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UPCOMING EVENTS FOR WPTLA

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 one-credit CLE follows dinner.

Wednesday, March 4 is the date of a 3-credit CLE program, presented by Business Partner **Robson Forensics**.

A **Westmoreland County Dinner Meeting** is planned for **March 11, 2015**., at **DeNunzio's Restaurant in Jeannette.** A one-credit CLE will follow dinner. Stay tuned for details.

Wednesday, April 8, 2015 is 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**.

The **Annual Judiciary Dinner** will be held on **Friday, May 8, 2015** at **Heinz Field in Pittsburgh**.

TINCHER V. OMEGA FLEX: A RETROSPECTIVE AND PROSPECTIVE VIEW OF PENNSYLVANIA'S STRICT PRODUCT LIABILITY

By: Jason M. Schiffman, Esq. and Daniel S. Schiffman, Esq.

Introduction

On November 19, 2014, the Pennsylvania Supreme Court issued its decision in *Tincher v. Omega Flex, Inc.*, 2014 WL 6474923 (Pa. 2014), providing much needed and long awaited guidance to judges, lawyers, and litigants regarding Pennsylvania's scheme for the treatment of strict product liability claims. Prior to the *Tincher* decision, there was significant confusion and disagreement among the Pennsylvania courts as to whether Pennsylvania was going to continue to utilize the Restatement (Second) of Torts § 402A as adopted and modified by Pennsylvania's courts or adopt the Restatement (Third) of Torts §§ 1 and 2.

After years of predictions regarding what changes, if any, would be made by the Supreme Court to strict product liability jurisprudence in Pennsylvania, the Supreme Court has spoken. The *Tincher* decision defines the requisites for pursuing a strict product liability claim in the Commonwealth of Pennsylvania. *Tincher* outlines the procedure for legal and factual determinations between the judge and the finder of fact, including whether these determinations should occur prior to trial or as findings rendered through trial. The scope of this article is to provide a broad and general outline of the key points set forth in the expansive *Tincher* opinion. This article is not meant to be all encompassing and a thorough and detailed reading of the *Tincher* opinion in its entirety is recommended for product liability practitioners.

Salient and Relevant Facts of *Tincher*

In *Tincher*, the plaintiffs alleged that the corrugated stainless steel gas tubing ("CSST") in their house was defective. The tubing was part of a gas transportation system that carried natural gas into the Tinchers' home to a fireplace. A lightning strike energized the tubing, caused a small puncture, ignited the natural gas, and destroyed the Tinchers' residence. CSST is different from traditional gas pipes in that it was designed with significantly thinner walls. The plaintiffs proffered that the exceptionally thin walls of the tubing, which was manufactured by Omega Flex, Inc., rendered it prone to failures when energized and allowed it to be punctured under conditions where traditional gas pipes would not have failed. The jury returned a verdict in favor of plaintiffs and against Omega Flex.

Omega Flex appealed the verdict to the Superior Court and urged adoption of the Restatement (Third) of Torts. In its appeal, Omega Flex claimed, *inter alia*, that under the Restatement (Third), the plaintiffs would have been required to prove that the defendant could and should have adopted a reasonable alternative design. The plaintiffs responded that the Restatement (Third) violates Pennsylvania law by improperly introducing negligence concepts into Pennsylvania's strict products liability scheme.

The Pennsylvania Superior Court affirmed the jury verdict and refused to adopt Restatement (Third) of Torts, noting in dicta that only the Pennsylvania Supreme Court was empowered to adopt this Restatement as the law.

Omega Flex filed a petition for allowance of appeal, which the Supreme Court granted on the lim-

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Christopher M. Miller

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A Message from the President …

By: Christopher M. Miller, Esq.

'Tis the Season…

As 2014 winds down to a close, we should all take some time to reflect on just how fortunate we are. I understand that we all have our fair share of problems and issues facing us. But in the grand scheme of things, for most of us, things are pretty good.

In my last article, I addressed the public perception of lawyers and discussed some cost-effective ways to take the fight back to the insurance industry and corporate America in order to get the truth out. In addition to being more proactive on social media, there are other ways that we can try to improve our image with the general public.

We do our best day in and day out to fight for victims of wrongdoing. It's hard work, but it can be extremely rewarding in many respects. Unfortunately, a lot of times our hard work gets a bad rap, often being portrayed as "greedy trial lawyers" who profit off of other's misfortunes. This is the image that we need to try to change.

Many of us are heavily involved with charity work outside of the legal profession. Still others are involved with charity work through the various trial lawyers' organizations (including WPTLA) to which we belong. Still others donate considerable sums of money year in and year out to causes that are important to them.

This holiday season, and throughout the upcoming year, we should all make it a point to get personally involved with some causes that we believe in. This recently hit home with me as a result of a discussion with one of my clients, a single mother. I asked her what her and her son's plans were for Thanksgiving. She told me how they would be spending Thanksgiving with their immediate family later in the day, but not until after they went to the local soup kitchen Thanksgiving morning to help serve meals to the homeless. She said that her son, all of seven years old, was reluctant to do so a few years ago when she started doing this with him, but now he gets excited and looks forward to doing it every year. For Christmas, her and her son go to their local senior citizens' high-rise and visit elderly people before spending their holiday with loved ones.

These are the types of things that we, as trial lawyers, should be engaging in as often as we can. Take some time out to go serve meals to the homeless, spend some time with the elderly who may not otherwise have a visitor on the holidays, volunteer for a food drive, or engage in whatever other service or charity that you are interested in this holiday season and throughout the year. All of us are short on time, but we can all manage to find a few hours here and there to do some good for others who are less fortunate than us.

The more proactive we become with these endeavors, the less likely it will be that the lives that we touch will be accepting of the negative propaganda that is constantly thrown at us. And just like my client's seven year-old son, I can pretty much guarantee that once you get involved, you'll enjoy it and feel very good about what you've done to put a smile on someone's face.
As a good friend of mine and fellow trial lawyer once told me, "Trial lawyers are some of the best people I know." Let's all try to make an effort this holiday season and in upcoming years to prove this statement to the public.

May all of you have a blessed holiday season and a Happy New Year!

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-ited issue of, "Whether this Court should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restatement."

Pennsylvania Strict Product Liability Law Prior to the *Tincher* Decision

The issues presented to the Supreme Court in *Tincher* centered upon the status of strict product liability and the standards of proof. Prior to *Tincher*, confusion had been rampant within the lower courts and federal district courts in the Commonwealth of Pennsylvania. Much of this confusion stemmed from the erroneous presumption set forth in *Berrier v. Simplicity Mfg.*, 563 F.3d 38, 40 (3d Cir. 2009). *Berrier* and its progeny predicted that the Pennsylvania Supreme Court would reject the principles of the Restatement (Second) of Torts § 402A, as adopted and modified by the Pennsylvania courts, and adopt the Restatement (Third) if presented with the opportunity to do so. The majority of the federal districts courts in Pennsylvania accepted the prediction set forth by the Third Circuit Court of Appeals in *Berrier* and adhered to the standards elucidated in Restatement (Third), including its insertion of negligence concepts.[1] However, both the state trial courts and appellate courts in Pennsylvania continued to adhere to the standards set forth in the Restatement (Second) of Torts, as modified by the Pennsylvania judiciary through decisional law.

The *Tincher* Decision

In *Tincher*, the Supreme Court defined the current state of Pennsylvania strict product liability law and specifically *rejected* the Restatement (Third) as accurately describing Pennsylvania law. The ruling precludes the federal district courts from issuing future rulings based upon the Third Circuit's erroneous prediction in *Berrier* that the Supreme Court would adopt the Restatement (Third) when presented with the opportunity.

The *Tincher* Court further explicitly overruled the landmark decision in *Azzarello v. Black Brothers Company*, 391 A.2d 1020 (Pa. 1978). *Azzarello* has been oft cited for its holding that a supplier is the guarantor of the safety of a product, which must be designed to be safe for its intended use when it left the defendant's control.[2] Under *Azzarello*, the jury was permitted to conclude that a product was defective if it lacked any element necessary to make it safe for its intended use or it possessed any feature that rendered it unsafe for its intended use.[3] The Court in *Azzarello* also ruled that the term "unreasonably dangerous" had no place in the instructions given to a jury and that negligence principles were improper in a product liability action premised upon strict liability.

The judicially created construct that there is an absolute dichotomy between strict liability and negligence and that negligence principles are improper in a strict liability action has long been the law of the Commonwealth. However, in practice, as Hamlet so eloquently stated, it was "More honor'd in the breach than the observance." From a practical perspective, it was often difficult or impossible for a plaintiff to convince a jury (or sometimes a judge) that a product contained a defect if the plaintiff did not prove the product also to be unreasonably dangerous.

This "standard" of proof has been called many names and interpreted in many ways. Although the focus in a case brought under the theory of strict product liability was purportedly on the product,

[1] Not surprisingly, the debate over the application of the competing standards was not confined to the Courts. The majority of the plaintiffs' bar supported the position that the Restatement (Second) of Torts § 402A should remain the law, while the defense bar heralded the arrival of the Restatement (Third).

[2] Notably, there is precedent, decided both prior to and after *Azzarello*, that supports the legal precept that a supplier of a product is the guarantor of its safety. This legal concept should survive even with the overruling of *Tincher*. *See* SSJI 16.20 Subcommittee Note citing *Salvador v. Atlantic Steel Boiler Co.*, 319 A.2d 903, 907 (Pa. 1974); *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975); *Carrasquilla v. Mazda Motors Corp.*, 197 F.Supp.2d 169 (M.D. Pa. 2002).

[3] It is noteworthy that Pennsylvania does not require that a jury be instructed that a product is "safe for *intended* use" and that an instruction of merely "safe for use" is usually acceptable and will not provide grounds for reversal on appeal. See *Marshall v. Philadelphia Tramrail Co.*, 626 A.2d 620 (Pa.Super. 1993); *Mount Olivet Tabernacle Church v. Edwin L.Wiegand Div., Emerson Electric Co.*, 781 A.2d 1263 (Pa. Super. 2001); *Craley v. Jet Equip. & Tools, Inc.*, 778 A.2d 701 (Pa. Super. 2001).

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negligence-based concepts of foreseeability and/or intended use or user often arose as issues raised by the defense in its attempt to defeat the injured party's claim.

The authors were privileged to discuss the impact of the *Tincher* holding with Shanin Specter, a founding partner of Kline & Specter, who stated, "Negligence concepts have always crept into a product liability case. People understand negligence; they understand unreasonable conduct."

Negligence concepts rendered the interpretation of strict product liability rife with difficulties.[4] The Supreme Court itself acknowledged, in 2013, the difficulties with some of the concepts employed to support the abstract division between strict products liability and negligence when it remarked, "While it is beyond the scope of this opinion to provide the needed reconciliation, clarification, or modification, we recently allowed appeal in *Tincher v. Omega Flex, Inc.*, —— Pa. ——, 64 A.3d 626 (2013) (*per curiam*), with the hopes of doing so in such case." *Lance v. Wyeth*, 85 A.3d 434, 453 (Pa. 2014).

> "Negligence concepts have always crept into a product liability case. People understand negligence; they understand unreasonable conduct." – Shanin Specter, Kline & Specter

In *Tincher*, the Court, per Justice Castille, analyzed prior case holdings and treatises to draft a lengthy and well-documented history of the evolution of strict product liability in Pennsylvania. The Court carefully parsed prior decisions of the Supreme Court, prior decisions of the lower courts, and treatises in order to craft a workable outline of the new direction of strict product liability.

These constructs will no doubt face further scrutiny, but, for now, the Court has spoken and provided us with well-reasoned guidance. Although there remain substantial areas that require clarification, the Court's decision will guide plaintiffs in their crafting of complaints, defendants in their crafting of answers, and both parties in their presentation of evidence. Most importantly, the *Tincher* decision provides firm guidance to parties regarding the requisites of what must be plead and proven to support a claim for product liability.

The overruling of *Azzarello* and the rejection of the Restatement (Third) are accompanied by broad declarations. The specific holdings of the Supreme Court in *Tincher* are as follows:

1. This Court's decision in *Azzarello v. Black Brothers Company*, 391 A.2d 1020 (Pa. 1978) is hereby overruled.

2. Having considered the common law of Pennsylvania, the provenance of the strict product liability cause of action, the interests and the policy which the strict liability cause of action vindicates, and alternative standards of proof utilized in sister jurisdictions, we conclude that a plaintiff pursuing a cause upon a theory of strict liability in tort must prove that the product is in a "defective condition." The plaintiff may prove defective condition by showing either that (1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions. The burden of production and persuasion is by a preponderance of the evidence.

3. Whether a product is in a defective condition is a question of fact ordinarily submitted for determination to the finder of fact; the question is removed from the jury's consideration only where it is clear that reasonable minds could not differ on the issue. Thus, the trial court is relegated to its traditional role of determining issues of law, e.g., on dispositive motions, and articulating the law for the jury, premised upon the governing legal theory, the facts adduced at trial and relevant advocacy by the parties.

4. To the extent relevant here, we decline to adopt the Restatement (Third) of Torts: Products Liability §§ 1 et seq., albeit appreciation of certain principles contained in that Restatement has certainly informed our consideration of the proper approach to strict liability in Pennsylvania in the post-*Azzarello* paradigm.

Tincher, at 1-2.

> A plaintiff may prove a defective condition by proving, by a preponderance of the evidence, ***either*** of the following: "(1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden

Arguably, the most important declaration is that a plaintiff may prove a defective condition by proving, by a preponderance of the evidence, ***either*** of the following: "(1) the danger is unknowable and unacceptable to the average or ordinary con-

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[4] See *Pennsylvania Dept. of General Services v. U.S. Mineral Products Co.*, 898 A.2d 590, 600 (Pa. 2006) in which the Court held that, "...a manufacturer can be deemed liable only for harm that occurs in connection with a product's intended use by an intended user; the general rule is that there is no strict liability in Pennsylvania relative to non-intended uses even where foreseeable by a manufacturer."

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sumer, or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions." *Id.*

Practitioners may be familiar with the first of these standards for proving product defect under the nomenclature of "consumer expectations standard." The second of these standards is commonly referred to as the "risk-utility standard."

The Consumer Expectations Standard

"The consumer expectations standard defines a 'defective condition' as a condition, upon normal use, dangerous beyond the reasonable consumer's contemplations." *Tincher* at 94-95 (internal citations omitted). The *Tincher* opinion indicates that the consumer expectations standard offers a standard that evaluates whether the danger associated with a product is unknowable and unacceptable to the average or ordinary consumer. A product is defective and unreasonably dangerous under the consumer expectations standard if the risks are greater than an average and ordinary consumer would anticipate.

Under the consumer expectations standard, a product is *not* unreasonably dangerous and defective if an average or ordinary consumer would reasonably anticipate and appreciate the dangerous condition of the product and the attendant risk of injury associated therewith. *See Tincher* at 95 citing the Restatement (Second) of Torts § 402A cmt. i ("The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.").

> A product is *not* unreasonably dangerous and defective if an average or ordinary consumer would reasonably anticipate and appreciate the dangerous condition of the product and the attendant risk of injury associated therewith.

When evaluating whether a product is defective pursuant to the consumer expectations standard, a variety of factors are considered, including: the nature of the product, the identity of the user, the product's intended use and intended user, and any express or implied representations by a manufacturer or seller of the product. *Tincher* at 95 (internal citations omitted).

The *Tincher* Court specifically notes two theoretical and practical limitations that can arise under a pure consumer expectations standard for determining product defect. The first limitation involves a product whose danger is obvious or within the ordinary consumer's contemplation. Under the consumer expectations standard, an obviously dangerous product would be exempt from strict liability. *Id.* at 97. The second limitation involves a product whose danger is vague and outside of the ordinary consumer's contemplation. This limitation would typically arise in an instance involving a product of a complex design. In such instance, the seller of the product could be arbitrarily subjected to the application of the strict liability doctrine. *See id.* at 97-98, citing *Heaton v. Ford Motor Co.*, 435 P.2d 806 (Or. 1967), and *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 308 (Cal. 1994) ("[A] complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance. For example, the ordinary consumer of an automobile simply has 'no idea' how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards.").

The *Tincher* Court noted that "[t]he consumer expectations test, because of the 'obvious defect' exception and vagueness concerns, has practical limitations in vindicating the basic public policy undergirding strict liability, *i.e.*, that those who sell a product are held responsible for damage caused to a consumer despite the reasonable use of the product and that any product is, presumptively, subject to liability on a theory of strict liability premised upon this policy." *Id.* at 98 (internal citations omitted).

The Risk-Utility Standard

Noting the difficulties associated with an alleged dangerous condition that is either "obvious" or "vague" as outlined above, the *Tincher* Court indicated that "a different approach is necessary and appropriate for judging the reasonableness of danger, at least respecting some products." *Id.* at 98.

Pennsylvania has applied and will continue to utilize a cost-benefit analysis test balancing the risks and utilities associated with specific product designs. The test offers a standard that states, in common terms: a product is in a defective condition if a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions. The risk-utility standard requires manufacturers to adopt precautions proportionate to the magnitude of the expected risks associated with the sale and use of the product.

> A product is in a defective condition if a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions.

As an evaluation of the reasonableness of a manufacturer's conduct in designing and/or manufacturing a product conduct is conducted post hoc, it is quite apparent that this formulation of determining whether a product is defective has strong roots in negligence. *Id.* at 99.

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The *Tincher* Court also specifically enumerates limitations inherent in utilizing the risk-utility standard to determine product defect. In relevant part, the Court notes that a holistic perspective on a manufacturer's choice to bring a product to market may not be immediately responsive in a case implicating allegations relating to a particular design feature. The Court continues and cites case law standing for the proposition that issues "properly litigated" typically concern a "micro-balance" of pros and cons of a manufacturer's failure to adopt a particular design feature that would have prevented plaintiff's harm as opposed to a critique of the design in general. *Id* at 99-100. The Court references the concept that, "products are unacceptably dangerous if they contain dangers that might cost-effectively (and practicably) be removed." *Id.*

In addressing the above, the *Tincher* majority states that, "Application of a risk-utility balancing test in its purest form likewise has theoretical and practical shortcomings. The goal and strength of a pure risk-utility test is to achieve efficiency or 'to maximize the common good;' yet, this is also its perceived weakness," noting that while efficiency is a goal of the law, it is not the sole purpose. *Id*. at 100. The *Tincher* Court notes that efficiency in this regard can conflict "with bedrock moral intuitions regarding justice in determining proper compensation for injury to persons or property in individual cases." *Id*.

The Court cites The Moral Perversity of the Hand Calculus, 45 St. Louis U. L. J. 759, 761 (2001), for the proposition that, "ultimately the Hand calculus is not about social efficiency, love, friendship or moral arrogance. It is only about compensation. The Hand calculus does not tell an entrepreneur whether or not to engage in conduct that will hurt one person and help another. . . . The Hand calculus serves a much narrower function. It tells an entrepreneur only that, if she engages in conduct that causes others to lose more than she gains, she will have to compensate them for their losses, but that, if she gains more than they lose, no duty of compensation will arise. . . . It is this very narrowness of the Hand calculus that makes it so morally perverse."

The *Tincher* Court concludes that, "We should be mindful that public policy adjusts expectations of efficiency and intuitions of justice considerations, informing a seller's conduct toward consumers as a group, and ensuring proper compensation in individual cases by judicial application of the strict liability cause of action." *Tincher* at 101.

Pennsylvania's Standard Following *Tincher*

To arrive at a suitable test, the Court remarked that an injury could be compensable if either method of proof was met or the two could be incorporated into one test. After a review of proof required, the Court concluded that a cause of action in strict products liability in Pennsylvania, requires proof of *either* the ordinary consumer's expectations or of the risk-utility of a product.

Strict Product Liability Practice Following *Tincher*

Both the consumer expectations standard and the risk-utility standard have predecessors. Often, plaintiffs pursued their actions based upon their failure to understand or appreciate the dangers of the product under the principle of a failure to warn. In other words, the defect was the failure to make known or understood to the user of a product the dangers associated with such use which they, the consumer, would not discover on their own.[5] Implicit in that cause of action is that had the plaintiff been aware of the danger, he would not have accepted it or been subjected to it.[6]

Of course, when determining whether a product was defective, the uses to which that product could and would be placed, as well as the utility of the product and whether the product could offer the same utility without the attendant risks, were always evaluated. We are all familiar with the commentary that a well designed and manufactured knife is dangerous but not defective.

While *Tincher* purports to change the question of whether a product is unreasonably dangerous, and thus defective, from a question of law to be determined by the judge pursuant to the dictates of *Azzarello* into a question of fact to be determined by the finder of fact, this is hardly a departure from the pre-*Tincher* practice followed by most Pennsylvania courts.

Mr. Specter noted that, while the courts will no longer be required to perform the balancing function, it has been extremely rare for a judge to perform a judicial risk-utility test, conclude a product was not defective, and dismiss the cause of action rather than permit issues to be determined by the jury. Nonetheless, in the wake of *Tincher*, practitioners should be cognizant of this change and will need to alter their practice accordingly.

The Court acknowledged the issue of how to define a defect so that the jury would understand the plaintiff's theory, and the

[5] Pennsylvania's Supreme Court rejects the standard set forth by Restatement (Second) regarding warnings when dangers are not generally known. See Pennsylvania Suggested Standard Civil Jury Instructions 16.30 (Civ) DUTY TO WARN Subcommittee notes stating, "The subcommittee notes that, in *Berkebile*, the Supreme Court explicitly rejected the Restatement provision requiring warnings and instructions where the "danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product." Restatement (Second) of Torts § 402A, comment j (1965)."

[6] It is well established in Pennsylvania that "[e]ven a perfectly made and designed product may be defective if not accompanied by proper warnings and instructions concerning its use." Pennsylvania Suggested Standard Civil Jury Instructions 16.30 (Civ) DUTY TO WARN citing *Berkebile v. Brantly Helicopter Corp*., 337 A.2d 893, 903 (Pa. 1975).

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Court noted that this is particularly difficult in design defect cases. It emphasized that there existed competing interests between the user and the seller. The consumer or user is interested in the safe use of a product and the cost of any injury while the supplier is interested in generating a profit and its good reputation. Either party could have moral interests. The Court specifically provided that the plaintiff now has the choice of proceeding under either or both standards. Mr. Specter noted that the ability to recover under one or both of the standards appears to be favorable to the plaintiff.

The first change in practice is premised upon the principle that the plaintiff is the master of the claim in the first instance. As such, a plaintiff's counsel must articulate the plaintiff's strict liability claim by alleging sufficient facts to make a prima facie case premised upon either a "consumer expectations" or "risk-utility" theory, or both. *Tincher* at 129-130; 132 ("Our decision today allows for application of standards of proof in the alternative.") As discovery progresses, the plaintiff may choose to pursue one theory and abandon the other, or to pursue both if the evidence obtained through the discovery process so warrants. *Id.* at 130. A defendant retains his ability to have any overreaching claims by the plaintiff dismissed via appropriate motion and objection. The trial court maintains its traditional role as gate-keeper. *Id.*

The second change, to the extent that it is indeed a departure from typical practice, is necessitated by the Court declaring a new division of duties between the judge and the fact finder. The *Tincher* Court declared that whether a product is in a defective condition is a question of fact and this decision is only removed from the fact finder's consideration if reasonable minds could not differ on the issue. This is noteworthy as it should have the effect of protecting strict product liability claims from dismissal during the dispositive motions phase of litigation. While a practitioner would now be tasked with proving to a jury that a product is defective, in practical terms this has always been the case and does not merit further discussion. The *Tincher* opinion, however, may help plaintiffs to defend against summary judgment.

Third, the *Tincher* Court cautions that its opinion, including the tests articulated therein, are "not intended as a rigid formula to be offered to the jury in all situations." The Court states that "[t]he alternate theories of proof contour the notion of 'defective condition' in principled terms intended as comprehensive guidelines that are sufficiently malleable to account for product diversity and a variety of legal claims, products, and applications of theory." In practice, attorneys should be aware of the flexibility offered by this new paradigm. The *Tincher* Court appears to have set forth this standard in a manner where it is adaptable enough to cover any situation without forcing a "one size fits all" approach. Any important consequence of this type of loosely defined guideline is that attorneys for both sides will be required to advocate for the appropriate jury instructions and the courts will be required to take an active role in determining the correct jury instruction once they have considered the facts of the case and the product at issue.

Looking Forward

The *Tincher* Court left several questions to be answered through future decisional law, perhaps the most important of which is the question of burden shifting under the new standards. The *Tincher* Court notes that California pioneered the alternate consumer expectations/risk-utility balancing test. Importantly, California found it to be appropriate to shift the burden of production and persuasion to the defendant to show a product is *not* defective in design after a plaintiff establishes a product caused an injury. *Tincher* at 133. The Court thereafter notes that some other jurisdictions have also shifted the burden of proof in such cases to the defendant and that "[t]he similarity of the approach we have approved to the Barker standard of proof may raise a question of whether Pennsylvania should also require a shifting of the burden of proof to the defendant when the plaintiff proceeds upon a risk-utility theory." *Id.* Nonetheless, the Court notes that this issue was not before it and had not been briefed by the parties, finding that "[t]he ultimate answer to the question best awaits balancing in an appropriate case, specifically raising the question, with attendant briefing from parties." *Tincher* at 135. As such, this issue remains open for future examination by the courts.

Indeed, the *Tincher* Court specifically limits its opinion stating:

> "We recognize – and the bench and bar should recognize -- that the decision to overrule *Azzarello* and articulate a standard of proof premised upon alternative tests in relation to claims of a product defective in design may have an impact upon other foundational issues regarding manufacturing or warning claims, and upon subsidiary issues constructed from *Azzarello*, such as the availability of negligence-derived defenses, bystander compensation, or the proper application of the intended use doctrine. These considerations and effects are outside the scope of the facts of this dispute and, understandably, have not been briefed by the Tinchers or Omega Flex. This Opinion does not purport to either approve or disapprove prior decisional law, or available alternatives suggested by commentators or the Restatements, relating to foundational or subsidiary considerations and consequences of our explicit holdings. In light of our prior discussion, the difficulties that justify our restraint should be readily apparent. The common law regarding these related considerations should

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> develop within the proper factual contexts against the background of targeted advocacy."
>
> *Tincher* at 135-136 (internal citations omitted).

Questions of interpretation and evidentiary issues will no doubt arise. During our discussion, Shanin Specter remarked that the *Tincher* opinion leaves many questions unanswered and that the initial trials utilizing the risk-utility standard will pose some practice problems. He specifically noted that, "In the risk-utility standard, who bears the burden of proof, the supplier or the consumer? If the court places the burden on the suppliers, a successful plaintiff's verdict would be subject to appeal at a higher level. Furthermore, it is unclear under this decision whether the standard jury instructions in this area survive. A supplier is a guarantor of its products' safety . . . a product must contain every element necessary to render it safe . . . these legal precepts were contained within holdings rendered both before and after *Azzarello*. A good argument exists that these jury charges do survive."

When the authors reached out to Clifford A. Rieders of Rieders, Travis, Humphrey, Harris, Waters & Dohrmann, a preeminent author and litigator of product liability issues including a majority of those that have been argued in front of the Pennsylvania Supreme Court, he remarked: "The court endorsed the policy underlying the Restatement 402A, that a manufacturer is effectively the guarantor of its product's safety." Mr. Reiders proffered that much of Pennsylvania's strict product liability jury instructions should remain intact. Specifically, Pennsylvania's jurors should still be instructed that the supplier is the guarantor of the safety of the product and must provide the product with every element necessary to make it safe for its intended use and, of course, any product that leaves a supplier's control should not possess any feature that renders it unsafe for use.

However, the *Tincher* decision will necessarily require some modification of Pennsylvania's jury instructions. Mr. Rieders submitted that in a case predicated upon consumer expectations, the jury should be instructed about the seller's special responsibility toward any member of the consuming public who may be injured by the seller's product and that the public has a right to and does expect that reputable sellers will stand behind their goods.

Mr. Rieders offered that when a plaintiff pursues a risk-utility theory, the jury will have to consider the usefulness and desirability of the product, its utility to the user and to the public as a whole, the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility, and the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance as some of the factors in their deliberation.

Conclusion

Tincher closes the door on the issue of whether the Restatement (Second) of Tort § 402A or the Restatement (Third) of Torts §§ 1 and 2 will apply to strict product liability actions premised upon allegations of product defect in the Commonwealth of Pennsylvania. While the federal courts predicted that the Pennsylvania Supreme Court would adopt the Restatement (Third) if confronted with this issue, that prediction ultimately did not come to pass.

The *Tincher* opinion leaves many areas of inquiry to be determined by the courts through "targeted advocacy" when fully and properly developed. It will be upon the prepared litigator to recognize these issues early and to properly present them to the court for judicial determination. While many litigators awaited the *Tincher* opinion with baited breath, in truth these holdings act more to articulate the standards and tests that the jury already took upon itself to determine.

In consulting with Mr. Specter regarding the impact of this decision, he stated that it was, "a step in the right direction in adjudication of product liability cases." However, he noted, "[a]lmost without exception, a good case will result in a Plaintiff's verdict and a bad case will not. This is regardless of what law applies."

While both the plaintiffs' bar and defense bar heavily invested in either the preservation of the Restatement (Second) of Torts §402A as modified by *Azzarello* and its progeny or in moving to the adoption of the Restatement (Third) of Torts §§1 and 2, following *Tincher*, a "good" case remains "good" and a "bad" case, "bad." Zealous advocacy remains paramount to obtaining the correct result and protecting your client's interests.

Whether the *Tincher* court "got it right" with this decision remains to be seen. Whether these new standards of proof are just and fair will be determined, in large part, by the decisional law that follows and by the implementation of these standards by the courts. The translation from the written word to practice is as important as the *Tincher* holding itself.

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

THE 2014 COMEBACK AWARD

By: Sandra S. Neuman, Esq.

On November 19, 2014 members of WPTLA gathered at The Grand Concourse at Station Square to celebrate one of the organization's favorite annual events – The Comeback Award dinner.

As you know, the Comeback Award is an opportunity to recognize a client who has demonstrated incredible strength and perseverance in overcoming life altering injuries. We all have had clients who turn to us to find answers, to seek help and to find a voice in what is often a difficult and impersonal legal system. And it is through this process that we connect with people who turn unspeakable tragedy into a story of hope and inspiration that needs to be shared. Every once and awhile, no matter how great the verdict or settlement, we come away with the sense that it was the client that helped us. Some clients touch and enrich our lives to the point that we become better at who we are and what we do because of them. This year's winner is no exception and her story was inspiring to all who attended the event.

Brenda Gump was involved in a serious motor vehicle accident as she travelled from church to her daughter's rehearsal dinner. Most of the bridal party reached the meeting place and as they called to find out where Brenda was, they saw her vehicle approach the left-turn only lane outside of the restaurant. Within seconds of spotting her, they saw a speeding truck slam into the vehicle Brenda was riding in. The excitement and anticipation of a family wedding turned to horror and fear.

Brenda sustained very serious injuries. Medical personnel at the scene and later at the hospital told the family it was a miracle she was alive. In addition to dozens of broken bones and collapsed lungs, Brenda had a very serious head injury. The family was told she wouldn't likely survive surgery, but if did, she would be severely impaired secondary to the significant damage to her brain. But the Gump family's faith wasn't shaken and they asked the medical team to do what they could to help Brenda win the fight for her life.

Brenda had a surgery to remove a large portion of her skull to relieve pressure on her brain. She was in a coma and nonresponsive for weeks. Her children and her husband kept a vigil at her bedside and despite the grim news and prognosis; they refused to give up hope.

Months into her recovery, Brenda awoke and said the name of a family member. This surprised the doctors, but not her friends and family. Brenda was a fighter and together with the support of her family, she was determined to work hard to regain as much of her strength and pre-accident life that she could. But she had to start at square one – learning to talk and to recognize and use basic items to care for her like silverware, a brush and a toothbrush. She also had rigorous physical therapy to learn to walk again.

Defying all odds, Brenda fought back from what was certain death or severe limitation to not only attended, but dance, at her daughter's wedding. Although she cannot be left alone, she is able to live at home where she is surrounded by and experiences the love and support of her family.

Brenda attended that Comeback Dinner with her husband Keith, mother Betty, three children Dana, Rachel and Daniel as well as her step-daughter Hailey. Although Brenda was able to accept the award, her daughter Dana addressed the audience and gave one of the most heartfelt and sincere speeches ever given at this event.

After Dana spoke Nicole Glass of The Brain Recovery Crew took the stage to accept WPTLA's $1000.00 donation and to tell the crowd about their organization and Brenda's recovery.

Brenda and Keith Gump were represented by Katie Killion and Anthony Mengine of Kontos Mengine Law Group.

Pictured above, from L to R; Board of Governors Member and Nominating Attorney Tony Mengine, 2014 Comeback Award winner Brenda Gump, Nicole Glass of The Brain Recovery Crew, President Chris Miller.
Photo courtesy of Martin R. Murphy Photography.

Comeback Award - 2014

Photos courtesy of Martin R. Murphy Photography.

Pictured above, from L to R: Ron Conway, The Honorable David N. Wecht, Past President John Quinn, Forensic Human Resource's Don Kirwan, 2002 Comeback Award Winner Phil Macri, 2013 Comeback Award Winner Kim Puryear, 2014 Comeback Award Winner Brenda Gump, 2012 Comeback Award Winner Davanna Feyrer, 2007/2008 Comeback Award Winner Karrie Lee Coyer, and 2001 Comeback Award Winner Beckie Herzig.

Pictured above, from L to R: Past President Jack Goodrich, Past President Mark Homyak, Past President Bill Goodrich, The Duckworth Group's Helen Sims, Julian Gray, The Duckworth Group's Chris Lattimore, Ken Nolan, and Board of Governors Member Jason Schiffman.

Pictured above, from L to R: Marissa Kelly and President-Elect Larry Kelly, John Lienert, Board of Governors Member Dave Landay, Immediate Past President Chad Bowers, Susan Geist and Past President Josh Geist.
On the L: Gary Ogg, Treasurer Bryan Neiderhiser, Dave Houck.
On the R: Dan Schiffman, George Kontos, Past President Carl Schiffman and Roni Schiffman.

SUMMARY JUDGMENT: DEFENDANT'S SHIELD OR PLAINTIFF'S SWORD?

By: Charles W. Garbett, Esq.

We have all seen it. That dreaded Motion for Summary Judgment. At conclusion of discovery, it almost seems a staple of defense practice to file this Motion even in cases where there are - - obviously - - disagreements concerning material issues of fact. Even when denied, defense counsel uses this as a weapon during settlement negotiations. After all, they point out that the Plaintiff just "barely" avoided a summary judgment.

But - - with a little imagination - - and given the right factual pattern, a Motion for Summary Judgment may be employed effectively by the Plaintiff.

I. THE CONTROLLING RULE.

Pa.R.C.P. No. 1035.2 provides, *inter alia*, that summary judgment may be granted *in whole or in part* if, after completion of discovery relevant to the Motion, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to either the claim or defense. In an automobile accident situation, of course, the Plaintiff has the burden of proving that the Defendant was negligent. The Defendant, however, has the burden of proving contributory or comparative negligence. As noted above, the rules require the party bearing the burden of proof to make an affirmative showing of proof sufficient to take the matter to a jury. It is not sufficient to merely state that this is an "issue in the case."

II. SPECIFIC APPLICATIONS - - VIOLATION OF STATUTE.

If the evidence shows a violation of a statute (such as a provision of the Vehicle Code) that would constitute negligence *per se*. Pa. S.S.J.I. (Civ.) § 13.100 (2013) and cases cited therein. In the appropriate case, (notably where the Defendant cannot prove contributory negligence on behalf of the Plaintiff), the Court may grant summary judgment on the issue of liability.

The recent case of *Knaus v. McBeth*, No. 10925 of 2013 (Lawrence C.P. 2014) (Motto, P.J.) illustrates this principle. In the *Knaus* case, the Plaintiff was eastbound on Route 422 and the Defendant westbound. For reasons which the Defendant could not explain, the Defendant lost control of her vehicle, crossed the centerline and collided head on with the Plaintiff's vehicle. During her deposition, the only explanation the Defendant could give was that she "must have hit a patch of black ice." However, she conceded that she did not see any black ice either prior to or following the accident. Furthermore, cars immediately in front of her had no difficulty traversing that portion of the roadway where the Defendant had started to slide.

Following the conclusion of discovery, the Plaintiff moved for summary judgment on the issue of liability. The Common Pleas Court agreed. In so holding, the trial court ruled that - - as a matter of law - - the Defendant's "explanation" was insufficient to justify the Defendant's presence on the wrong side of the road, in violation of 75 Pa.C.S. § 3361. In so holding, the court relied upon two decisions of the Superior Court which had considered this same issue: *Bohner v. Stein*, 463 A.2d 438 (Pa. Super. 1983) (reversing a defense verdict in a "wrong side of the road" case where Defendant's only excuse was that the roadway was wet and covered in places with dead leaves); and *Krupa v. Williams*, 463 A.2d 429 (Pa. Super. 1983) (affirming a directed verdict in favor of the Plaintiff where the Defendant could not explain why he had crossed the centerline and collided head on with the Plaintiff's vehicle).

This strategy should not be confined to "wrong side of the road" cases. With a little digging, other examples abound, especially where one can establish a violation of the Motor Vehicle Code. For example, the provisions of the Motor Vehicle Code require a driver to look before proceeding. Noteworthy, it is not enough for the driver to say that he or she looked and saw nothing. The law requires the driver to see what must have been within his field of vision. *Masters v. Alexander*, 225 A.2d 905 (Pa. 1967) (Musmanno, J.); *Nolan v. Weaver*, 149 A.2d 184 (Pa. 1959). Other Vehicle Code violations which could support a Motion for Summary Judgment include: texting while driving (75 Pa.C.S. § 3316); driving in excess of the posted speed limit (75 Pa.C.S. § 3362); or making a left turn when such movement was unsafe (75 Pa.C.S. § 3322). This list is by no means exhaustive. However, it illustrates the point.

If you can establish a violation of the Vehicle Code - - especially a violation of the "Rules of the Road," (75 Pa.C.S. §§ 3301, et seq.) - - you are in a position to move for summary judgment. Of course, you must take a realistic look at your case. If your Motion is "iffy," the Court will probably deny it. Also, if there is an arguable case for comparative negligence, the Court may decide to just let the jury consider the "whole ball of wax" and apportion negligence accordingly.

But, if you have the right case, the Mo- *Continued on Page 13*

SUMMARY JUDGEMENT … *(Continued from Page 12)*

tion for Summary Judgment may be the way to go. Instead of being a shield for the Defendant, it can be an effective sword for the Plaintiff. If you are granted summary judgment on the issue of liability, you can then proceed to trial solely on the issue of damages. Of course, that confines everyone's attention exactly where you want it: on the nature and extent of your client's injuries and your claim for damages.

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

Announcing Our New Trivia Contest!!

The Advocate team is happy to announce a new feature that will appear regularly in The Advocate. The trivia contest will run in each quarterly issue. There will be one winner from each contest, who will receive a $100 Visa gift card. Rules are as follows:

- One entry per person, 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 at the Board Meeting immediately following the entry deadline 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 – erudert@aldlawfirm.com.

Trivia Question #1

Based on current production standards, what non-food item costs $454 per pound?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by January 21, 2015. Prize for this contest is a $100 Visa gift card. Winner will be drawn at the January 22, 2015 Board Meeting preceding the dinner meeting at LeMont. The correct answer to Trivia Question #1 will be published in the next edition of The Advocate.

SPONSOR SPOTLIGHT

NAME:Chris Lattimore

BUSINESS/OCCUPATION:
Merrill Lynch: Financial Advisor

FAMILY: Wife and three daughters (5yrs, 3yrs and 5 months) and a small white fluffy dog.

INTERESTS: I enjoy reading and listening to audiobooks, exercising, and coaching/teaching.

PROUDEST ACCOMPLISHMENT: My 3 daughters.

FUNNIEST/WEIRDEST THING TO HAPPEN TO YOU ON THE JOB: The weirdest thing to ever happen to me… when meeting with a couple, they engaged in a heated argument, began yelling at each other and before I could react, they were up and slamming the door on each other. I was left sitting at the table. Perhaps commonplace for other advisors, this was a first for me.

FAVORITE RESTAURANT: Any good Mexican food. It is rare here in Pittsburgh (I'm from Sonoma County, CA)

FAVORITE MOVIE: Gladiator, but Good Will Hunting is a close second.

FAVORITE SPORTS TEAM: San Francisco 49ers

FAVORITE PLACE(S) TO VISIT: "I left my heart in San Francisco"

WHAT'S ON MY CAR RADIO: An audiobook. Or some Disney princess movie soundtrack if my daughters are in the car.

PEOPLE MAY BE SURPRISED TO KNOW THAT: If I wasn't a financial advisor, I would teach high school math and coach high school football.

SECRET VICE: I'm a coffee geek and will seek out specialty coffee cafes when traveling.

WPTLA EDUCATION RECAP

By: Max Petrunya, Esq.

The WPTLA has made enormous strides to provide its members with relevant and cutting edge CLE presentations. One of the benefits the WPTLA offers to its President's Club members is three free CLE credits per year. This year, the WPTLA's continuing education programs are off to a tremendous start, with many exciting programs on the horizon.

On October 10, 2014, the WPTLA hosted a three-credit CLE presented by Philip Miller, Esquire at the Omni William Penn hotel. Mr. Miller is the co-author of *Advanced Depositions Strategy and Practice*, and a member of the National Faculty for the American Association for Justice (AAJ). During his presentation, Mr. Miller shared with our 56 attendants many deposition strategies aimed at extracting the most information from deponents and gaining critical admissions on the record using the defendant's own witnesses. Mr. Miller also highlighted the use of 30(b)(6) Corporate Representative depositions in litigation and provided exquisite instruction on strategies aimed at counteracting the defendant's independent medical examiner. Mr. Miller's presentation was well-received and heralded by many of our members as the best CLE program ever attended.

The WPTLA Education Committee is excited to announce future CLE programs. Following our January 22, 2015 dinner meeting at the LeMont restaurant on Mt. Washington, the WPTLA is proud to host Dr. Margee Kerr as our speaker. Dr. Kerr is a nationally recognized expert on professional haunted houses and is currently working on a study at the University of Pittsburgh measuring the impact of real-world fear experiences. Dr. Kerr's presentation, "Hello fear, goodbye brain: Looking at the costs and benefits of inciting fear", will focus on the use of fear as a tool to incite behavior and will be a one-credit CLE for all in attendance.

On March 4, 2015, WPTLA business partner Robson Forensic Inc. will present a three-credit CLE on Youth Sports Safety, Playground Safety, Facility Safety, and Daycare Liability. The presentation will be given by Robson experts Dr. Lisa Thorsen and Corey Andres on topics that represent emerging trends in litigation in Pennsylvania. The WPTLA is proud to offer this three-credit CLE from one of its business partners.

On March 11, 2015, Dave Gardner from Robson Forensic Inc. will be presenting a one-credit CLE after our dinner meeting in Westmoreland County at De Nunzio's restaurant. Mr. Gardner's presentation will focus on construction failures and related issues associated with the stairs, decks, and other constructed apparatus that may fail and injure individuals.

Also on the horizon from the WPTLA Education Committee and WPTLA's Business Partners is a two-credit CLE on the use of forensic economics in litigation by Don Kirwan from Forensic Human Resources and a two-credit CLE by Chris Finley from Finely Investigations about all of the uses of private investigators in your practice.

Thank you to all of our members and CLE attendants this year. I look forward to seeing all of you at future WPTLA events and CLEs.

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 27 2014-2015

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

A NEW PARTNERSHIP OPENS NEW OPPORTUNITIES FOR WPTLA TO ASSIST THE INDIGENT

By: Gregory R. Unatin, Esq.

At their meeting on November 19, 2014, the Board of Governors of the Western Pennsylvania Trial Lawyers Association approved an exciting new endeavor for our organization – membership in in the Pittsburgh Pro Bono Partnership. Attorney Katie Kenyon, a partner at Meyer Unkovic & Scott, L.L.P. and Chair of the Administrative Board the Pittsburgh Pro Bono Partnership, made an appearance at the meeting and introduced this great opportunity to our Board of Governors. Ms. Kenyon explained how the Partnership, a collaboration of legal departments, law firms, the Allegheny County Bar Foundation and Neighborhood Legal Services Association, connects law firms and legal organizations to a network of legal aid programs in the Greater Pittsburgh community.

Through this new collaboration, members can make a meaningful impact in the community by representing clients in a variety of legal matters, including child custody conciliations, criminal expungements, and matters affecting the temporary or chronic homeless, just to name a few. Ms. Kenyon and the Partnership are also exploring how WPTLA members might take up the reins on a signature program to help children and families involved with disciplinary and other proceedings in public education.

The legal aid programs in the Partnership's network are primarily located in Allegheny County. However, the Partnership is discussing opportunities to expand into other counties where many of our members are already providing a safety net for the indigent and those most in need of pro bono services.

While our members are no doubt accustomed to talking on new challenges, the Partnership offers free CLE training in practice areas which may represent a change of pace for many WPTLA members, but are nonetheless tailored for litigators. In addition, legal malpractice coverage is provided through the Partnership's affiliation with the Allegheny County Bar Foundation.

By pooling our resources for the benefit of those most in need, we demonstrate the values we hold as trial attorneys and the strength of our organization. The commitment is simple: we pledge as an organization to encourage our members to devote at least 10 hours of pro bono services per year to persons of limited means.

A mere ten hours per year is just a blip on even the busiest calendar, especially when the tools for meeting this commitment are close at hand. Try five hours. If you are not enriched and rewarded by devoting your time to pro bono work, then stop there. Your commitment, however small, will make a positive difference in our community.

For questions about WPTLA's involvement with the Pittsburgh Pro Bono Partnership or pro bono opportunities, please contact Greg Unatin at 412-281-4100 or gunatin@meyersmedmal.com.

From The Advocate staff

BY THE RULES

By: Mark E. Milsop, Esq.

Do the Federal Rules and Caselaw Provide Barriers to Combating Police Brutality?

Recently, the issue of police brutality has been on the forefront and in the headlines. Although the merits of any of the recent headline cases is beyond the scope of this column, I do feel comfortable in working with the premise that police brutality does still occur in the United States and some of it may have to deal with race. As protests have heightened and destruction has occurred during some protests, the question is what can and should be done?

It is my premise that the civil justice system, if operating properly can provide an important deterrent to police brutality.[1] Certainly, no police department wants to lose a trial based upon its training policies or a pattern of abuse. Nonetheless, a series of rulings favoring law enforcement have made it very hard to bring many civil rights claims, thereby minimizing the deterrent effect of civil litigation.

It is time for the bar to begin to question whether or not there are too many legal barriers to recovery in a civil rights action. Some barriers include:

- The requirement of plausibility in pleading under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), as applied to civil rights litigation in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). There, a *Bivens* action was dismissed under Federal Rule of Civil Procedure 12(b)(6) because the Complaint failed to provide sufficient facts to establish that the action was plausible. Where many of the policies and procedures at issue and the nature of underlying law enforcement training are hard to obtain pre-suit, prudent pleading only allows for limited specificity.

- The imposition of such a powerful defense tool as "Qualified Immunity." Those using this defense often cite to *Saucier v. Katz*, 533 U.S. 194 (2001), as qualified and modified in *Pearson v. Callahan*, 555 U.S. 223 (2009), as the lead case. Under *Saucier* and *Pearson*, a law enforcement official is immune from suit where the officer's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[2] *Pearson* 555 U.S. at 231. In order to evaluate this, a two prong test is employed as to: (1) whether the facts that a plaintiff has alleged make out a violation of a constitutional right; and, (2) whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. *Id*., at 232. Unfortunately, the Courts are not satisfied to inquire whether the right to be free from unreasonable searches and seizures (including lethal force) is clearly established. Rather, it seems that the question shifts to whether under the facts of the particular case, the right is *clearly* established. Unfortunately, the facts of every case are unique enough that the clearly established test becomes insurmountable in many cases where there has been a constitutional violation.[3]

- The standard for municipal liability under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), has become too conducive to municipalities who are lax either in their training, establishment of policies, or the enforcement of their policies. See also *City of Canton v. Harris*, 489 U.S. 378 (1989)

Although a thorough examination of the questions I have posed could consume more pages than this publication typically spans, it is my hope that these questions will be posed repeatedly and cause the bench and bar to examine whether there is a need to re-examine the judicial rules applied to civil rights litigation. Any issues existing can only be remedied where the leadership everywhere resolves to implement the best policy and training and to enforce their policies. A clear expectation that civil liability will attach where civil rights are breached can go a long way toward improving the current climate.

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[1] Although the scope of this column is the rules of procedure and evidence, the second and third issues raised include substantive law. Nonetheless, they merit discussion here since they are frequently used as defense tools in dispositive motions.

[2] Consider this as an alternative formulation of qualified immunity: "Qualified immunity will be found where the conduct at issue does not violate statutory or constitutional rights of which a well trained law enforcement officer would have known."

[3] Although I concede that where the first prong is not met, there should be no claim; one must wonder how this differs from the more general requirement that every lawsuit must be legally sufficient. However, although an argument can be made against second guessing split second field decisions, the clearly established standard goes further than necessary. Hence, this rule should be modified.

COMP CORNER

By: Thomas C. Baumann, Esq.

The Commonwealth Court recently determined at *Stermel* v. *WCAB* (City of Philadelphia) 214 Pa. Commw. Lexis 537 No. 2121 C.D. 2013 that the self-insured municipality which pays heart and lung benefits to an injured worker may not receive subrogation from a third-party recovery. In doing so, it followed the Supreme Court case of *Oliver* v. *City of Pittsburgh, 608* Pa. 386, 11A.3d 960 (Pa. 2011).

In *Stermel* the Claimant was employed as a police officer for the City of Philadelphia. In June 7, 2006, he was rear-ended by an intoxicated driver while parked along the side of the road. He missed 21 weeks of work as a result of a back injury. During the time he was off work, he received heart and lung benefits at full salary pursuant to the Act. The City, self -insured for both workers' compensation benefits and heart and lung benefits issued a Notice of Compensation Payable. The NCP noted "Claimant received a salary continuation in lieu of Pennsylvania Workers' Compensation for a period of lost time under the City of Philadelphia's Heart and Lung Act." Stermel returned to work after his period of disability and his benefits ended.

Stermel pursued a third-party claim against the driver who struck his vehicle and against the tavern that served the driver, alleging that he was served while visibly intoxicated. He received $100,000 from both sources. The City sought subrogation for $7,244.37 in medical bills and wage loss payment of $20,498.96 via a Petition to Review Compensation Benefit Offset.

The workers' compensation Judge initially granted subrogation to the extent that the wage loss payments represented workers' compensation benefits. The Claimant appealed and the Workers' Compensation Appeal Board initially reversed. It relied on the Supreme Court's decision in *Oliver*. However, after a Request for Rehearing from the Employer, it granted the subrogation right. The Board claimed that *Oliver* was distinguishable because there was apparently no evidence in that matter that the injured worker had received workers' comp benefits. It also found that *Oliver* did not address the interplay between the Motor Vehicle Financial Responsibility Law, the Heart and Lung Act and the Workers' Compensation Act. Interesting, the Board found that two -thirds of the heart and lung disability benefits represented workers' comp benefits even though two-thirds of what Stermel received exceeded the maximum compensation rate actually payable.

On appeal to the Commonwealth Court, Stermel raised three issues: whether the Employer had waived the issue of its entitlement to subrogation, whether the Board failed to follow the holding in *Oliver* and that as a government employee, he had immunity from any subrogation claim?

The Commonwealth Court then conducted an extensive review of the Motor Vehicle Financial Responsibility Law, the Heart and Lung Act and the Workers' Compensation Act and how each affected the other. The Court noted that the legislature passed the Motor Vehicle Responsibility Law in 1984. Therein, Section 1720 states as follows:

> In actions arising out of the maintenance or use of the motor vehicle, there shall be no right of subrogation or reimbursement from a Claimant's tort recovery with respect to workers' comp benefits, benefits available under Section 1711 (relating to required benefits), 1712 (relating to availability of benefits) or 1715 (relating to availability of adequate limits) where benefits paid or payable by a program, group contract or other arrangement whether primary or excess under Section 1719 (relating to coordinating of benefits).

The Court noted that Section 1722 of the Motor Vehicle Financial Responsibility Law determined the basis for the exclusion of workers' compensation and heart and lung benefits from subrogation. Section 1722 prevents someone pursuing damages under the Act from recovering benefits paid under workers' compensation or heart and lung. The decision also cited Supreme Court cases interpreting the Motor Vehicle Financial Responsibility Act.

The Court then cited the 1993 Amendment to the Workers' Compensation Acts now known as Act 44. There, the legislature repealed Section 1720 and Section 1722 of the Motor Vehicle Financial Responsibility Act as applied to benefits under the Workers' Compensation Act. No mention in Act 44 was made of benefits payable under the Heart and Lung Act.

After discussing the interplay between the Heart and Lung Act, the Workers' Compensation Act, and the Motor Vehicle Financial Responsibility Law, the Court then conducted an analysis of the Supreme Court's decision in *Oliver*. There, the injured worker was paid $848 under the Heart and Lung Act and settled a claim against a third-

Continued on Page 18

COMP CORNER *(Continued from Page 17)*

party for $2,300.00. She sought Declaratory Judgement in an action before the Court of Common Pleas to bar subrogation. The Trial Court ruled in the injured worker's favor while the Commonwealth Court reversed. The Supreme Court then reversed the Commonwealth Court. The Supreme Court declined to order subrogation noting "although the Workers' Compensation Act also embodies a similar remedial scheme, the Heart and Lung Acts more favorable treatment of public safety employees that are temporarily disabled, suggest against treating an overlap as an equivalency. " Id, at 966.

In *Stermel*, the City of Philadelphia argued that *Oliver* was distinguishable. It noted that an NCP was issued, thereby acknowledging the injury. It pointed out that this situation did not apply *Oliver*. It argued that part of the benefits Stermel received were workers' compensation benefits.

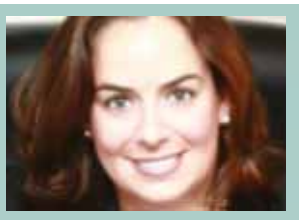
The Commonwealth Court pointed out that the only difference between *Oliver* and *Stermel* was that there was no information in *Oliver* as to whether the Court had issued an NCP. The Court called this a "distinction without a dIfference." The Court also stated as follows: "The NCP, which was issued unilaterally by an Employer, does not **transform** Heart and Lung benefits into workers' compensation ... " (emphasis added). The Court distinguished cases on which the City had relied, *Wisniewski* v. *WCAB* (City of Pittsburgh) 621 A.2d 1111 (Pa. Cmwlth. 1993) and *Bureau of Workers' Compensation* v. *Workers' Compensation Appeal Board* (Excalibur Insurance Management Service) 32 A.3d 291 (Pa. Cmwlth. 2011), finding that since the two cases dealt with a termination and reimbursement from the supersedeas fund their holdings were not applicable.

The Court noted that Act 44 changed subrogation only for workers' compensation benefits and not heart and lung benefits. It noted that an injured worker could not recover for benefits paid under heart and lung in a third- party recovery. Therefore, there could be no subrogation out of such an award. Under such circumstances there would be no double recovery.

In regard to the immunity claim, Stermel had argued that Section 23 of Act 44 gave him sovereignty immunity from the subrogation claim. The Court chose not to address this issue since it had concluded that the City of Philadelphia was not entitled to subrogation.

Claimants who receive heart and lung benefits cannot prove those damages in a third-party action. The decision in *Stermel* addresses without completely saying so, the inequity of permitting subrogation against damages which are not part and parcel of the benefits leading to the claim for subrogation. Can such an analysis be used in other matters?

MEMBER PICTURES & PROFILES



Name: Laura Phillips

Firm: Phillips and Faldowski, P.C.

Law School: Georgetown University

Year Graduated: 2004

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

Most memorable court moment: Watching the judge turn to the second page of the verdict slip when I got my first plaintiff's verdict – that's how I knew we had won.

Most embarrassing (but printable) court moment: I was cross-examining a defendant doctor on the stand, and gripping onto my pen to avoid waving my arms around. He was making me so angry that my pen suddenly exploded in my hands, sending pieces of it flying into the jury box.

Most memorable WPTLA moment: Meeting some of the Steelwheelers at my first Judiciary Dinner and realizing what an amazing organization they are.

Happiest/Proudest moment as a lawyer: Driving to a client's house to distribute a settlement check when she was gravely ill. It gave her peace to know her family would be taken care of.

Best Virtue: Wit

Secret Vice: Real Housewives (any of them)

People might be surprised to know that: I am trained as an opera singer. I do weddings!

Favorite movie (non-legal): Pitch Perfect

Favorite movie (legal): The Rainmaker

Last book read for pleasure, not as research for a brief or opening/closing: The Widow Clicquot, about the woman who founded the Veuve Clicquot winery

My refrigerator always contains: Leftover pasta

My favorite beverage is: Red wine

My favorite restaurant is: Il Pizzaiolo

If I wasn't a lawyer, I'd be: For better or for worse, this is where my talents lie.

HOT OFF THE WIRE!

By: Chris Hildebrandt, Esq.

SUPREME COURT OF PENNSYLVANIA

The Medical Records Act does not apply to pharmacies. As a result, pharmacies are not constrained to charging "reasonable expenses" when providing medical records.

Landay et al. v. Rite Aid of Pennsylvania, Inc., 2014 Pa. LEXIS 3086 (Nov. 24, 2014)

Plaintiff, an attorney, submitted an authorization to Rite Aid on behalf of an individual, requesting copies of the individual's pharmacy records. Rite Aid sent a $50.00 invoice to Plaintiff. Plaintiff paid the invoice and Rite Aid supplied the requested records. Thereafter, Plaintiff filed a class action against Rite Aid, alleging that Rite Aid's act of charging a flat fee for the reproduction of records violates Section 6152 (a)(2)(i) of the Medical Records Act ("MRA"). Plaintiff sought a declaratory judgment that the MRA prohibits Rite Aid from charging more than the reasonable expenses it incurred to reproduce the requested records.

The trial court dismissed Plaintiff's Complaint, concluding that the MRA does not apply to pharmacies. On appeal, the Superior Court reversed, holding that "a pharmacist is a health care provider."

The Pennsylvania Supreme Court upheld the trial court, holding that the term "health care provider," as contained in the MRA, does not include pharmacies, "as they are not entities that operate a health care facility." In doing so, the Court focused solely on the definition of "health care provider" as it was understood at the time of the 1998 amendments to the MRA, noting that the Court could only "ascertain the intent of our legislature based on the law at the time the statute was enacted or amended." Thus, while the scope of services provided by pharmacies and pharmacists has expanded since 1998, the Court refused to consider a more "modern" interpretation of current-day pharmacists.

The Tort Claim Act's statutory cap of $500,000 is not unconstitutional; to the extent the cap should be adjusted, it is for the legislature to consider, and not the courts.

Zauflik v. Pennsbury School Dist., 2014 Pa. LEXIS 3030 (Nov. 19, 2014)

Plaintiff was struck by a school bus, resulting in a crushed pelvis and amputation of her left leg. At the time of the incident, the school district had an $11 million liability/excess coverage policy in place. However, throughout the claim, the school district maintained that its liability was capped at $500,000, as set forth pursuant to the Tort Claims Act, 41 Pa. C.S. §§ 8501-8564 ("Act"). The matter proceeded to trial on damages, and a jury returned a verdict in Plaintiff's favor totaling $14,036,263.39. The school district filed a post-trial motion, seeking to mold the verdict to $500,000. Plaintiff opposed, arguing that the cap is unconstitutional. The trial court molded the verdict and entered judgment in the amount of $502,661.63, reflecting delay damages.

On appeal, the Commonwealth Court affirmed the trial court, rejecting Plaintiff's constitutional challenges. The court concluded that it is the role of the General Assembly "to make the difficult policy decisions and enact them into law if such decisions receive the support of the necessary majority," and thus affirmed the trial court's order molding the jury verdict to reflect the Act's $500,000 damages cap.

The Pennsylvania Supreme Court affirmed the trial court and Commonwealth Court. Although the Court engaged in a lengthy analysis of the issue, ultimately the Court refused to deem the Act unconstitutional, noting that Plaintiff's "position is difficult to sustain because she essentially asks this Court to make uniquely legislative judgments, such as whether it is 'better' to provide for unlimited governmental liability in tort to individual private parties, or is it 'better' to limit such liability in order to avoid curtailing services on which the public as a whole depends for its health, safety and welfare." Moreover, regarding the fact that the statutory cap was enacted 36 years ago (and has not been adjusted since that time), the Court noted that the issue of raising the cap requires "detailed study and analysis of all relevant policy factors in a complicated balancing act that is properly addressed to the General Assembly."

SUPERIOR COURT OF PENNSYLVANIA

A party filing a petition to transfer venue on the basis of forum non conveniens must only demonstrate a "sufficient factual basis" for the petition. Notably, the responding party's suggestion that the moving party's witnesses could testify via video was deemed to be "oppressive," as the responding party's witnesses would testify live and the moving party's case would be relegated to "hours of video testimony."

Lee v. Bower Lewis Thrower, et al., 2014 PA Super 240 (Oct. 22, 2014)

This action arises out of an automobile accident that occurred

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HOT OFF THE WIRE … *(Continued from Page 19)*

on November 23, 2010, on the campus of Penn State University in State College, PA. Plaintiff was crossing Bigler Road on foot at night when she was struck by a pickup truck driven by Penn State employee John Armstrong, who was on his way home from work. The location where Plaintiff was crossing Bigler Road was next to Penn State's East Parking Deck, a structure that had been built as a part of a larger campus improvement project. The project involved designing various elements of infrastructure in and around the parking deck, such as sidewalks, crosswalks, and lighting. Plaintiff claimed that Defendants, among whom are the companies who designed and built the area at issue, negligently designed the intersection by failing to include proper lighting and warning signs. Plaintiff filed suit in Philadelphia County. Defendants subsequently filed a petition to transfer venue based on forum non conveniens. The trial court granted the petition and transferred the case to Centre County.

Plaintiff appealed, contending that the trial court failed to apply the test set forth in Cheeseman v. Lethal Exterminator, Inc., 701 A.2d 156 (Pa. 1997), "when it simply conducted a balancing test between Philadelphia County and Centre County and the relative inconvenience of a small number of witnesses who might not be called to testify at trial." Plaintiff also contended that the affidavits of the witnesses were "conclusory and vague."

The Superior Court noted that the party seeking to transfer venue must present "a sufficient factual basis for the petition, and the trial court retains the discretion to determine whether the particular form of proof is sufficient." The Court also noted that while mere inconvenience remains insufficient, "there is no burden to show near-draconian consequences." The Court reviewed the trial court's reasoning and analysis of the witnesses' affidavits. The Court concluded that the trial court "considered the detailed information of record before it," and refused to disturb the trial court's decision. In doing so, the Court noted that one of the trial court's concerns was the distance between Philadelphia County and Centre County and the time required to travel between the two counties. The trial court also rejected the "speculative argument" that Defendants' employees would not be inconvenienced if they had to travel from Centre County to Philadelphia County because Defendant had an office in Philadelphia County. Finally, the trial court rejected Plaintiff's suggestion that Defendant's witnesses could testify via video. The trial court determined that this would be oppressive to Defendants, as the "result of this solution would be a trial where the jury sees a live Plaintiff, sitting mere feet from the jury box, explaining her injuries, while most or all defense witnesses are presented via pre-recorded videos."

UPCOMING CALENDAR OF EVENTS

Thursday, January 22, 2015	**WPTLA Board/Dinner Meeting/CLE – Jr. Members Welcome** LeMont Restaurant, Pittsburgh, PA 4:30 p.m. Board Meeting -- 5:30 p.m. Cocktails -- 6:15 p.m. Dinner
Wednesday, March 4, 2015	**3-Credit CLE Program featuring Robson Forensics** Pittsburgh, PA
Wednesday, March 11, 2015	**WPTLA Board/ Members Dinner Meeting** DeNunzio's Restaurant, Jeannette, PA 4:30 p.m. Board Meeting -- 5:30 p.m. Cocktails -- 6:15 p.m. Dinner
Wednesday, April 8, 2015	**WPTLA Board/Members-Only Dinner Meeting** Rivers Casino, Pittsburgh, PA 4:30 p.m. Board Meeting -- 5:30 p.m. Cocktails -- 6:15 p.m. Dinner
Friday, May 8, 2015	**Annual Judiciary Dinner** Heinz Field, East Club Lounge, Pittsburgh, PA 5:30 p.m. Cocktails -- 7:00 p.m. Dinner
May 2015	**Ethics Seminar/Golf Outing**
June 2015	**Business Partner Happy Hour** Pittsburgh, PA

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.

Retroactivity of the *Miller v. Alabama* Case

Bobby is in a very complex situation. He sits in a jail cell knowing that he will spend every day of his life there with no possibility of ever getting out while his accomplice, the one who actually killed the guard, sits awaiting his mere fifteen year sentence to be up or even ten years to end before his possible parole. Of course this is not fair, but that is how the law worked out in this particular situation. For Bobby's case to have even a chance of being shortened, the *Miller V. Alabama* case must be deemed retroactive.

First, what makes a court decision retroactive or prospective? A retroactive rule means that it may be applied to cases that already happened, like in Bobby's situation. A prospective rule eliminates the ability to go back and adjust previous rulings. A substantive change is usually defined as one that bans a certain type of punishment for a particular group of people. This type of change is generally retroactive. This may be applied to this situation as they are banning life sentences on those juveniles tried for murder. Other cases are seen as procedural. These types of changes are those that affect the process of reaching a result and not the result itself. These changes are usually seen as prospective. This may also be applied to this case if the ruling from *Miller* is seen as simply forcing those sentencing the juveniles to consider their age compared to their punishment. An exception to this rule is a case where a rule describes the fairness and accuracy of certain criminal processes. *Miller* could also fall under this circumstance since it describes how a judge must consider ones youth, crime, and particular circumstance before punishing them with the maximum sentence.

Miller must fall into one of these three broad categories the best. It could be described as a substantive rule for several reasons. Of course, it seems to ban minors outright from receiving a life sentence without the possibility of parole. A declaration stated as such would definitely be retroactive because it would make anybody's sentence that fell under these guidelines unconstitutional. All juveniles sentenced to such a severe punishment would be given the opportunity to petition for a new trial and get their sentenced reduced. This would be because the Supreme Court saw punishing juveniles with such a severe sentencing as cruel and unusual, therefore going against the Eighth Amendment.

Others may see this case as procedural. This would be because the case changes the way a judge goes through the process of sentencing a juvenile criminal. Next the judges must go through a series of steps to ensure that the defendant is not being punished beyond what is reasonable for their age. This also includes taking into consideration what is best for that person's particular situation This may apply in Mike and Bobby's cases especially. It will make a good example at the least. If these considerations were used to figure out each of these defendant's cases, Mike should end up with a longer sentence than Bobby for being the one who actually killed the guard. This would be because of the stipulation where the judge must consider each individual case. Even Mike's sentence would not be life, though, because the judge also would have to consider his age as he did when Mike got his sentence reduced to 15 years. Under the State of Bliss's laws, they both got the same charge because Bobby was seen as a accomplice to the same crime, and they both should have been sentenced to the same extent. Since Mike's trial was dragged out until after *Miller*, he was given a much lesser sentence due to his age and crime. The reason the *Miller* Case begins to fall out of this category is the exception.

The exception says that a procedural rule can be retroactive if it is a,"watershed rule of criminal procedure implicating the fundamentals of fairness and accuracy of the criminal proceeding." This means that if a procedure is changed in any way to make the outcome fairer for the defendant, then the procedural change is retroactive instead of prospective. The *Miller* case falls into this category because it makes sentencing procedures fairer for juvenile offenders. They discuss using age and the defendant's situation as mitigating factors before coming to a conclusion about any sentencing. It has been said that the decision does not ban any penalties from being applied to any group or in any situations but it does affect the sentence in that it forces the one giving it to follow a process. This makes it procedural. As the ruling goes on, it says that the sentence must consider the person's age and other characteristics before giving them any certain penalty. This makes the ruling fall into the category of the exception. It creates a situation where one must go through a certain process to create total fairness and accuracy in the defendant's final sentence. Each sentence should be molded for each particular case and each particular person under this rule. Also, following this line of thinking on the *Miller* case, the rule is retroactive.

Not every professional totally agrees over any legal matter, let alone one so easily argued both ways. Whether this case is retroactive or not is still not figured out, but debates have been favoring the retroactive approach to the law. This is easy

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2014 ESSAY CONTEST SUBMISSION *(Continued from Page 22)*

to see based on the simplistic rendering of the facts given by the definition of certain legal terms an d by the facts given by the *Miller* case and in Mike and Bobby's situation. After all these facts are picked apart and analyzed it is easy to see that the *Miller* case can be ruled out as a substantive change. That means the next step is figuring out whether it falls into the exception. It is simple to say that it does, as it displays the fairness of certain sentences towards people of specific ages or in particular situation. Through these means, this rule should be given retroactive effect.

This ruling changes the way judges look at single cases by themselves along with a defendant's age and other mitigating circumstances. These things are important to determining what action is best to penalize some criminals. Some people, like Bobby, have been unfairly sentenced because of blanketing laws that follow an unconstitutional system. This means that these 450 offenders imprisoned in the State of Bliss should get the opportunity to petition if they believe they received an unfair sentence due to not treating their case as a specific one. In cases like Bobby's, it is not fair that they may have to serve a lifetime in prison, while people like Mike are free 15 years later. This fairness is restored by the retroactivity of this ruling. That fairness is itself is part of what make the *Miller* case fall into that procedural exception category.

It should be easy to see what needs to be done in the State of Bliss. It begins with Bobby. Once the case is deemed retroactive and his public defender can petition to reopen his case for sentencing, then things may change for others as well. Other young adults who had their lives ruined by unconstitutional laws may get their lives back because of the renewed fairness created by the "watershed rule"

Submitted by:
Derek Shaffer, of Lakeview High School

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Pittsburgh, PA 15209
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November 14, 2014

Dear WPTLA Members:

The Steelwheelers would like to thank the Western Pennsylvania Trial Lawyers Association for its extraordinary generosity as exhibited through the President's Challenge 5K over the past fourteen years.

The great success of the run again this year can be attributed to the efforts of Sean Carmody, Chair, of the President's Challenge Committee, Laurie and Maria and the generosity of the members of the WPTLA. The 5K run also provides non-WPTLA supporters of the Steelwheelers an opportunity to join the members of the WPTLA to show their support.

WPTLA's contributions to the Steelwheelers have continued to allow us to focus on providing competitive sports opportunities for people with disabilities. The money raised is used to fund competition and equipment for the wheelchair basketball team and quad rugby team. This year we expanded by adding a hand cycling team. Two of our members recently competed in the prestigious New York City Marathon and Ashli Molinaro took second place among women! On November 1st and 2nd the Rugby team hosted the 12th Annual Steel City Slam Quad Rugby Tournament in Slippery Rock and the basketball team recently competed in Virginia Beach and Edinboro and is working out details to play in an exhibition game against the Cleveland team during halftime of a Cleveland Cavs game.

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

With great appreciation,

The Pittsburgh Steelwheelers

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

...Through the Grapevine

Past President **Carl R. Schiffman**, Board of Governors Member **Jason M. Schiffman**, and Member **Dan Schiffman** have changed their firm name to Schiffman Firm. Dan has changed his email address to dan@schiffmanfirm.com. All other information remains the same.

Congratulations to Board of Governors Member **Katie A. Killion** on the birth of her daughter, Graciela "Gracie" Ava Killion, born Nov. 10, 2014. Mom and baby are healthy and doing great.