THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

# THE ADVOCATE

Volume 28, No.1
Fall 2015

## UPCOMING EVENTS FOR WPTLA

A **Legislative Meet & Greet** will be held on **Oct 8** at **Storms Restaurant in Pgh**.

Learn about **Rule 30 (B)(6)** from **Mark Kosieradzki** on **Oct 9** in Pgh, at a 3 credit CLE.

Help your community on **Oct 10** at a **Habitat for Humanity** work project in Beaver County.

Join us at the famed **Wooden Angel Restaurant** in Beaver on **Oct 26** for a reception and talk from our Business Partners.

Come to a **Lunch 'n Learn** on **Nov 6** in Pittsburgh, on *Preparing Clients for Post Litigation Complexity*.

Mark your calendar for our **Comeback Award Dinner** on **Nov 11** at the **Duquesne Club** in Pittsburgh.

## 2015 PITTSBURGH STEELWHEELERS 5K

*By: Sean Carmody, Esq.***

On September 12, 2015 WPTLA held the 15th Annual President's Challenge 5K Run/Walk/Wheel event benefitting the Pittsburgh Steelwheelers. Over 200 people registered to race, walk or wheel the 5K course along the North Shore Riverwalk. This year's event featured a new twist with participants being given the option to register for a CrossFit alternative course where participants ran a shorter distance while completing a preset number of air squats, pushups and burpees. Place winners in each category received a Top Finisher Award with the winners also receiving a gift card. All youth participants received medals.

This year's race included a "friendly" competition between WPTLA members. President Larry Kelly issued a challenge to all WPTLA members, their firms and families to compete for the 5K Firm Challenge Trophy. Four (4) person teams with at least one (1) WPTLA member and three (3) others who may be members of their firm or immediate family, competed for the Cup. A $1,000.00 prize was donated to the winning firm's charity of choice. This year's Firm Challenge winners were Phil Kondrot, Steven Von Bloch, Collin Vitale and John Zeller of Edgar Snyder & Associates. The trophy will be prominently displayed at the offices of Edgar Snyder & Associates for one (1) year until it is up for grabs at next year's race.

I would like to thank all the sponsors, participants and volunteers who made the event a success this year. Committee members Rhett Cherkin, Chad McMillen, Dave Zimmaro, Bob Eyler and Executive Director Laurie Lacher all contributed greatly to the success of the event. This year's race raised approximately $30,300.00 for the Steelwheelers who use the proceeds for funding their basketball, rugby and competitive hand cycling seasons. I hope to see you all at next year's race.

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

*Photo Courtesy Chuck Tipton*

**President**
Lawrence M. Kelly

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# *A Message from the President …*

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

One of my favorite quotations is from Teddy Roosevelt. He said that:

> "The credit belongs to the man who is actually in the arena whose face is marred by dust and sweat and blood, who strives valiantly, knows the great enthusiasms, the great devotions and spends himself in worthy causes. Who, at best, knows the triumph of high achievement and who, at worst, if he fails, fails while daring greatly so that his place shall never be with those cold and timid souls who know neither victory nor defeat."

I am of the opinion that most lawyers begin their career with the hopes of being a trial lawyer. However, soon they realize that being a trial lawyer is a difficult road. My first trial, a criminal case, I prepared a hundred hours, tried the case for three (3) days and lost. The jury was out less than an hour when they came back and convicted my client of fraudulently signing a marriage license for her son's 16 year old fiancee.

After the trial, I thought for a brief moment that this is not what it is cracked up to be. I spent all that time preparing and did not get the result that I wanted.

Trial lawyers are some of the most mentally tough people I have met in my lifetime. That is why less than 10% of all lawyers in America can call themselves trial lawyers. Less than 10% of all lawyers in America have tried more than 10 cases to verdict. Most lawyers after spending a hundred hours in preparation and not getting the results that they want would not do it again.

I think the toughest thing in the world to do is to give something your absolute best effort, fail, and then get up after your failure and do it again. Trial lawyers do it again.

I, like most trial lawyers, after my humbling defeat, got up and did it again. I have tried so many cases to verdict after 32 years that I quit counting. I will not bore you with the details of the victories that I had obtained for my clients. I have been very fortunate to make a difference in the lives of many of my clients.

Instead, I believe it is time to talk about the failures that we as trial lawyers are experiencing at the present time. The recent statistics establish that 80% of all medical malpractice cases that go to trial result in defense verdicts. If you take Philadelphia out of the equation, that number goes even higher. The jury verdicts in automobile accident cases and other personal injury actions as of late are not much better if you are a Plaintiff or if you represent a Plaintiff.

I read on the PaAJ list serve two (2) or three (3) times a year about how one of our brethren has obtained a magnificent verdict on behalf of their clients. I applaud those efforts. To obtain a verdict in today's climate is not easy. I salute those men and women who are able to obtain those verdicts.

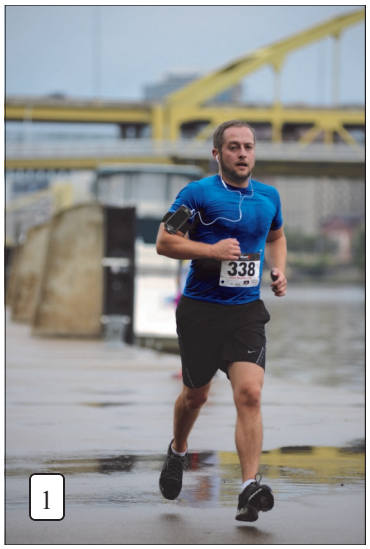
However, I also salute those men and women who have tasted defeat in trial and have gotten up and done it again. My hat goes off to those men and women who have not lost just one case but maybe two (2), three (3) or five (5) in a row and yet will not cow tail to the wishes and the demands of the insurance industry. In today's climate, those are my heroes.

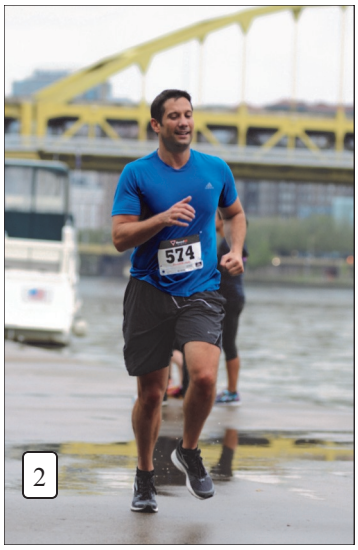
Those are the men and women to whom the credit belongs. They are actually in the arena. Their faces have been bloodied and their egos have been bruised. However, they continue to spend themselves in worthy causes. The tide will eventually turn. Soon they will, as they continue their journey through the slings and arrows of outrageous fortune that occur during the trial, once again know the thrill and the triumph of high achievement.

They are trial lawyers and they shall never be with those cold and timid souls who know neither victory or defeat. They are trial lawyers – a special breed of whom I am proud to be a member.

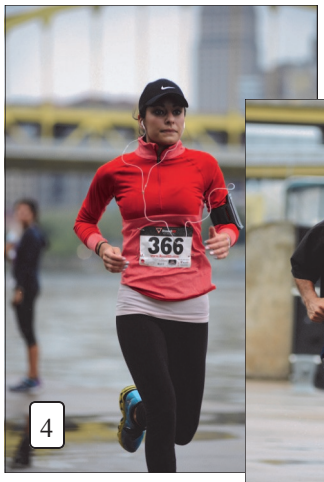
*** Larry is a WPTLA Member from Luxenberg Garbett Kelly & George, P.C. Email: lkelly@lgkg.com*

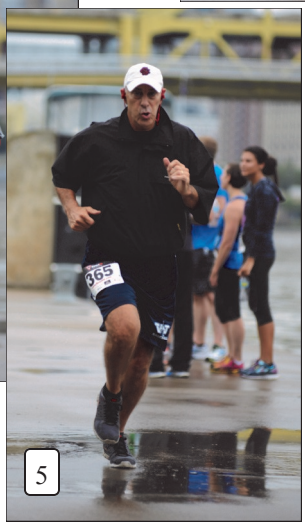
## Photos from the President's Challenge 5K Run/Walk/Wheel Sept. 12, 2015










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

*In #1, Pete Giglione*

*In #2, Board of Governors Member Dave Zimmaro*

*In #3, Board of Governors Member Chad McMillen*

*In #4, Lauren Kelly*

*In #5, President Larry Kelly*

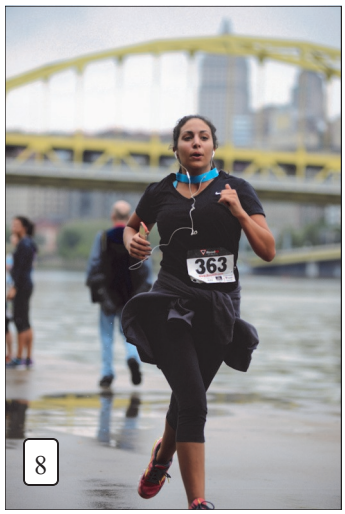
*In #6, Mitch Dugan*

*In #7, Board of Governors Member and 5K Race Chair Sean Carmody*

*In #8, Erica Kelly*

*In #9, Board of Governors Member Chuck Garbett*

*Photos Courtesy Chuck Tipton*





# In This Issue

## Features



## News



## Columns

# WPTLA CLE PREVIEW 30(B)(6) DEPOSITIONS WITH MARK KOSIERADZKI, ESQUIRE

*by Max Petrunya, Esq. ***

The WPTLA Education Committee is proud to host another 3-credit CLE presentation with a nationally recognized presenter this year at the Omni William Penn Hotel. Similar to last year's program with Philip Miller, Esquire, co-author of *Advanced Deposition Strategy and Practice*, the WPTLA is honored to have Mark Kosieradzki, Esquire, present a 3-hour CLE focused on the use of 30(b)(6) depositions.

Mark Kosieradzki is an expert on 30(b)(6) depositions and teaches his techniques at seminars across the country. Mr. Kosieradzki is nationally renowned for his knowledge of 30(b)(6) deposition practice and has released a DVD entitled "Deposing the Corporate Representative: 30(b)(6) Depositions." This DVD will be provided to all attendees at the CLE as part of the price of admission to the program.

For those who attended last year's presentation with Mr. Miller, many of Mr. Kosieradzki's 30(b)(6) corporate representative practices were highlighted during the last hour of Mr. Miller's presentation. Mr. Miller focused on the use of 30(b)(6) depositions in civil litigation to extract necessary information specific to the central issues of a case, along with using 30(b)(6) depositions to obtain critical admissions from defendants.

Mr. Kosieradzki's upcoming CLE is a must see for WPTLA members as the use of the Corporate Representative 30(b)(6) Deposition is the most underutilized and misunderstood discovery weapon available to lawyers involved in cases with corporations as defendants. Mr. Kosieradzki will teach our members mastery of the 30(b)(6) concepts and use of 30(b)(6) depositions in all aspects of our practice. These teachings will provide a wealth of knowledge to our members and, similar to the feedback provided by WPTLA members following Mr. Miller's presentation last year, will provide insight and information our members will find invaluable to their practices.

The cost will be $200.00 and will include a copy of Mr. Kozieradski's DVD. The presentation will begin at 9:00 a.m. and will conclude at noon on Friday, October 9, 2015 at the Omni William Penn Hotel in Downtown Pittsburgh. Attendance for last year's presentation with Philip Miller, Esquire, was excellent. The WPTLA is hopeful that more members of our organization will turn out for Mr. Kosieradzki's presentation this year.

Thank you to all of our members for your continued attendance at our CLE programs and for your support of the education programs. If you have any questions or concerns about this presentation, or if you have any suggestions for future presenters and/or presentations, please do not hesitate to contact Max Petrunya by e-mail at mpetrunya@peircelaw.com or by phone at (412) 281-7229.

I look forward to seeing all of you at Mr. Kosieradzki's presentation on October 9, 2015.

Pre-registration for this course is available at http://wptla.org/event/3-credit-cle/ Walk-in registration opens at 8:30 a.m.

***Max is a WPTLA Member from Robert Peirce & Associates. Email: mpetrunya@peircelaw.com*

## Upcoming CLE Programs

**"Preparing Clients for Post Litigation Complexity"**
featuring Helen Sims and Michael Duckworth,
The Duckworth Group
Friday, Nov. 6, 2015 Lunch 'n Learn CLE
12:00 noon - 1:00 p.m. Gulf Tower

**1 Hour Ethics Program**
featuring Larry Kelly, WPTLA President and
member of the Disciplinary Board
of the Supreme Court of PA
Friday, Dec. 18, 2015 Lunch 'n Learn CLE
12:00 noon - 1:00 p.m. Gulf Tower

## 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

# DEVELOP A "NOSE" FOR HANDLING LOSS OF SMELL CASES

*By: Doug Stoehr, Esq. ***

My soon-to-be client, Tony, was asked by his mother to bury her horse near the end of her property. A nylon strap was placed under the horse and a professional excavator used a five -foot chain to lift the horse. While placing the horse in the burial hole, the chain broke and snapped across Tony's head and face. He was treated for a fractured skull and orbital of the left eye, and cranial surgery resulted in the placement of plates in his forehead, and multiple smaller plates and screws along both sides of his nose. Tony was also diagnosed with a torn retina and a ruptured blood vessel.

I initiated a claim against the liability carrier for the excavation company, in addition to the distributor of the chain. Fortunately, the excavation company was well-insured and took the lead in defending the claim. Tony was unable to work for a long period of time as a self-employed landscaper whose business was thriving before this incident. Tony's wife was pregnant with their first child. He was left with only 15% vision in his left eye and had significant scarring on his scalp and across his forehead. At least 65 staples were placed in his forehead because of the surgery.

As the claim unfolded, I noticed that Tony made comments about his inability to smell. Tony raised this issue with his neurological surgeon. The surgeon told him that the loss of smell would likely be permanent if he did not retrieve it within one year. Tony initially downplayed the significance of this loss; it actually seemed more troubling to his wife. I had never encountered a loss of smell claim before, so I was more than intrigued. Intuitively I knew there must be some value to the loss of smell, and made this an additional component to our overall claim.

I reviewed many Internet articles and utilized the services of the Monell Chemical Senses Center in Philadelphia. I learned that one of the more common causes of olfactory dysfunction is head trauma. In fact, research states that head injury is the leading cause of post traumatic anosmia. Only 10% of patients with post traumatic olfactory loss ever experience improvement. Individuals with impaired olfactory function are unable to detect important warning signs, such as gas leaks or chemical fires. Therefore, they place themselves and co-workers at an increased risk for serious injury or death. Tony was concerned because his occupation necessitated digging and excavation work. I presented my initial findings to the insurance carrier but the representative was unaffected. Not surprisingly, the claims company was only interested in medical bills, lost wages, and scarring. The loss of vision was the only non-economic injury that drew attention.

During my research I noted that Richard Doty, Ph.D., had published a great deal in the area of loss of smell. Dr. Doty is a professor at the University of Pennsylvania Medical School, and Director of its Smell and Taste Center. I accompanied Tony for an overnight visit to Philadelphia, and to Dr. Doty's office for several hours of testing. Dr. Doty opined that Tony suffered from a total loss of olfactory function and his condition was permanent. Frequently people who lose their sense of smell also lose the ability to taste. Tony did not have any loss of taste function per se, but his complaints of taste loss were reflected in his decreased appreciation of food flavor. This is because most "tastes" are dependent upon the sense of smell.

Upon our return from Philadelphia, I set the settlement wheels into motion. The prior year I had attended an AAJ weekend seminar on how to conduct a focus group. I utilized a local temporary employment agency to provide me with three groups of eight people from Blair County. I rented some suites in a local hotel and made a presentation about our case. The AAJ seminar presenter stressed that we should not do a focus group solely about damages. Rather, the focus group should "focus" on a particular issue in your case, to see how potential juror would react. I did a modified approach and made a presentation to the focus group "jurors." My partner acted as defense counsel and likewise made a presentation. I elicited some limited testimony from Tony and his wife, and defense counsel did a sharp cross-examination.

I had a local videographer record the deliberation of each group. We spoke to the jurors after the deliberation and I gained insight about the issues for which they had the most interest. I asked each juror to identify two pieces of evidence or areas of testimony that influenced them to award higher damages. Numerous people responded with "photographs," which meant the pictures of Tony's shaved head with multiple staples or Tony in recovery after surgery. Jurors also liked the testimony of Tony's wife who spoke well and maintained her composure while speaking of Tony's injuries and challenges. I also asked jurors to identify two factors that "hurt" Tony's claim. Surprisingly, many people responded that the lack of medications caused them to think that his injuries were not bad. Others were influenced by the lack of physical restrictions placed on Tony by his doctors. In other words, despite losing his vision and ability to smell, and suffering from recurrent headaches, the focus groups decreased awards for future pain and suffering and loss of earning capacity. Tony's "damages" were also affected by his own

*Continued on Page 6*

**DEVELOP A "NOSE"** *… (Continued from Page 5)*

testimony. Tony stated that he had hopped on a jet ski recently, and wanted to resume riding four-wheelers. This caused jurors to minimize his recovery. Finally, two jurors wanted to know after the sessions whether the excavator was paid for his services. I asked why this was important. They both stated that if he had done this gratuitously, he should not have been liable for Tony's damages!

Later in my office I analyzed the settlement value that each individual placed on the case. I also reviewed whatever jury verdicts and settlements I could find in Pennsylvania regarding the types of injuries that Tony suffered. I found limited Pennsylvania verdicts for the loss of smell. Verdicts range from $200,000.00 - $450,000.00 for this area of damage alone. However, these cases did not involve an injured plaintiff whose occupation depended upon the ability to smell.

In addition to a demand letter, I prepared a settlement disc. It was a Power Point presentation of sorts, wherein my IT professional streamed photographs, charts, excerpts of medical reports, and pertinent pages of my economic and vocational expert's report. I narrated the presentation after it was approved by Tony and his wife. The claims representative downplayed the significance of the settlement disc, but I believe that it showed the magnitude of Tony's injuries and the strength of our claim. I do not recall whether we have a confidentiality provision to the release because this case was settled several years ago. Therefore, I will not disclose the identity of the excavation company or the precise settlement amount. However, the settlement was well in excess of one million dollars.

Handling this type of claim taught me a lot about olfactory loss and its profound effect on the taste buds. To no great surprise, the insurance industry minimizes this area of damage. The key is to have your client evaluated by an expert, like Dr. Doty. Present evidence on the profound effects that this loss has on your client. I realize that the greater area of damage for this case was Tony's loss of vision and cranial surgery. I also have no doubt that the loss of smell, and its effect on Tony's taste, also played a key role.

*Editor's Note*: *Doug Stoehr has represented injured people in Blair and the surrounding counties for 20 years. He handled insurance claims while attending law school at night at Temple. Doug handles automobile and general personal injury cases, and claims against nursing homes and hospitals. He is a member of the Million Dollar Advocates Forum, and has been recognized by Pennsylvania Super Lawyers in 2012, 2013, and 2014. He enjoys a rating of "10" - "Superb" by AVVO. He also writes and publishes a magazine with circulation to over 30,000 households, called Just Cause: A Magazine About Accidents, Injuries, and the Law.*

*** Doug is a WPTLA Member in private practice with Douglas V. Stoehr, Attorney at Law. Email: dougstoehr@stoehrlaw.com*

# ARE UBER DRIVERS EMPLOYEES?

*By: Tom Baumann, Esq. ***

Uber, a company that competes with traditional taxi companies, maintains that the drivers operating under its umbrella are independent contractors. A recent ruling from the California Labor Commission disagrees with that characterization.

In a decision in June, 2015, the Commission found that an Uber driver was an employee. It declared the company is "involved in every aspect of the operation." It notes that Uber drivers have to take and pass DMV and background checks. It limits the age of cars that can be used with their system and drivers must register their cars with the company.

Uber drivers are subject to approval ratings from the people they carry. Uber requires the drivers to maintain a score level in order to be eligible to continue to drive for the company. Apparently, Uber determines the price to be paid by the customer and sets the reimbursement available to the driver.

Under Pennsylvania Law, in making a determination of whether an employment relationship exists rather than that of independent contractor, the primary factor is the right to control either the work to be done or the manner in which the work is to be performed. *Universal Am-Can, Ltd. vs. WCAB (Minteer),* 762 A.2d 328 (Pa. 2000). Other issues to be considered include the nature of the work or occupation, the skill required for performance, whether the one employed is engaged in a distinct occupation or business, which party supplied the tools, whether payment is by the time or by the job, whether work is part of the regular business of the employer, and the right to terminate the employment at any time. *See Hammermill Paper Co. vs. Rust Engineering Co.,* 243 A.2d 389 (Pa. 1968). The right of control maintained by Uber over its drivers may qualify injured drivers as employees for purposes of Pennsylvania Workers' Compensation. All drivers sign contracts with Uber. If practitioners are faced with such a potential client, obtaining the contract is a must. Practitioners may need to refer to the line of cases involving leased trucks relationships for guidance.

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

# W. D. Pa. Upholds Summary Judgment Denial in *McMahon* Bad Faith Litigation. *McMahon v. Med. Protective Co.*, No. CIV. A. 13-911, 2015 WL 4633698 (W.D. Pa. Aug. 3, 2015)

This case was featured in Summer 2015 edition of *The Advocate*, with a full synopsis of the facts and the Court's original ruling on the parties' cross-motions for summary judgment. The claim involves a bad faith dispute between an insured dentist and her malpractice carrier following a settlement in which the insurance carrier mislead the dentist as to its settlement position, causing the dentist to contribute $50,000 of her own money toward a settlement. The Court denied the insurance carrier's motion for summary judgment, which opinion is the subject of the prior article. The carrier sought reconsideration from the trial judge, on the basis that the Court's original opinion applied the incorrect standard to a contractual or bad faith claim.

The insurance carrier argued, in essence, that absent an excess verdict, a claim for breach of an insurance contract and/or bad faith cannot stand under Pennsylvania law. The Court, in affirming its original denial of Defendant's motion for summary judgment, stated:

> Medical Protective argues that the standard applied by the court to a contractual bad faith claim is erroneous because *Cowden* and *DeWalt* involved excess verdicts resulting from an insurer's failure to settle a case and there was no excess verdict in this case. In the most recent insurance bad faith case decided by the Third Circuit Court of Appeals, the appellant insurance company argued that "an excess verdict was necessary in order to have a contractual or bad faith claim." *Wolfe v. Allstate Prop. & Cas. Ins. Co.*, No. 12–4450, 2015 WL 3634779, at *8 n. 9 (3d Cir. June 12, 2015). The court of appeals noted that it knew of no decision with that holding and cited the summary judgment opinion in this case as an example of a decision predicting that an excess verdict is not required for a third party bad faith claim under Pennsylvania common law. *Id*.
>
> The court recognizes that "negligent bad faith" is an odd concept, but Pennsylvania courts have repeatedly held that an insurer's unreasonable refusal to settle a claim can subject an insurer to bad faith liability. *See*, *e.g.*, *Birth Ctr. v. St. Paul Cos., Inc.*, 567 Pa. 386, 787 A.2d 376, 389 (Pa.2001) ("[W]e hold that where an insurer acts in bad faith, by unreasonably refusing to settle a claim, it breaches its contractual duty to act in good faith and its fiduciary duty to its insured."). The court's prediction that the standard articulated in *DeWalt* applies to McMahon's contractual bad faith claim was carefully considered, and the court does not find it clearly erroneous.

The Court also denied the carrier's request that this issue be certified for an interlocutory appeal to the Third Circuit. Keep an eye on the progress of this litigation, as this case highlights an unsettled area of Pennsylvania jurisprudence.

## THE ADVOCATE

### ARTICLE DEADLINES and PUBLICATION DATES

#### VOLUME 28, 2015-2016

| | Article Deadline | Publication Date |
|---|---|---|
| Vol 28, No. 2 Winter 2015 | Dec 4, 2015 | Dec 14, 2015 |
| Vol 28, No. 3 Spring 2016 | Mar 7, 2016 | Mar 21, 2016 |
| Vol 28, No. 4 Summer 2016 | Jun 6, 2016 | Jun 20, 2016 |

# New Rules 220.1 and 220.2 of the Pa.R.C.P. Bans Jurors' Use of Electronic Devices With Communication Capabilities While In Attendance at Trial or in Deliberations

*By: Richard J. Trankocy, Jr, Esq.* **

On October 1, 2015, new Rules of Civil Procedure 220.1 and 220.2 will take effect and will require court staff and trial judges to instruct members of the jury array, prospective jurors, and selected jurors not to use a computer, cellular telephone, or other electronic device with communication capabilities while in attendance at trial or during deliberations. These devices can be used during breaks but not to obtain or disclose information about any case in which the juror is participating.

Rule 220.1(c)(4)(i) indicates that information about the case includes:

> Information about any party, witness, attorney, judge or court officer. News reports of the case, information collected through juror research about the facts of the case, any topics raised during the case and testimony from any witnesses and any other topic the juror might think would be helpful in deciding the case.

The jurors shall be advised of these instructions at the beginning of voir dire, at the commencement of the trial, prior to deliberations, and any time the trial judge deems appropriate. Pa.R.C.P. 220.1(d)(1)-(4). Jurors will also be instructed that it is their obligation to snitch on another juror if they see a violation of these rules and immediately inform the court.

These rules have also been parlayed into the voir dire rule 220.3 by adding 220.3(b)(16), which indicates that jurors must be able to refrain from using a computer, cellular telephone or other electronic device with communication capabilities in violation of Rule 220.1. Rule 220.2 permits the trial judge discretion to sanction any offending juror by holding the juror in contempt of court and/or seizing the electronic device.

** *Rich is a WPTLA Member in private practice the with Law Offices of Richard J. Trankocy, Jr. Email: r.trankocy@verizon.net*

## Elected Officers and Board of Governors Fiscal Year 2015 – 2016

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# COMP CORNER

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

**COMMONWEALTH COURT DETERMINES USE OF AMA GUIDES TO DETERMINE PARTIAL DISABILITY UNCONSTITUTIONAL IN PART**

The Commonwealth Court in an *en banc* decision in *Protz v. WCAB* (Derry Area School District) No. 1024C.D.2014 has determined that Section 306.2 of the Workers' Compensation Act is unconstitutional pursuant to Article II, section 1 of the Pennsylvania Constitution. President Judge Pellegrini wrote the Decision for the 4-3 majority. Judges Simpson and Covey wrote dissents.

Protz was originally injured in 2007. She suffered a very serious knee injury that ultimately led to a knee replacement. She developed complex regional pain disorder as a result of the injury due to a severed artery from the operation. The Employer sought an Impairment Rating Evaluation and one was performed utilizing the sixth edition of the AMA Guides to the Evaluation of Permanent Impairment. Since said exam was not scheduled within 60 days of the expiration of 104 weeks of disability benefits, litigation commenced. The Workers' Compensation Judge upheld a conversion to partial disability. The Workers' Compensation Appeal Board sustained the action of the Judge. Claimant appealed to the Commonwealth Court alleging that Section 306.2 of the Act constituted an improper delegation of authority under the Pennsylvania Constitution.

Protz pointed out that the legislature is empowered to delegate authority. However, "1., the basic policy choices must be made by the legislature and 2., the legislation must contain adequate safe guards which will guide and restrain the exercise of the delegated administrative functions." *Gilligan v. Pennsylvania Horseracing Commission*, 422 A. 2d 487, 489 Pa. (1980) remanded, 432 A. 2d 275 (PA Commonwealth. 1981).

Applying these requirements to the *Protz* case, the court stated "Section 306 (a.2) of the Act is wholly devoid of any articulations of public policy governing the AMA in this regard and of adequate standards to guide and restrain the AMA's exercise of this delegated determination by which physicians and WCJ's are bound. Indeed, Section 306 (a.2) merely requires that the most recent version of the AMA guides be used to determine a Claimant's impairment rating. 77 P.S. § 511.2. Accordingly, under this basis alone, we find Section 306 (a.2) of the Act unconstitutional."

The Court also noted that Section 306 (a.2) of the Act did not provide for any type of governmental review of the Guides. It cited to *Pennsylvania Builders Association v. Department of Labor and Industry,* 48 A. 3d 215 (Pa. Commonwealth. 2010) (en banc) where it was noted that the adoption of new Pennsylvania Construction Code utilizing the International Code Council's codes had to be approved by regulation at the end of each year in which the codes were used to update the Pennsylvania UCC. It noted in the Workers' Compensation Law that there was no subsequent review of new additions of the AMA guide, "leaving unchecked discretion completely in the hands of a private entity."

nterestingly, the majority decision seemed to invalidate Section 306 (a.2) completely. However, in the last paragraph of the Decision and in the order, the court vacated the Appeal Board's Decision and remanded the case to the Board with instructions to remand to the Workers' Compensation Judge. The WCJ was directed to apply the fourth edition of the AMA Guides to adjudicate the case. If the legislature did not designate the fourth edition, can the court do so?

The matter will likely be heard by the Pennsylvania Supreme Court. The Amicus Committee of the Pennsylvania Association for Justice will be asked to participate.

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

**Don't agree with what you've read? Have a different point of view?**

If you have thoughts or differing opinions on articles in this issue of The Advocate, please let us know. Your response may be published in the next edition.

Also, if you would like to write an article about a practice area that you feel our members would benefit from, please submit it to Editor Erin Rudert.

**Send your articles to er@ainsmanlevine.com**

# HOT OFF THE WIRE

*By: James Tallman, Esq.***

**Civil Procedure**

Notice to insurance company's lawyer of the filing of original process is insufficient to toll statute of limitations when there has been no good faith effort to serve process on the actual defendants. *Trivitt v. Serfass*, No. 1596 MDA 2014 (August 21, 2015).

The action arose out of a July 15, 2011, automobile accident. A complaint was filed on July 15, 2013. It was reinstated on September 30, 2013. The complaint was mailed to the sheriff on October 18, 2013 and was served by the sheriff on October 24, 2013. From November 22, 2011, until July 15, 2103, the plaintiffs' counsel and lawyer retained by the defendant's insurer had engaged in communications regarding the accident and settlement of the claim. In fact, on July 15, 2013, the plaintiffs' lawyer had notified the defendant's counsel that the complaint had been filed that day. Defense counsel, however, refused to accept service of the complaint. Defense counsel requested and received a copy of the complaint from the plaintiffs' counsel's office. He also wrote the prothonotary requesting a copy of the complaint, indicating that he represented the defendants. The trial court found that the plaintiffs failed to make a good faith effort to serve the complaint and dismissed it. On appeal, the plaintiffs-appellants argued that a good-faith attempt to give notice of a timely-filed lawsuit was sufficient to toll the statute of limitations. The plaintiffs-appellants also argued that notice of the action to counsel for the defendant's insurance company was sufficient to toll the statute of limitations. The Superior Court rejected these arguments. The appellate court found that notice to the insurer's counsel was irrelevant. The Superior Court found that the facts showed that counsel for the plaintiffs had made no effort to serve the defendant until three months after the statute of limitations had expired. Accordingly, it affirmed dismissal of the action.

**Medical Malpractice**

Peer Review Protection Act, 63 P.S. 425.1 et seq., does not apply to disclosure of quality-of-care review conducted by insurer since insurer does not provide health care services. *Venosh v. Henzes*, 2015 PA Super. 169 (Aug. 7, 2015).

In a medical malpractice action, the plaintiff served a subpoena on her insurer, Blue Cross of Northeastern Pennsylvania, for records relating to the procedure at issue and investigative records. Blue Cross had conducted a quality-of-care review of the medical providers and of the incident at issue. Blue Cross moved to quash the subpoena and refused to produce any materials relating to its review based on the Peer Review Protection Act, 63 P.S. 425.1 et seq. A special discovery master found the Act to be applicable. The trial court disagreed and ordered Blue Cross to produce the investigative materials. Blue Cross appealed to the Superior Court. The Superior Court affirmed the trial court's order that the investigative material was not within the scope of the Peer Review Protection Act. Applying its holdings in *Yocabet v. UPMC Presbyterian*, 2015 WL 3533851 3 (Pa. Super. 2015), and *McClellan v. Health Maintenance Organization*, 686 A.2d 801 (Pa. 1996), the Superior Court held that a health insurer, such as Blue Cross, is not a "health care provider" and, therefore, the review Blue Cross initiated was not protected from discovery by the Peer Review Protection Act.

**Medical Malpractice/Jury Selection**

Motion to strike prospective jurors for cause was properly denied even though jurors were employed by the corporate medical system that employed the defendant doctor. Prejudice could not be presumed. *Shinal v. Toms*, 2015 PA Super. 178 (Aug. 25, 2015).

In this medical malpractice action, the plaintiffs sued Geisinger Medical Center and Geisinger Clinic, in addition to an individual doctor. The matter was scheduled for trial. The trial, however, had to be continued because the court was unable to empanel a jury as too many prospective jurors were employed or insured by the corporate defendants. On a second attempt, the trial court refused to dismiss for cause four prospective jurors that worked for or were married to someone who worked for a Geisinger entity. Counsel for plaintiff argued that the decision in *Cordes v. Assocs. of Internal Medicine*, 87 A.3d 829, 833-34 (Pa. Super. 2014) (*en banc*) (plurality opinion), *appeal denied*, 102 A.3d 986 (Pa. 2014), mandated the dismissal of the four for cause. The trial court agreed that *Cordes* applied, however, it did not agree that *Cordes* mandated the dismissal of the four prospective jurors for cause. Notably, on appeal, the Superior Court held that *Cordes* is not binding precedent because it was a plurality opinion. Instead, the Superior Court applied *McHugh v. P&G Paper Prods. Co.*, 776 A.2d 266 (Pa. Super. 2001), which requires the court to presume prejudice only where the pro-

*Continued on Page 11*

**HOT OFF THE WIRE** *(Continued from Page 10)*

spective juror has a close relationship - be it familial, financial or situational - with parties, counsel, victims, or witnesses. The Superior Court refused to expand the range of relationships requiring a presumption of prejudice based on *Cordes*. The Superior Court held it was proper for the prospective jurors not to have been dismissed for cause because none had a close relationship with the defendant doctor, who was employed by Geisinger.

***James is a WPTLA Member from the firm of Thomas E. Crenney & Associates, LLC. Email: jtallman@crenney.com*

# TRIVIA CONTEST

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

## Trivia Question #4

**What is the largest number you can write using only 2 digits and no other mathematical symbols?**

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by Monday, October 26, 2015. Prize for this contest is a $100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #4 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 admin@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!)

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 #3 - **What is the Surgicorps motto? Changing lives, one surgery at a time.**

**Congratulations to Question #3 winner Drew Leger, of the Law Office of Andrew J. Leger, Jr., PC**

*Each year, WPTLA sponsors a Scholarship Essay Contest for high school seniors in the Western District of PA. Three winning essays are chosen by a committee as the best of those submitted. These winners are invited to attend the Annual Judiciary Dinner, where they are presented with a certificate of their achievement, along with a $1,000 scholarship award. Last year's high school students were asked to write an essay discussing their opinion in a fictional case on the issue of whether or not the State's denial of the application for Special Organization License Plate submitted by the Hands Up 4 Peace is an unconstitutional violation of the First Amendment or whether such control is permissible in light of the State's role in issuing the license plates. Below is the one of 2015's three winning essays.*

The First Amendment of the Constitution of the United States of America protects citizens from being punished for their speech, religion, press, assembly, and petition. It is the job of the United States Judicial system to determine what is considered the right to free speech and what can be considered a threat or an offense to other citizens. Freedom of speech is one of the basic freedoms that is guaranteed in the Constitution and citizens today are still being censored when it comes to their speech and ideas. The line is often blurry as to whether or not the government should act over statements citizens make. The government's role is to protect citizens when there is need to protect them; though the government cannot censor speech just because someone might get offended. Regardless of how hard the government tries they cannot make everyone happy, nor should they because that is not their role. The organization, Hands Up 4 Peace, meets all of the criteria necessary to make a specialty license plate. Not allowing them to create this license plate is an infringement on their Constitutional right of freedom of speech.

In 2014, the fifth circuit of the United State Court of Appeals heard a case by the name of *TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC. v. VICTOR T. VANDERGRIFF*. In the state of Texas, to make a specialty license plate, one can either choose one provided by the state or can make a license plate with a third party. If the license plate is made by the third party, under state law it must be approved by the Texas Department of Motor Vehicles. The first main issue in this case was to decide if a license plate is considered free speech or government speech. The board of the Texas department of Motor Vehicles argued that because the license plates are regulated by the government, that it is clearly government speech. However, in the Supreme Court Case of *Pleasant Grove City, Utah v. Summum* even if a private donor wanted to construct a monument in a public park~ the government has the final say because that is government speech. This instance is considered government speech because the public views the monuments in the park under the governmenfs jurisdiction. The difference between a permanent monument and a license plate on the back of a personal vehicle is just that, a license plate is a on a personal vehicle. A permanent monument in a park is clearly on government grounds under the government's jurisdiction. The government does not have the right to determine what can and cannot be on a person's personal vehicle. The court decided that this was an instance of private speech, not government speech.

The second main issue of the Texas case was about content of the license plate. Based on the case *Rosenberger v. Rector* & *Visitors of the Univ. of Va.,* 515 U.S. 819, 831 (1995), "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys./I Denying The Sons of Confederate Veterans the right to creating this license plate caused the issue of viewpoint discrimination. The same issue can be viewed with the Hands Up 4 Peace group. Not allowing this group the right to create their license plate is viewpoint discrimination. The government does not have the right to stop this group. By rejecting the license plate because it is "offensive", this would discriminate against Hands Up 4 Peace's mission of "the promotion of peaceful conflict resolution and racial diversity awareness through community outreach and youth programs."

The case of *ACLU v. TATA* brought up the idea of content of license plates. This case took place in North Carolina and drivers in the state have the option to choose from over two hundred specialty license plates. These license plates span a wide range of controversial topics. One plate available was the Knights of Columbus, which is a group where members must be Catholic. One could argue that this could offend people of a different religion. Viewpoints must be allowed to be expressed regardless of how many people it offends. Discrimination against speech because of its message is presumed to be unconstitutional because of the case *Rosenberger v. Rector* & *Visitors of the Univ. of Va.,* 515 U.S. 819, 831 {1995}. Allowing specialty license plates allows the public to express their views in special interests while also raising revenue for the state. This is a win-win situation because the driver can express his/her views and the state makes a profit.

The organization Hands Up 4 Peace has every right to make a specialty license plate. They meet all the criteria necessary to participate and they are entitled to put what they want on their personal vehicle. Because this is a matter of private speech, the government cannot stop the group from making this plate. Not allowing them to create this license plate

*Continued on Page 13*

**ESSAY** ... *(Continued from Page 12)*

would be infringement on the organization's right to freedom of speech expressed in the First Amendment of the Constitution. It is not the government's role to try to protect people from being offended. The role of the government is to protect its citizens, but only when they need protecting. The state does not have the authority to decide what can and cannot be said in matters of private speech. Spreading the ideas of a group in the community committed to spreading peace and understanding is not offensive and would be beneficial in the long run. Yes, the idea of this license plate could offend someone and yes, someone might complain about it, but censoring a group's freedom of speech is a far worse crime. Allowing specialty license plates lets people with different beliefs show and share their viewpoints and after all that is how our government is run; people from different walks of life sharing their ideas to shape our nations laws and policies.

**Submitted by:**
Alexander Barna, Hopewell High School

# ERIE RETREAT RECAP

On Thursday, Aug 20, WPTLA kicked off the fiscal year with a retreat in Erie. The first scheduled event was a golf outing at Lakeview Country Club in Northeast, hosted by Bill Weichler. Due to heavy rain in the forecast, the golf was cancelled.

Later that day, the first board meeting of the year was held at the Sheraton Bayfront Hotel, which was immediately followed by a reception. The attendees socialized over cocktails and hors d'oeuvres, including a mashed potato bar. Business Partners in attendance for this event included Chris Finley of Finley Consulting & Investigations, Cindy Miklos of FindLaw, Lisa Caligiuri of IWP, Bill Goodman and Phil Saunders of NFP Structured Settlements, and Dave Gardner and Tiffanie Haemer of Robson Forensic.

All met in the lobby at 8:30 p.m. to take the trolley to Greengarden Lanes for a friendly game or two of bowling. After Larry Kelly divvied up the teams and collected the "fees," the competition commenced. There were strikes and spares thrown all over the lanes, not to mention a few gutter balls, right Larry? After all was said and done, Larry begrudgingly presented winning trophies to our own Eric Purchase and Lisa Caligiuri of IWP for highest scoring male and female bowlers. Everyone then piled back on the trolley for a safe return to the hotel.

Friday morning's CLE program came too early for some, but thanks to Bill Goodman and Cindy Miklos for presenting a 2 hour program to finalize the event. Overall, while the attendance wasn't great, a good time was had by all.

*Pictured above, from L to R; Top Male Bowler Eric Purchase, Top Female Bowler Lisa Caligiuri of IWP, President Larry Kelly, Max Petrunya, Chuck Alpern, Phil Saunders of NDC Advisors, Lisa Caligiuri, Chuck Garbett, Cindy Miklos of FindLaw, Eric Purchase, Bill Goodman of NFP Structured Settlements, Laurie Lacher, Larry Kelly, Tiffanie Haemer of Robson Forensic, Chad Bowers, Doug Keil, Dave Gardner of Robson Forensic, Chris Finley of Finley Consulting & Investigations, Guido Gurrera, Chris Miller, and Bill Weichler and his golden bowling ball.*

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

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**15th Annual**
**5K RUN/WALK/WHEEL**
**To benefit the Pittsburgh Steelwheelers**

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

September 12, 2015

Dear President's Challenge Participant:

The Steelwheelers would like to express our deepest appreciation to the **Western Pennsylvania Trial Lawyers Association (WPTLA)** for their support of the Pittsburgh Steelwheelers over the past fifteen years. The Steelwheelers would also like to thank you for your participation and support. It is you who make this event a success and we hope you have an enjoyable experience.

The WPTLA, whose mission is to protect our rights to a trial by jury, deserves a lot of praise for the public service work they do through this event, their annual essay scholarship contest, work with Habitat For Humanity and the Pittsburgh Downtown Partnership. Without a doubt the Steelwheelers would not be here today had the WPTLA not stepped in at a time when the continuity of the Steelwheelers was in question. Because of their support we have thrived! The President's Challenge has allowed the Steelwheelers to grow and improve by enabling us to purchase much needed equipment and to help fund the costs of travel. The camaraderie of team sports, the physical exercise and the ability to compete truly means a great deal to the quality of life we enjoy.

This past year the Rugby team competed in 6 tournaments and the basketball team competed at Nationals and our newly formed competitive hand cycling team has already had great success.

Finally, the Steelwheelers is a United Way Contributor Choice organization, which means that anyone who gives to United Way can designate the Steelwheelers as the beneficiary of their donation. Our United Way Contributor Choice number is 1687.

If you would like additional information about the Steelwheelers please feel free to call Robert Eyler (412) 821-0415. Thank you for your support of the Steelwheelers and WPTLA in their efforts to help us.

Sincerely,

The Steelwheelers

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

# *...Through the Grapevine*

Congratulations to **WPTLA Member John E. Lienert** and his wife Gina on the birth of their second child, daughter Livia Nicole, born Sept 17, 2015.

The firm of Goldberg Persky & White has moved to 11 Stanwix St, Ste 1800, Pittsburgh 15222. **WPTLA Members of the firm include President's Club Member David P Chervenick, Joseph J. Cirilano, Holly L Deihl, Diana Nickerson Jacobs, Samuel P. Kamin, Cori J. Kapusta, Jason E. Luckasevic, President's Club Member Bruce E. Mattock, Leif J. Ochetree, David B. Rodes, Benjamin W. Schweers, and Jason T. Shipp**.

Congratulations to all WPTLA Members who have been named "Best Lawyers."