that the Impairment Rating Evaluation could be based on the injuries as described in the Bureau documents at the time of the evaluation.

Claimant sought allocatur and the Supreme Court granted it. The majority opinion reversed the Commonwealth Court and reinstated the Workers Compensation Judge's finding that the rating evaluation was not valid. Interestingly, the majority opinion points to the language in § 306(a.2) of the Act. There, rating evaluators are to "determine the degree of impairment ***due to*** the compensable injury." (Emphasis in original). 77 P.S. § 511.2 (1). The majority opinion concludes that the Impairment Rating Evaluation must "consider and determine causality in terms of whether any particular impairment is 'due to' the compensable injury." Since the evaluating physician failed to consider the psychological conditions which were added to the description of injury in the litigation post IRE, the IRE necessarily failed.

The author recommends that everyone dealing with an Impairment Rating Evaluation read the *Duffey* decision closely along with the dissents. Practitioners can now move to set

Continued on Page 14

COMP CORNER *(Continued from Page 13)*

aside rating evaluations if additional diagnoses are successfully added and those additional diagnoses were not considered.

Query: Can an Impairment Rating Evaluation be set aside by adding a new injury description with litigation filed more than 60 days after receipt of the Notice of Change of Status?

Query: Should practitioners litigate the extent of description of injuries when notified of an Impairment Rating Evaluation?

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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.

John Lienert had an automobile accident/underinsured motorist coverage case in November 2015 in Washington County before Judge Nalitz. The verdict was for $40,000.

Paul Tershel recently had an auto case before Judge O'Brien in Allegheny County. The verdict was for $350,000.

Mike Calder had a medical malpractice trial in February 2017 in Clarion County before Judge Arner. The total verdict was for $2,000,000.

Brendan Lupetin had a slip and fall case in March 2017 in Allegheny County before Judge Della Vecchia. The verdict was for $2,100,000 (all non-economic).

Michael Rosenzweig and Armand Leonelli had a trip and fall case in Allegheny County before Judge Marmo. The verdict was $409,621 which was molded to $286,743.70 to account for 30% comparative negligence on the part of the Plaintiff.

TRIVIA CONTEST

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

Trivia Question #10

Which musician is often called the fifth Beatle?

Please submit all responses to Laurie at laurie@wptla.org with "Trivia Question" in the subject line. Responses must be received by Friday, June 2, 2017. Prize for this contest is a $100 Visa gift card. Winner will be drawn June 5, 2017. The correct answer to Trivia Question #10 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 #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? Answer: 3 (or 5)!**. According to USA Today, since the AFL/NFL merger, only Dallas, Pittsburgh, and San Francisco have more playoff wins as a franchise than Tom Brady's individual playoff wins. If you include pre-merger playoff games, Green Bay and Oakland/LA also make the list.

Congratulations to Question #9 winner Jason Schiffman, of The Schiffman Firm.

BY THE RULES

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

It Is Now Prudent to File a Protective Action When Demanding UM/UIM Arbitration

Many lawyers may be under the impression that the statute of limitations has been tolled once an arbitration panel has been appointed. Correctly or incorrectly, a recent unpublished Superior Court case calls this assumption into question. Specifically, in Erie Ins. Exch. v. Bristol, 2016 Pa. Super. Unpub. LEXIS 1886, 2016 WL 3062309 (Pa. Super. Ct. 2016), the Court held that the statute of limitations had not been tolled by the extrajudicial act of demanding arbitration nor by the appointment of an arbitrator. The Bristol Court held, "Appellant was at all times required to commence his 'action' within the required time-period, by filing a *praecipe* for a writ of summons, a complaint, a petition to appoint arbitrator, or a petition to compel arbitration, with the prothonotary." Erie Ins. Exch. v. Bristol, 2016 Pa. Super. Unpub. LEXIS 1886, *15.

As outlined below, there is an argument to be made that Bristol would not govern the situation where a full arbitration panel has been appointed. However, after Bristol, it certainly seems that the prudent practitioner will file an appropriate document with the Court to toll the statute of limitations even if: 1) a demand for arbitration has been made; 2) a statement under oath has been taken; 3) the insurer has agreed to arbitration; 4) the claimant and/or insurer have appointed an arbitrator; or, even if; 5) a full arbitration panel has been impaneled, as all but number 5 have been held inadequate, and the absence of a holding on number 5 does not seem reassuring at this time.

The Bristol case arose out of a July 22, 2005 hit and run accident. By June 19, 2007 the claimant's counsel notified Erie of the claim for underinsured motorist benefits. A statement under oath was taken in February 2008. Erie's counsel sent a letter in September 2010 confirming claimant's counsel's intent to appoint an arbitrator.[1] On September 14, 2010, Erie appointed an arbitrator. In November 2010, the Claimant appointed an arbitrator.[2] A neutral arbitrator was discussed but not appointed. Then in May 2013, Erie filed a declaratory judgment that the 4 year statute of limitations had expired. The requested relief was granted by a motion for Summary Judgment and the Superior Court affirmed.

The Superior Court's decision in Bristol is unpublished; and Allowance of Appeal had been granted. Nonetheless, it is recommended that the Superior Court decision be respected until it has been corrected by the Supreme Court. It is the undersigned's belief that at best the Supreme Court will hold that the statute of limitations has been tolled only if a full arbitration panel, including a neutral has been appointed thus obviating the need for any Court intervention.

In support of its decision, the Court relied heavily on Hopkins v. Erie Ins. Co., 2013 PA Super 90, 65 A.3d 452, an underinsured motorist claim where arbitrators had not been appointed within the 4 year statute of limitations.[3]

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Definition of Affidavit

Occasionally when responding to a Motion for Summary Judgement, there is a witness who is cooperative, but cannot get to a notary for whatever reason. In such cases, it is worth noting that the rules do not necessarily require that an Affidavit be notarized. Specifically, Rule 76 provides:

> A statement in writing of a fact or facts, signed by the person making it, that either (1) is sworn to or affirmed before an officer authorized by law to administer oaths, or before a particular officer or individual designated by law as one before who, it may be taken, and officially certified under seal of office, or (2) is unsworn and contains a statement that it is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities. Pa.R.C.P. 76. Definitions.

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Important Change for Amendment of Complaints and Captions

Rule 1033 has finally been amended to allow for relationship back of an amendment to a Complaint or a Caption. Unlike the

[1] By this point, the statute of limitations had already expired. Hence, the only issue that the Bristol Court should have needed to address was whether or not by appointing an arbitrator Erie had waived the statute of limitations.

[2] The inactivity is explained in part by the fact that the plaintiff was incarcerated.

[3] The Hopkins Court held that "the four-year statute of limitations on underinsured motorist claims begins to run when the insured settles with, or secures a judgment against, the underinsured owner or operator." Hopkins, 65 A.3d at 459.

Continued on Page 17

BY THE RULES *(Continued from Page 16)*

federal rule, the Amended Rule 1033 requires that the relationship back is allowed only if within 90 days after the statute the correct party received notice of the action. The Rule as Amended provides:

> Rule 1033. Amendment (a) A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, add a person as a party, correct the name of a party, or otherwise amend the pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted. (b) An amendment correcting the name of a party against whom a claim has been asserted in the original pleading relates back to the date of the commencement of the action if, within ninety days after the period provided by law for commencing the action, the party received notice of the institution of the action such that it will not be prejudiced in maintaining a defense on the merits and the party knew or should have known that the action would have been brought against the party

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A meritorious Preliminary Objection may be used to open a Judgment by Default.

Rule 237.3, Relief from Judgment of Non Pros or by Default, has been amended to allow for the attachment of preliminary objections to a Petition to open a Judgment by Default.

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KEENAN BALL TRIAL COLLEGE

Keenan Ball College is pleased to announce that **Veronica Richards** of Richards & Richards, LLP, recently spoke at their first ever Med Mal Seminar in Feb, 2017. The seminar was comprised of 14 speakers from all over the country who have obtained a verdict of over one million dollars in a Med Mal case.

Congratulations Vonnie!

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HOT OFF THE WIRE

*By: James Tallman, Esq.***

Summary judgment for insurer affirmed where UIM rejection form contains *de minimus* deviations. *Ford v. Am. States Ins.*, No. 13 WAP 2016 (Feb. 22, 2017) – Supreme Court of Pennsylvania affirmed the Superior Court's affirmance of Westmoreland County trial court's summary judgment ruling in a declaratory judgment action in favor of the insurer and held that § 1731 does not require *verbatim* reproduction.

Appellant Alisha Ford was insured under a policy purchased by her mother with American States Insurance Co. ("American States"). Appellant was injured in a car accident. Ms. Ford received the tortfeasor's BI limits of $25,000. She then pursued a UIM claim. American States denied the claim because Appellant's mother had signed a UIM coverage rejection form.

Appellant filed a declaratory judgment action against American States. On appeal, the Supreme Court of Pennsylvania began by examining Motor Vehicle Financial Responsibility Law ("MVFRL") and, specifically, § 1731 of it. Under the MVFRL, insurers are required to offer UIM coverage. Section 1731, however, provides that UIM coverage may be waived by an insured if the insured signs a written rejection form and sets forth the mandatory language for the rejection form. Section 1731(c.1) provides that "[a]ny rejection form that does not specifically comply with this section is void." 75 Pa. C.S. § 1731(c.1).

The UIM rejection form signed by Appellants mother had the plural "Motorists" in the title, whereas the form had the singular. It also had injected the word "motorists' between the words "underinsured" and "coverage" in the second sentence. On appeal, the Supreme Court of Pennsylvania discussed the fact that the General Assembly did not mandate verbatim reproduction but rather specific compliance. Drawing on that distinction, the court explained that "inconsequential" differences in wording will be construed to "specifically comply" with § 1731 of the MVFRL. In conclusion, the Supreme Court of Pennsylvania held "a UIM coverage rejection form specifically complies with Section 1731 of the MVFRL even if the form contains *de minimus* deviations from the statutory rejection form found at 75 Pa. C.S. § 1731(c)."

King v. U.S. Express Inc. *King v. U.S. Express Inc.*, No. 15-2270 (E.D. Pa. September 1, 2016) – District court held additions to § 1731 of the MVFRL UM rejection to be valid.

Plaintiff was injured in a work-related motor vehicle accident. The at-fault vehicle was never identified and the plaintiff filed a uninsured motorist claim under his employer's commercial vehicle policy. The insurer produce a UM/UIM rejection form that added language to the language mandated by § 1731 of the MVFRL. The form added language expanding the rejection to apply to "all persons driving or working under the authority of any named insured or riding as a passenger in an insured vehicle." It also added language that the coverage was rejected for "all insured drivers, and I act on full authority of all insureds under this commercial auto policy."

The district court held the language enhanced the clarity of the waiver and was necessary for the waiver to make sense and be effectuated. Further, the court held that it would be inequitable to compel the insurer to provide UM coverage for which the insured was never paid.

Superior Court holds that college owes college athletes a duty of care when engaged in school sponsored and supervised intercollegiate activity. *Feleccia v. Lackawanna College*, 2017 Pa. Super. (February 24, 2017) – Superior Court found there were genuine issues of material fact and reversed trial court's judgment in favor of Lackawanna College.

Appellants, Augustus Feleccia and Justin T. Resch, where injured while participating in tackling drill on March 29, 2010, the first day of spring contact football practice at Lackawanna College. On March 22, 2010, Appellants had each signed a broad waiver of liability and hold harmless agreement. On March 29, 2010, the College had no certified athletic trainer present at the practice. The College did have two women present who had graduated the year before with bachelor degrees in athletic training but failed the exam to become certified athletic trainers.

On March 29, 2010, the team engaged in a tackling drill, commonly referred to as the "Oklahoma Drill." Appellant Justin Resch suffered a T-7 vertebrae fracture while attempting a tackle. Appellant Augustus Feleccia first experienced a "stinger" in his right shoulder. One of the female "trainers" told Feleccia that he could resume the drill if his shoulder felt better. Subsequently, he resumed the drill and Feleccia suffered a traumatic brachial plexus avulsion of his right side.

Continued on Page 19

HOT OFF THE WIRE *(Continued from Page 18)*

The appellants filed suit against the College, the football coach, and the "trainers," alleging negligence, gross negligence, and recklessness. After discovery, the College filed for summary judgment. The trial court granted summary judgment based on the waivers and, alternatively, assumption of the risk. On appeal, the Superior Court found that that waiver could not be enforced for a number of reasons. First, the waiver was not worded to make it clear that it applied to relieve the College of liability for its own acts of negligence. Second, the Superior Court found that the allegations along with the factual record raised genuine issues of material fact regarding the College's gross negligence and/or recklessness. The trial court erred by not determining the scope of the waiver with regard to the claims of gross negligence and recklessness. Further, the Superior Court held that there were genuine issues of material fact regarding whether the College's failure to have qualified medical personnel at practice constituted gross negligence or recklessness.

The Superior Court held that the waiver was not enforceable to release the College from its own reckless conduct as matter of law and that there were genuine issues of material fact as to both the scope of the waiver and the College's gross negligence or reckless conduct. The appellate court also held that a jury should decide whether the College was negligent *per se* for not providing qualified medical personnel. As for assumption of the risk, the Superior Court found there to be issues of fact precluding summary judgement. The court held a jury should decide whether the appellants assumed the risk of injury where they did not know that the "trainers" were not qualified. The court also held that there were issues of fact as to whether the "Oklahoma Drill" posed an inherent risk of football.

The case was remanded for trial.

Superior Court reversed judgment for insurer based on general release signed by Spanish-speaking insured. *Del Pielago v. Orwig*, 2016 PA Super 258 (Nov. 21, 2016)

The Superior Court reversed summary judgment for insurer based on a general release. The adjuster did not speak Spanish and presented the release to the Spanish-speaking insured without a translator. The Superior Court held the release could not be enforced.

District Court for the Middle District of Pennsylvania holds that granted summary judgment for plaintiff. *Broe v. Manns*, 2016 W.L. 5394394 (September 27, 2016 M.D. Pa.) – District Court granted summary judgment for plaintiff based on negligence *per se.*

The plaintiff was injured when his vehicle was rear-ended by a vehicle operated by defendant. The defendant admitted at his deposition that the accident occurred because he was distracted by his phone GPS and failed to brake before it was too late to avoid hitting plaintiff's vehicle. The defendant was cited for violating 75 Pa.C.S. § 3361 (assured clear distance rule). The citation and admissions was sufficient for the court to grant summary judgment. The court rejected the defendant's attempt to invoke the sudden emergency doctrine by reasoning the defendant could not avail himself of such defense because he was driving carelessly.

Trial court refuses to sever UIM and 3d party claims. *Smith v. Koch*, S-460-2016, (C.P. Schuylkill July 22, 2016) – Trial court denied motion to severe actions and insurer remained identified in case.

The plaintiff filed suit against third-party driver and his UIM insurer after being injured in a car accident. The UIM carrier, Allstate, moved to sever the actions and stay the UIM action. The trial held the claims arose out of the same accident and consolidation would prevent multiple trials. The court explained that a "carefully managed trial can address any prejudice or confusion."

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

Kudos to Past President and Plaintiff Database Chair **Chris Miller** on the new Plaintiff's-Only Database.

Have you checked it out on our website?

It's only for Plaintiff members. You must enter a password and sign an affidavit before you can gain access.

If you have something to submit, please contact Chair Chris Miller at chris@dmlawpgh.com or 412-434-1400, or contact the association office at 412-487-7644 or laurie@wptla.org.

Great job, Chris!!

Below is the slate of nominees to be put forth at the April 18 Membership Meeting. Only members in good standing are invited to attend the meeting and vote.

Nominated Officers and Board of Governors
Fiscal Year 2017 – 2018 *

Officers:

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

Board of Governors:

Allegheny County

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

Beaver County

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

Blair County

Nathaniel B. Smith

Butler County

Matthew McCune

Indiana County

Troy M. Frederick

Lawrence County

Phillip L. Clark, Jr. — Charles W. Garbett

Mercer County

Richard W. Epstein

Washington County

Laura D. Phillips — Jarrod T. Takah

Westmoreland County

Michael D. Ferguson

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

**** Fiscal year runs July 1 – June 30.***

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

...Through the Grapevine

David B. White and **James R. Schadel**, of Burns White, have moved their offices to 48 26th St, Pittsburgh 15222. Phone and email remain the same.

Our condolences to **William P. Chapas**, with AlpernSchubert, on the recent passing of his mother.

Ronald P. Carnevali, Jr., and **Michael J. Parrish, Jr.,** of Spence Custer Saylor Wolfe & Rose, have moved their office to 1067 Menoher Blvd in Johnstown. Phones remain the same, but emails have changed to rcarnevali@spencecuster.com and mparrish@spencecuster.com, respectively.

Anticipated congratulations to **Lawrence R. Chaban**, of Lawrence R. Chaban, Esquire, on the upcoming birth of twin grandchildren.

John E. Lienert announces the opening of The Lienert Law Firm, based in Pittsburgh. Address: PO Box 15926, Pittsburgh 15244. P: 412-540-5297 F: 412-540-3366 Email: john@lienertlaw.com Website: www.lienertlaw.com

Congratulations to **Daniel Sammel**, of Ainsman Levine, on his recent nuptials.

Thomas D. Hall has a new firm, Law Offices of Thomas D. Hall, at 500 Grant St, Ste 2900, Pittsburgh 15219. P: 412-515-1449 Email: tdh@attorneytomhall.com

Rudolph L. Massa and **Peter D. Giglione** have partnered to form Massa Butler Giglione, Attorneys at Law. Address, phone and email remain the same.