THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

Volume 27, No. 1
Fall 2014

5K RECAP

By: Sean J. Carmody, Esq.

On September 13, 2014, WPTLA held the 14th annual President's Challenge 5K Run/Walk/Wheel event along the North Shore Riverwalk to benefit the Pittsburgh Steelwheelers. Nearly 200 people registered to race, walk or wheel the 3.1 mile course, which took place during a light rain. The family-friendly event had approximately 23 children under the age of 15 participate. Place winners in each category received trophies and all youth participants received medals.

I would like to thank all of the sponsors, participants and volunteers who made the event a truly positive experience. A special thanks to all those Western Pennsylvania Trial Lawyers Association members who came out with family and friends to support the event. The race was covered by 2 local news stations and raised $31,750.00 for the Steelwheelers. The donation will be ceremoniously presented to the Steelwheelers at the Annual Judiciary Dinner in May 2015.

With continued support from our membership, partners and sponsors, we hope to build upon the success of the event.

Above R, 5K Committee Member Chad McMillen runs for the finish line, while 5K Chair Sean Carmody, L, paces himself. On R, Runners begin the 5K. Additional photos from the 5K can be found on p. 13

UPCOMING EVENTS FOR WPTLA

Wednesday, November 19, 2014 is the date of the annual **Comeback Award Dinner**. New venue this year at the Grand Concourse at Station Square in Pittsburgh.

Thursday, January 22, 2015 marks the date of a dinner meeting at the **LeMont Restaurant in Pittsburgh**, when we'll welcome our Junior Members.

A **Westmoreland County Dinner Meeting** is being planned for **March 2015**. Stay tuned for details.

Wednesday, April 8, 2015 will be the **Members Only Dinner Meeting**, when we'll elect our Officers and Board of Governors for the 2015-2016 year. The location is the **Rivers Casino in Pittsburgh**.

President
Christopher M. Miller

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A Message from the President …

By: Christopher M. Miller, Esq.

COMBATTING THE "OTHER SIDE'S" LONGSTANDING PROPAGANDA CAMPAIGN

We've all heard the jokes about trial lawyers. They have been around for as long as I can remember, and there are hundreds of them. Some are more creative than others, and they usually get a laugh from their recipients. As you know, none of them are particularly flattering to our profession. We have an image problem, and the general public has bought in.

How did this negative perception of trial lawyers come to be? I'm not sure that I can answer that question specifically. There are many factors involved, and probably many more than what I have even thought of. Much of it comes from corporate America and the insurance industry. It's fueled by relentless attacks on victims of negligence, putting spins on verdicts obtained in the hopes that they can influence future jurors, and flooding the market with "insurance fraud" commercials and billboards. All the while, record profits seem to be realized year in and year out by many companies and the insurance industry. Despite those "greedy trial lawyers" who bankrupt companies, increase the cost of goods and services, drive doctors out of state and increase everyone's insurance premiums, corporate America and the insurance industry seem to be doing just fine.

If only the general public knew about the record profits earned each year by many corporations and the insurance industry. If only they were aware of the fact that the number of lawsuits filed annually has significantly diminished. If the public only realized that "frivolous lawsuits" are virtually nonexistent due to the legal safeguards that are in place. Or if only they recognized the fact that no one seems to know where all of the doctors and healthcare professionals seem to have allegedly disappeared to.

We can't compete with the insane advertising budgets that these giants have in place. What we can do is fight back in small, relatively inexpensive ways. With the rapid advances in technology over the past decade, we can now reach a large portion of the population without spending huge sums of money on advertising. Facebook, Twitter, and the many other forms of social media provide an easy, inexpensive alternative to television, radio, and billboards. Millennials and adolescents are becoming increasingly more and more reliant on smart phones, notebooks, and computers for their news, media, and social interaction.

We can reach these folks through social media outlets and the internet. We can get the truth out easily and inexpensively. Don't just post or list positive case outcomes on your firm's website, Facebook, or Twitter account. Start posting some of these facts to your firm's Twitter account or Facebook page. Do a little research and identify some of the truths that exist about insurance profits, the number of healthcare professionals in the tri-state area, or the statistics that exist regarding motor vehicle collisions. Once you are armed with this information, post it on Facebook or Twitter. Identify it on your website. Send out e-newsletters to your clients. Just make sure that your information is accurate before putting it out there for everyone to see.

Encourage your friends, relatives, *and* clients to "like" your firm's Facebook page or "follow" your firm's Twitter account. Hopefully their friends and followers will also get the information passed along to them. Slowly but surely, we can get the message out to a lot of people. We can change the general perception of lawyers and victims' rights in a cost-effective manner. We can get the truth out to the general public. It's time to take the fight back to the other side.

ERIE RETREAT RECAP

By: Eric J. Purchase, Esq.

President Chris Miller chose Erie as the host site of the Western Pennsylvania Trial Lawyers Association's fiscal year kick-off event on August 21 and 22, 2014. The attendees agreed it was a smashing success. Unfairly maligned as a city encased year-round in ice and snow, Erie in summertime is a scenic resort city with spectacular waterfront entertainment, challenging golf courses and, surprisingly important for this year's WPTLA crew, home to the most bowling lanes per capita of any city in the nation. [1]

Thursday morning provided perfect weather for a day on the golf course as Bill Weichler hosted a group at Lake View Country Club. Tim Riley observed that the course was in pristine condition. Josh Geist, who throughout the day was frequently told, "It's still your putt," confirmed the greens were fast, the lake views majestic, and course management was challenging.

Fresh off the round, the players and late arrivers gathered at the Bayfront Sheraton for a meeting of the board of governors. The board addressed important matters ranging from the solicitation of volunteers for the year's work to updates on important charity projects. Following the meeting, all retreated to the Sheraton's waterfront dining room for a restorative meal and refreshing beverages, courtesy of our business partner Chris Finley of Finley Investigations.

It wasn't long before dinner conversation turned to the featured activity of the night: Bowling! The puzzled attendees quizzed one another: Who chose bowling in August? How will we get there? How many gruesome injuries should we expect?

The answers were fast and reassuring. Larry "Gutterball" Kelly was the genius behind the plan, and would ultimately be the architect of a complex bowler pairing system the particulars of which, to this day, remain a mystery to everyone but Larry. Erie's celebrated Flagship Trolley would collect the entire group at the Bayfront and shuttle them in style to Greengarden Lanes and back. And injuries, aside from some deflated egos, would prove to be happily absent.

Individual kegling performances varied wildly between the extremes of the comically absurd and the merely mediocre. Jim Moyles, for one, was heard crowing, "I don't know about the rest of yinz, but I lost far fewer balls on these lanes than I did at Lakeview this morning!" Others seemed more interested in the jukebox than the action on the lanes. Despite the passionate competition of all involved, one team emerged with a clear victory. Congratulations to one of our surprisingly skilled business partners for carrying yours truly to a much-maligned but nevertheless dominant championship win.

The post-bowling activities of the attendees are shrouded in a veil of secrecy. Rumors abound of the group dispersing along the eastern bayfront to a popular dive bar on the water known for its namesake drink, the Rumrunner. While the wait staff were reportedly pleased to host "a large group of attractive (mostly) men and women who were having a lot of fun and tipping as only the late night crowd can," no witness could be found willing to go on the record to confirm the evening's remaining activities. Newcomer Darrell Kuntz, when asked, would say only, "I wasn't sure what to expect, really, from my first WPTLA event. But it's hard not to notice that these people certainly get more interesting as the night wears on. I'm definitely coming again next year!"

Friday morning came early, as it tends to do. Varsha DeSai of Alliance Medical Legal Consulting deserves special thanks for her presentation of that day's seminar, "Increasing the Value of Your Case - Effective Use of Life Care Plans and Future Medical Costs Projections." Everyone agreed our

[1] Editor's Note: According to the most reliable source available (the Internet), Milwaukee is actually the city with the most bowling lanes per capita, followed by Madison, WI. Please let Mr. Purchase continue to believe it is Erie.

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PRINCIPLES FOR SUCCESS: A GUIDE FOR YOUNG LAWYERS

By: John E. Lienert, Esq.

As a young lawyer, I carefully observed and studied the habits of more veteran lawyers, whom I believed were not only reputable in the field, but also successful in their profession. I wanted to emulate the approach these lawyers took throughout their cases, whether it was in the courtroom or on paper in the form of a legal pleading or brief. So I set out on a mission to uncover the hidden secret to success . . . and I quickly realized that there was no hidden secret.

Success comes in the form of milestones: it looms over the horizon of challenges and obstacles that must be met head-on. The principles set forth in this article are merely intended as a guide to help young lawyers face the various challenges and obstacles that may arise in the first few years of practicing law with confidence, and as such, allow young lawyers to achieve success at each juncture of their respective legal careers.

The four general principles for achieving success that I believe every young lawyer should apply and adhere to are: (1) Hard Work, (2) Preparation, (3) Valuable Relationships, and (4) Work-Life Balance.

The first and most important thing a young lawyer can do is work hard. There is no substitute for hard work. Young lawyers must put in the time and then they must put in more time; however, it should be noted that working endless hours does not always translate into working hard and it does not automatically result in success. Working long hours may certainly increase the chances of achieving a desired result, although working long hours is not a substitute for working smart and efficiently – something all young lawyers must learn to do early on in their careers.

Hard work requires discipline and organization. Discipline must be at the forefront of the young lawyer's agenda. Discipline is something most young lawyers already possess; if they did not have discipline, they likely would not have made it through law school. Cultivating that discipline, however, is the key to achieving success in the first few years of the practice of law.

Organization is acquired through discipline. Staying organized and focused can be accomplished with a simple "To Do" List that captures everything the young lawyer needs or wants to accomplish on a daily, weekly, monthly and yearly basis. The feeling of satisfaction a young lawyer gets from crossing off a task on his or her "To Do" List can seem like a relatively minor accomplishment; however, that feeling of satisfaction can go a long way when the task at hand is one of major importance or significance. There is no substitute for hard work, but having discipline and being organized will help alleviate some of the stress and pressure that comes with hard work.

The second principle for achieving success as a young lawyer focuses on preparation. I was never the smartest person in my class, but I managed to make it seem that way to a lot of people, including my parents and professors, because of my relentless preparation for the task at hand. In addition to hard work, discipline, and organization, preparation (whether in the classroom, in the office, or in the courtroom) is one of the most valuable tools for achieving success as a young lawyer. Being prepared means doing your homework; knowing the situation that confronts the young lawyer and preparing for not only the known, but the unknown as well. When the young lawyer is unyielding in his or her effort to prepare for the task that lies ahead, the young lawyer will be able to face that situation with the confidence necessary to put him or herself in a position to succeed. Preparation is an investment – sometimes it pays off and sometimes it doesn't; when it doesn't, the young lawyer should have the desire to prepare that much harder the next time around. And if for some reason, it does not pay off the first time around, the young lawyer will know, based on his or her experience, how to approach preparing for the next task at hand. A young lawyer must believe in him or herself and take pride in his or her preparations; this will carry the young lawyer a long way early in his or her legal career.

The third principle for achieving success as a young lawyer centers on building valuable relationships. Good relationships must be developed with staff, co-workers, colleagues, and other lawyers both inside and outside of the law firm. A good relationship centers on trust. Trust is earned; it is developed through communication and action. Trust is gained through people-skills and it is enhanced by delivering on your word. In developing valuable relationships with others, a young lawyer must be interested in the other person. The young lawyer must learn as much as he or she can about the other person through communication and research. A young lawyer should try to find something in common with that person, whether it be a similar interest in a particular legal issue or cheering for the same sports team. Such commonality forms a bond and that bond leads to a strong and trusting relationship – something that will benefit both persons throughout their respective legal careers. Again, communication is key to developing good relationships.

Continued on Page 5

PRINCIPLES FOR SUCCESS … *(Continued from Page 4)*

Finally, a successful young lawyer must find a way to maintain an appropriate balance between his or her work life and his or her personal life. Too often I hear stories about a young associate working inordinate amounts of hours every day of the week while neglecting his or her own personal life. For a young lawyer to successfully manage his or her work life and personal life, the young lawyer must be willing to prioritize. Many young lawyers want to prove their worth to the partners and there is nothing wrong with that; however, in doing so, the young lawyer should make a commitment to set aside some time during the week and on the weekends to do something he or she truly enjoys, whatever that may be.

Efficient time management skills will allow a young lawyer to not only accomplish his or her daily work assignments, but it will also provide the young lawyer ample time to engage in activities and interests outside of the work environment. Whether you enjoy exercising, reading, playing golf, watching TV or just hanging out with your significant other, family, or friends, make sure to commit yourself to doing these things regularly throughout the week. You only live once . . . get out and do something you enjoy – you will feel better about yourself.

There is no magical formula for achieving success. The principles set forth in this article are no guarantee that the young lawyer will achieve success; however, by working hard, having discipline, being organized, preparing for the task at hand, developing valuable relationships and maintaining the appropriate work-life balance, the young lawyer will have a better chance at achieving success during the first few years of practicing law.

You will not always succeed in what you set out to do; however, in the event you do not succeed, work hard, believe in yourself, take pride in what you do, pick yourself up off the mat and push forward. Just remember, no matter how difficult the challenge is, stay the course, be positive . . . oh yeah, and while you're at it, enjoy the ride!

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 erudert@aldlawfirm.com

SPONSOR SPOTLIGHT

NAME:Maggie Alexander

BUSINESS/OCCUPATION: NFP Structured Settlements/NDC Advisors

FAMILY: My husband Jesse, and my two sons, Pete (6) and Hank (4)

INTERESTS: Boating, atv riding, and spending time with my family!

PROUDEST ACCOMPLISHMENT: Raising two happy, healthy little boys

FUNNIEST/WEIRDEST THING TO HAPPEN TO YOU ON THE JOB: Meeting with claimants at a state penitentiary

FAVORITE RESTAURANT: The Tuscan Inn

FAVORITE MOVIE: Sweet Home Alabama

FAVORITE SPORTS TEAM: Pittsburgh Penguins

FAVORITE PLACE(S) TO VISIT: Inner Harbor, Baltimore

WHAT'S ON MY CAR RADIO: KDKA in the morning and country music in the evening.

PEOPLE MAY BE SURPRISED TO KNOW THAT: I have a pacemaker.

SECRET VICE: Anything from Oakmont Bakery!

BY THE RULES

By: Mark E. Milsop, Esq.

Social Media Discovery

Much has been written about the appropriateness of the discovery of user names and passwords for social media sites, including my previous column in The Advocate. For the record, I remain opposed to such discovery. However, it seems like most cases are adopting the approach of looking at the public page to determine if discovery of the full, private portion of the site is appropriate.[1] As I have stated in the past, I think that type of discovery is an impermissible fishing expedition, an invasion of privacy and violative of Pa.R.C.P. No. 4011 (prohibiting discovery causing unreasonable annoyance, embarrassment, oppression, burden or expense).[2]

Having said the foregoing, I would like to focus on the issue of the remedy. Defense counsel often seeks the user ID and password for unfettered access to the client's social media page. Although I do not suggest that many attorneys would abuse this access, it can be done. This type of access would allow an attorney or anyone with the information to post on behalf of the client, change passwords for the account, potentially access credit card information, etc. If this information filters down to individual defendants, insurance carriers, office employees, etc., there is certainly room for misuse. In addition, the prospect of a hostile third party having controlling access to a client's social media account is undoubtedly an uncomfortable situation for the clients.

If the Court is inclined to allow the defense access to a plaintiff's social media site, the access must be tailored in such a way to protect the plaintiff and allow only the access necessary to serve the purpose of the discovery. One remedy that I have now successfully advanced in two cases is that the Plaintiff and counsel be allowed to view the website with Plaintiff's counsel present. One of these cases, *Simms v. Lewis*, 2012 WL 6755098, 11961 CD 2011 (Indiana County 2012) has had some discussion in a number of orders, but has not been discussed in terms of the remedy. The second case, *Gamble v. Ishma* (Erie County 2014) has not received publicity.

[1] A recent case denying such discovery based upon the lack of a predicate is *Hoy v. Holmes*, 28 Pa. D. & C.5th 9 (Schuykill County 2013).

[2] See e.g. *Brogan v. Rosenn, Jenkins & Greenwald, LLP*, 28 Pa. D. & C.5th 553, 575 (Lackawanna County 2013) (discovery request seeking carte blanche access to private social networking information is overly intrusive, would cause unreasonable embarrassment and burden in contravention of Pa.R.C.P. 4011(b), and is not properly tailored "with reasonable particularity" as required by the Pennsylvania Rules of Civil Procedure.)

Appropriate language for such an Order would be as follows:

> The parties shall coordinate a date, time and location within 60 days of this order where Plaintiff will access his/her _____ account in the presence of counsel for Defendant.
>
> It is further ORDERED that Plaintiff shall not alter or delete any existing photographs or information on her _____ account from the date of this Order until the date of access arranged pursuant to this Order.

Such an approach is fairer than unfettered access since it provides Defendant the ability to access a social media account without being as intrusive as an order requiring disclosure of usernames and passwords.

Westmoreland County Trial Lists

Westmoreland County now has their trial lists online. They have announced that they will stop mailing trial lists as of January 2015. The trial lists will be posted upon completion and then updated one time a week before the trial term.

COMP CORNER

By: Thomas C. Baumann, Esq.

ARE PENNSYLVANIA AGENCIES TAKING TOO MUCH PENSION CREDIT?

The Pennsylvania Workers' Compensation Act permits a credit against workers' compensation benefits for pension benefits which have been funded by the time-of-injury employer. Section 204(a) of the Act provides: ". . . the benefits from a pension plan to the extent funded by the employer directly liable for the payment of compensation which are received by an employee shall also be credited against the amount of the award made under Sections 108 and 306 except for benefits payable under Section 306(c)."

The Department of Labor & Industry has promulgated regulations to put the pension offset provisions of the Act into effect. Section 123.8 of the Act 57 regulations with Act 53 amendment states under Section (c), the offset may not apply to pension benefits to which an employee may be entitled but is not receiving. Under Section 123.4(f), the employer is only entitled to credit for the net amount of pension payments received by the injured worker after taxes are deducted.

The Commonwealth Court has also dealt with the issue of the credits a defendant takes where the claimant receives less in pension benefits than the maximum amount that he could have elected to receive. In *City of Philadelphia vs. WCAB (Harvey)*, 944 A.2d 1 (Pa. Cmwlth. 2010), the employer was seeking credit for the claimant's full pension to the extent that it was funded by employer; however, the claimant was not receiving the full amount of his pension.

In *Harvey*, the claimant began receiving a service-connected disability pension in the monthly amount of $2,292.21. At the time he began receiving the disability payment, he was also receiving $2,289.84 per month in workers' compensation benefits. The pension benefit, pursuant to the pension agreement, was reduced by the amount of the workers' compensation benefits. Therefore, his pension payment per month was $2.27. Employer presented testimony from an actuary indicating that the employer contributed 53.983% to the claimant's pension benefit. The employer sought a reduction of the workers' compensation payment in the amount of 53.983% of the amount of the claimant's full monthly pension benefit against the workers' compensation benefits. The Judge granted the reduction and the claimant appealed to the Appeal Board, which initially affirmed. However, the claimant sought rehearing before the Board, arguing Section 204(a) of the Act. The Board granted the claimant's Petition for Rehearing, finding that the offset against compensation benefits should be equal to 53.983% of the benefits that claimant was actually receiving, or $2.27 per month, reduced to $1.23 per month.

An appeal followed to the Commonwealth Court. There, the Court concluded:

> The Board found Section 204(a) allows an employer to offset claimant's Workers' Compensation Benefits only based on the amount of pension benefits received. The amount of pension benefits happened to be $2.77. The plain language of Section 204(a) of the Act supports the Board's determination to allow employer to offset his Workers' Compensation Benefits in an amount equal to 53.983% of his full pension even though claimant did not receive his full pension would yield an absurd result. . . . [F]urther, to construe Section 204(a) of the Act in the fashion advanced by the employer would run completely contrary to the principle that the Act is designed to benefit injured workers and it is to be liberally construed to effectuate its humanitarian objection.

WPTLA member, Doug Williams, brings to the author's attention efforts by the Commonwealth of Pennsylvania, through the Pennsylvania State Employees Retirement System (PSERS), to claim a credit for the maximum amount of benefits that injured workers *could* have elected to receive rather than the amount that they *actually* elected. Doug represents two claimants, both of whom are retired employees of the Commonwealth of Pennsylvania who are receiving workers' compensation benefits. One claimant was employed by the Turnpike Commission and the other by the Department of Corrections. In each case, the injured worker selected a pension option that paid less than the maximum amount that the worker could have elected. In each case, the Commonwealth of Pennsylvania claimed to have funded a portion of the pension and asserted a right to a credit against weekly compensation benefits. However, the Commonwealth, like the employer in *Harvey*, calculated the credit as a percentage of the maximum monthly payment that each worker *could* have elected rather than basing the credit on what the worker *actually* received. Both cases are currently in litigation and, as you might expect, Doug is arguing that the Commonwealth's method runs contrary to the Act, the applicable regulations, and the Commonwealth Court's decision in *Harvey*.

If others are facing this issue, please contact the author so other members can be updated.

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 27 2014-2015

	Article Deadline	Publication Date
Vol 27, No. 2, Winter 2015	Dec. 2, 2014	Dec. 12, 2014
Vol 27, No. 3, Spring 2015	Mar. 6, 2015	Mar. 20, 2015
Vol 27, No 4, Summer 2015	Jun. 5, 2015	Jun. 19, 2015

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MEMBER PICTURES & PROFILES

Name: Deborah Maliver

Firm: Biancheria & Maliver, P.C.

Law School: Pitt

Year Graduated: 1995

Special area of practice/interest, if any: Medical Malpractice

Most memorable court moment: When a defendant doctor remembered that he was in a patient's room for the first time at trial (prior to that he could not say where he was at the time of a critical incident) because he forgot to flush the toilet in the room after moving his bowels. The jury gagged in unison.

Most embarrassing (but printable) court moment: Judge screaming at me so much in trial he fell out of his chair

Most memorable WPTLA moment: I can't remember the most memorable moment. Only snippets of singing a song.

Happiest/Proudest moment as a lawyer: Always whenever I get an injured victim help.

Best Virtue: Honesty

Secret Vice: Black Licorice

People might be surprised to know that: I am a third generation female physician.

Favorite movie (non-legal): Groundhog Day

Favorite movie (legal): A Clockwork Orange

Last book read for pleasure, not as research for a brief or opening/closing: Pale Fire by Nabokov

My refrigerator always contains: Fruit for my parrot

My favorite beverage is: Water

My favorite restaurant is: Vivo's

If I wasn't a lawyer, I'd be: A famous, gorgeous and rich movie star.

HOT OFF THE WIRE!

By: Chris Hildebrandt, Esq.

SUPERIOR COURT OF PENNSYLVANIA

In a 46 page opinion, the Superior Court reversed a $2.5 million award, determining that a property owner that does not retain control over a worksite (even though the property owner's designated authorized representative, responsible for overseeing worksite safety, was at the worksite on a daily basis) has no duty to an employee of an independent contractor.

Nertavich v. PPL Electric Utilities, et al., 2014 PA Super 184 (Aug. 27, 2014)

Plaintiff was a painter employed by QSC. QSC was hired by PPL to paint a number of 90-foot-high electric transmission poles. In the contract between QSC and PPL was a "PPL Specification Document" which "prescribed each step how to paint the poles." PPL also maintained control over the worksite, supplying an "Authorized Representative" who was designated as "the daily source of contact . . . in areas of any question, materials, quality assurance, general safety, work procedures and schedule." PPL's Authorized Representative had the authority to immediately stop all painting work at his discretion for perceived safety violations.

PPL's poles had been manufactured to PPL's specifications, and the only way QSC could place its painters on the poles was through the use of custom ladders, provided by PPL. PPL provided the ladders, but not the bolts to secure the ladders to the poles. On the date of the incident, Plaintiff was 40' off the ground, standing on one of the ladders while painting the pole. QSC had provided Plaintiff with a pole belt, a body harness and two lanyards. Plaintiff, however, was only using the pole belt and one lanyard (which was coated in dried paint), which he had looped around a ladder peg. Plaintiff, holding onto the lanyard, leaned to his left to paint a hard-to-reach spot when the ladder wobbled, the lanyard unlooped, and he fell to the ground, suffering significant injuries.

A jury returned a verdict in Plaintiff's favor, finding PPL 51% negligent and Plaintiff 49% negligent. The trial court had denied PPL's motion for nonsuit and motion for directed verdict. On appeal, the Superior Court determined that PPL was entitled to j.n.o.v. because Plaintiff failed to establish that PPL had retained control over the manner, methods, means and operative detail of QSC's work; ergo, PPL did not owe a duty to employees of QSC, an independent contractor.

The Superior Court reasoned that while PPL's Specification Document "provided quality specifications for the painting" of the poles, Plaintiff's fall "had nothing to do with these quality specifications." Moreover, the contract did not instruct QSC "how to climb the poles safely." Even though PPL had an Authorized Representative on site to monitor safety, the Superior Court, citing *Beil v. Telesis Const. Inc.*, 11 A.3d 456 (Pa. 2011), noted that "a property owner who retains 'a certain degree of authority over safety issues, such as supervising and enforcing safety requirements, and even imposing its own safety requirements at a work site, does not constitute control for purposes of imposing liability.'" The Superior Court determined that "PPL's designation of a contract field representative . . . did not evidence its retention of control over all matters of work site safety."

Likewise, even though PPL supplied QSC with the climbing ladders, this was not sufficient evidence to demonstrate that PPL retained control of the worksite. According to the Superior Court, PPL did not "mandate" that QSC use the ladders, and only provided the ladders to QSC when QSC was unable to obtain the ladders on its own. In addition, because the contract between PPL and QSC specified that QSC was responsible for "all climbing assist and rigging equipment necessary to complete" the contract, QSC could have rejected PPL's ladders or chosen a different means to climb the poles.

The Superior Court also rejected Plaintiff's direct negligence theory against PPL, concluding that PPL's failure to supply the bolts with the ladders did not increase Plaintiff's risk of harm. Likewise, because PPL owed no duty to Plaintiff, PPL's violations of industry safety standards was irrelevant and properly withheld from the jury.

An insurance policy is to be read as a whole, and where the household exclusion clause language differs between the UM and UIM portions of the same policy, the language will be deemed to be ambiguous.

Clarke v. MMG Ins. Co., 2014 PA Super 192 (Sept. 4, 2014)

Plaintiff, while operating his motorcycle, was involved in a collision with another vehicle. At the time of the collision, his motorcycle was insured by American Modern Select, while his two automobiles were insured by MMG Insurance Company. Plaintiff maintained $25,000 in

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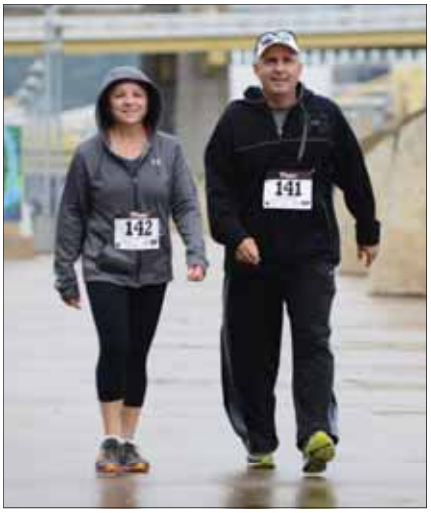
5K Photos

Pictured clockwise, beginning upper L: John Lienert, Immediate Past President Chad Bowers, President-Elect Larry Kelly, Lauren Kelly, Board of Governors Member Mark Milsop, President Chris Miller, Past President Josh Geist, Business Partner Cindy Miklos, David and Board of Governors Member Kelly Tocci, John Bacharach, Board of Governors Member Chuck Garbett and daughter Kelly.



5K Photos

Pictured clockwise, starting R: Board of Governors Member Warren Ferry, 1st place WPTLA Male John Lienert with 3rd place WPTLA Male Chad McMillen, Past President Bernie Caputo with kids Dante, Gianna and Bene, 2nd place WPTLA Female Kelly Tocci with 1st Place Female Runner daughter Amanda, 5K Chair Sean Carmody, Board of Governors Members Greg Unatin and Max Petrunya, with Andrew Rothy, and 5K Race Founder The Honorable Beth Lazzara with daughter Lucia.

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 address whether it is a violation of the Constitution for two people, who committed the same crime and were both found guilty of the same crime, to receive different sentences for that crime based on a change in the sentencing guidelines that affects only one of the people. Below is the one of 2014's three winning essays.

The Eighth Amendment to the Constitution of the United States of American protects citizens against the infliction of cruel and unusual punishment. Regarding this statement, it is the job of the judicial system to interpret what has been defined as cruel or unusual. This important job is a procedural right, a right that is designed to ensure a just interpretation of the due process of law. Another familiar procedural right is a trial. The Bill of Rights also guarantees us the right to a fair trial; however, a trial is not merely another procedural right. Trials are comprised of an array of additional rights which are substantive. Substantive rights can be understood as basic rights that constitute the order of society. This means that certain parts of a trial, including the right to cross-examine witnesses and the right to legal representation are all substantive rights, though the trial itself is a procedural right. This perspective emphasizes the importance of understanding substantive law and its proper application There are often blurred lines in determining a government's right to act with regards to a specific law; however, law is clearly based on the governing body's own interpretation. A government is only permitted to limit the freedoms of its constituents for a legitimate reason or this government would be acting out of its scope of permissible action.

In 2012, United States Supreme Court Justice Elena Kagan wrote part of the court's ruling in *Miller v. Alabama*. "The traditional purposes of sentencing don't work the same when applied to young defendants" (Markham 2), said Kagan, regarding the guidelines of the court. Kagan's opinion agrees with the fact that children are less mature and more vulnerable to poor influences; therefore, they are unable to be held fully accountable for their actions in the eyes of the law. There is no logical way that an individual whose character has not yet fully formed can make proper decisions regarding themselves and those around them. This reasoning explains the Supreme Court's ruling in *Miller v. Alabama*, but the pertinent question of whether or not the decision should be retroactively applied remains. The decision to apply the court's decision retroactively would occur as an effect of a substantive change of constitutional law. When one's status prohibits him or her from being given a specific punishment, a substantive change is in progress. There are currently offenders in jail whose ages were ignored during their trial, an unsuitable function of the court's ruling in *Miller v. Alabama*. If an individual truly deserves a life sentence, he or she will receive one after a proper trial; consequently, in the instance of reopening and retrying a case, if the individual committed a crime truly worthy of such a strict sentence, the standing will remain, but those who were forced into a life sentence indecently will receive justice. This process would be an accurate part of a substantive change of law.

There are two main reasons why, as a matter of a substantive change, the case should be given a retroactive effect. The first is that in each case, the actual crime of the juvenile offender was the only criterion that was taken into consideration when sentencing,. The severity, nature, and type of crime were examined and then a sentence was determined based upon these factors, not the other details involved in the case. This introduces the second reason for the retroactive application of the decision: the age(s) of the offender(s), no matter what the crime is, remain crucial details which need to be considered when trying any case in a court of law. The cases surrounding the *Miller V. Alabama* decision involve individuals whose ages were completely disregarded when the judiciary was imposing a sentence; the sentence was imposed based solely on the crime committed. The age of an offender needs to be taken into consideration because someone's age can prevent him or her form possessing the ability to make proper decisions. Juveniles' inability to make mature choices has been proven as scientific fact in the field of brain science (2). Furthermore, there is a consensus around the entire world that children cannot be held to the same standard of responsibility that adults can be. Relating this to the Eighth Amendment, it would indeed be cruel for someone to remain in a correctional institution for their entire life with no chance of receiving paroled only because a judge did not take their age into account when deciding on an appropriate punishment. Disregarding the ages of offenders demonstrates apathy towards justly trying a case, which proves that the ruling should be retroactively applied as a substantive change of constitutional law.

Obviously, it is not fair to force people who were unfairly sentenced to remain in a correctional facility without a chance of parole. The convicted murderers of Bliss should be given permission to have their cases retried because not only were they unfairly sentenced according to the ruling of *Miller v. Alabama*, but there are also people in the same situation as those convicted at Bliss who escaped similar punishment. Similarly, it is completely unjust that Bobby should receive a more severe punishment than Mike. This implication of the law is exactly what the members of the United States Supreme Court were trying to prevent from occurring in their *Miller v. Alabama* decision. They knew that the previous sentencing guidelines, which disdained age, were not appropriately formatted, and they made their decision in support of the idfea that this was not the proper way to sentence juvenile offenders. Merely because an individual has had to experience sentencing through the unfavorable guidelines prior to the *Miller v. Alabama* decision does not mean he or she should not be able to receive the same just treatment under the law as those future individuals who will be subject to the updated guidelines. Applying the case post factum provides the opportunity for a judge to properly examine all of the necessary materials involved

with each individual case before making a decision on the proper punishment for the offender. This process will improve the juvenile courts, make the sentencing process more reasonable, and allow criminals who were unjustly sentenced to receive appropriate punishment.

While those in opposition to the retroactive application of the case believe that the victims' families will be subject to unnecessary emotional distress, the juveniles who are forced to give up the rest of their lives in a correctional facility will also experience emotional turmoil and frustration. In the case of the Bliss facility, it is clear that Bobby received a stricter sentence than the prime offender of the crime due to his inability to afford an expensive lawyer. Without the application of the *Miller v. Alabama* case, Bobby will not be able to get married, have children, travel, or even take a scenic walk anytime in the future. Bobby will miss out on all of the opportunities life offers because he could not afford a lawyer who could fight his case on a technicality. Bobby should have the opportunity to have his case reopened and retried. After his case has been retried, if he is found to deserve a life sentence, then Bobby will serve it; however, it is not right for him to suffer the rest of his life because he could not afford a better lawyer. Yes, Bobby participated in the crime and yes, Bobby made a mistake. An even bigger mistake would occur if the *Miller v. Alabama* decision were not applied ex post facto: thousands of juveniles will be deprived of the opportunity to rehabilitate themselves and benefit society. It is a harsh reality for the families who have lost a loved one, but the future implications of the decision will make sure that only those who deserve a life sentence without parole beyond a reasonable doubt will receive one.

Works Cited

Markham, Jamie. "Miller v. Alabama." *Nccrimilallaw.edu.* UNC Schoo; of Government Blog, 27 June. 2012. Web. 20 Feb. 2014. http://nccriminallaw.sog.unc.edu/?p=3698.

Submitted by:
Lia Kopar, of Hopewill High School

ERIE RETREAT RECAP *(Continued from Page 3)*

clients would be well-served by more and better use of the quality service and professional attention Varsha provides for our clients.

By noon or so, a return home was what most had left on their agenda for the day, although a small but enthusiastic group was seen headed for the courtyard at the Erie Club. Those of us from Erie were grateful you came to the furthest corners of the Commonwealth to enjoy the beautiful weather with us. It was a great event.

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

UIM coverage under his policy with American Modern Select.

After recovering the third-party limits as well as American Modern Select's UIM limits, Plaintiff sought UIM proceeds under his MMG policy. MMG, however, denied Plaintiff's claim, asserting that the policy's Household Exclusion Clause precluded coverage because the motorcycle involved in the collision was not a covered vehicle under the MMG policy. Plaintiff filed suit against MMG; the trial court granted MMG's Motion for Summary Judgment, holding that Plaintiff's UIM claim was barred by the Household Exclusion Clause.

The Superior Court reversed the trial court's decision, finding that the language of MMG's exclusion was ambiguous. Specifically, while the Household Exclusion Clause in the UM portion of the policy excluded coverage for injuries sustained in vehicles "not insured for this coverage *under this policy*," the same clause in the UIM portion of the policy excluded coverage for injuries sustained in vehicles "not insured *for this coverage*." The Superior Court, reading the policy as a whole, determined that the ambiguity caused by the UIM exclusion's language (i.e., "whether it refers to UIM coverage through any insurer or UIM coverage under that particular policy") was clarified in light of the UM policy's language. The Superior Court noted that based upon the language in the exclusion found in the UM policy (" . . . under this policy"), MMG Insurance "understood how to exclude coverage for injuries occurring in vehicles not insured by MMG Insurance." The Superior Court determined that the phrase "under this policy" was not mere surplusage, and if "the UIM and UM exclusions were intended to have the same meaning, they would have the same language."

WPTLA/STEELWHEELER EVENT

Wouldn't it be awesome to see the Steelwheelers in action? Wouldn't it be great for WPTLA members to challenge them to a game of basketball?

What if we organize a basketball game against the Steelwheelers? It could be a great event attended not only by our members, but the general public as well.

In order to make this idea a reality, we need to know if you are willing to participate in the event or will attend. We need members to play in the basketball game, collect tickets, etc. We also need to fill the seats.

If you think this is a worthy endeavor, if you are interested in playing, or if you'd like to help out by manning the entrance, refreshments, etc., **please contact us!**

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

...Through the Grapevine

Congratulations to **WPTLA Member Michael Zimecki** of Berger and Green on the recent publication of his novel, *Death Sentences*. Although fiction, the book is based on a shooting in Pittsburgh. The novel is published by Crime Wave Press and is available through amazon.com.

Member Benjamin W. Schweers has moved to Goldberg Persky & White, 1030 Fifth Ave, Pittsburgh 15219. Ben can be reached at 412-471-3980 or bschweers@gpwlaw.com.

Member Robert N. Isacke, Jr, wishes to be reached at 6601 Darlington Rd, Pittsburgh 15217.
P: 412-901-3927

Our condolences to the friends, family and co-workers of longtime **WPTLA Member William C. Schwartz**, who passed away on August 19.

Congratulations to **Board of Governors Member Gregory R. Unatin** and his wife, Sydne, on the birth of their daughter Harper Lane. All 3 are doing great.

Board of Governors Member Erin K. Rudert has a new home. She is now working with Ainsman Levine & Drexler, 310 Grant St, Ste 1500, Pittsburgh 15219. P: 412-338-9030
Email: erudert@aldlawfirm.com