THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

Volume 27, No.4
Summer 2015

UPCOMING EVENTS FOR WPTLA

A **Retreat** is scheduled for **Aug 20-21** at the **Sheraton Bayfront Hotel** in **Erie**. Activities include golf, reception, bowling, and CLE. Register on our website, under the Events tab.

Sept 12 marks the annual **5K Run/ Walk/Wheel** to benefit the Pittsburgh Steelwheelers. Plan to attend this great family fun event on Pgh's North Shore.

A **CLE program and Reception** is being planned for **Sept 21** at **Willow Restaurant in Pgh**. CLE provided by IWP.

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

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

HIGHLIGHTS OF THE 2015 JUDICIARY DINNER

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

The annual Judiciary Dinner, one of our organization's signature events, was held on Friday, May 8, 2015 at Heinz Field. The dinner serves to honor those members of our judiciary who either retired or attained senior status in the preceding year. However, before the dinner began, those in attendance had the opportunity to relax and socialize with their fellow trial lawyers and a number of jurists during the cocktail hour.

Following dinner, the program began by recognizing the winners of this year's Presidents' Scholarship. The Presidents' Scholarship is awarded to the winners of WPTLA's annual essay contest. Each year, the Scholarship Essay Committee selects a timely legal topic and provides a factual vignette as well as accompanying case law for the participants. The entrants must then use these materials to write an essay in support of the position for which they choose to advocate. This year's three winners were Alex Barna of Hopewell Senior High School, Antonio Frisina of Cathedral Preparatory School, and Douglas Smith of Maplewood High School. WPTLA and Scholarship Essay Committee member Charles Garbett presented these scholarships on behalf of the Scholarship Essay Committee. After Chuck's introduction of each of the scholarship winners, there is no doubt that each of these individuals will be successful in whatever career path they choose. Their winning essays will be published in future editions of The Advocate.

One of the highlights of the evening was the presentation of the Daniel M. Berger Community Service Award. This year, WPTLA had the opportunity to honor Dr. Jack Demos for his work with Surgicorps International. Dr. Demos founded Surgicorps in 1994 with the goal of providing free medical and surgical care to people in developing countries. Since that time, Dr. Demos has made more than 40 of these medical mission trips. Those in attendance at the dinner had an opportunity to watch a presentation where Dr. Demos showed pictures of those whose lives were forever changed by the volunteers of Surgicorps who generously donate both their time and talents to this organization. The presentation included before and after photographs of individuals who had surgeries to repair cleft lips and palates, individuals who required treatment of scar contractures from burns and those who required treatment for traumatic injuries. The work performed by this organization is truly remarkable and has changed numerous lives. In addition to honoring Dr. Demos for the work that he has performed on behalf of Surgicorps, WPTLA, along with Berger & Lagnese, FindLaw, and NFP Structured Settlements, was proud to make a donation to that organization to help it continue its inspiring goal of "Changing lives, one surgery at a time."

After recognizing Dr. Demos for his volunteerism with Surgicorps, Sean Carmody, the Chair of the President's Challenge 5K Run/Walk/Wheel, presented the proceeds of our 14th Annual 5K to the Pittsburgh Steelwheelers. As a result of this past year's event, WPTLA was able to present the sum of $31,750 to the Steelwheelers. Formed in the 1970's, the Steelwheelers originally began as a wheelchair basketball team. The organization now competes in both wheelchair basketball and rugby events, and has formed a hand cycling team. Over the past 14 years, the President's Challenge 5K has proudly raised over $350,000.00 to help support this remarkable organization.

Of course, the purpose of the evening was to recognize those Judges who either retired or attained

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President
Christopher M. Miller

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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A Message from the President …

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

I want to thank all of you for everything that you do for your clients, victims of sometimes tragic and life-altering incidents caused by the negligence of corporate America, dangerous products, unsafe designs, poor business practices, medical negligence, drunk drivers and general carelessness and disregard for the safety of others. I don't think this is said enough to trial lawyers, who often times find themselves worn down from the constant grind with insurance adjustors, defense attorneys and lien collectors. But what you do on a day-to-day basis for people who truly need help should not go unrecognized.

It seems as though we are constantly battling, constantly under attack for *helping* victims. The message that has been put forth by big business, the insurance industry and many right-wing politicians is that we, trial attorneys, drive up insurance rates, cause businesses to go bankrupt and force doctors to leave the Commonwealth. Numerous studies and statistics have de-bunked these myths. Unfortunately, the general public widely accepts these falsehoods as the gospel. We, along with our clients, are routinely portrayed as the bad guys.

Despite this, big business and the insurance industry seem to post record profits on an almost annual basis. There are fewer and fewer malpractice lawsuits every year, yet doctors continue to pay higher and higher malpractice premiums. The greedy appetite of corporate America and the insurance industry is constantly hungry, yearning for more and more profit. But we, along with our clients, are the bad guys.

In direct contradiction to the message put forth by these industries, we force companies to design safer products, adopt better business practices, make repairs to sidewalks, pay attention to the road while driving and address differential diagnoses, amongst many other things. We force the insurance industry to treat their insureds in a fair manner. Without trial lawyers, what is to stop a known defective product from being sold to the public, to keep an insurance company from denying valid claims, to prevent a doctor from ruling out a differential diagnosis? We keep these industries in check. We are the last gatekeepers of our society.

A good friend of mine, who is also a trial lawyer, once made a comment that resonated with me - "Trial lawyers are some of the best people I know." I couldn't agree with that statement any more. What each of you do on a daily basis is important work, you are helping people attempt to put their lives back together in some fashion. Not only that, many of you are actively involved in charitable organizations, giving your time, energy and monetary donations. Trial lawyers truly are some of the best people I know.

So again, thank you for what you do. It's hard work, and it's an ongoing struggle. It takes a special kind of person to be a trial lawyer, and all of you should be proud of what you do. Each of you do important work, you make a real difference in the lives of your clients and to society in general. Try to remember that the next time you find yourself being beat down by the day-to-day grind that we routinely endure. Keep up the good work, keep fighting the good fight.

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

HIGHLIGHTS OF THE 2015 JUDICIARY DINNER … *(Continued from Page 1)*

senior status during the 2014 calendar year. This year, we had the opportunity to honor Judge Alfred B. Bell of the Court of Common Pleas of Westmoreland County; Judge Gary P. Caruso of the Court of Common Pleas of Westmoreland County; Judge Robert A. Kelly from the Court of Common Pleas of Allegheny County; Judge Donald E. Machen of the Court of Common Pleas of Allegheny County; and Judge William R. Nalitz from the Court of Common Pleas of Greene County. Those Judges who were able to attend were introduced by WPTLA members who practiced with these Judges before they ascended to the bench or who had represented clients before the Judges. The introductory remarks made it clear that the retirement of these judges has left voids that will be difficult to fill.

A special highlight of the evening occurred when President-Elect, Lawrence Kelly, recognized Chris Miller for his service as President of the Western Pennsylvania Trial Lawyers Association. Chris has worked tirelessly for this organization for a number of years. He has always been actively involved in organizing and supporting our 5K Run/Walk/Wheel event to benefit the Steelwheelers. However, as President, Chris worked hard to move our organization forward. He did so by initiating a database for our members to access materials such as pleadings, briefs, deposition transcripts and other similar materials that will be useful to our practices as trial lawyers. Additionally, Chris was instrumental in securing nationally recognized individuals, such as Phillip Miller, to speak at WPTLA sponsored CLE courses. Those are only two examples of the many ways that Chris worked diligently to lead WPTLA during his tenure as President. Simply stated, as our President, Chris was not satisfied with the status quo and, instead, worked hard to move our organization forward. The recognition that Chris received was well deserved. Of course, we now look forward to continuing to move WPTLA forward under the leadership of President-Elect, Larry Kelly.

To all of you who attended this year's event, thank you. To those of you who were unable to attend, I encourage you to make time for next year's Judiciary Dinner. It is a worthwhile event that showcases the fact the trial lawyers have a collective heart for helping others.

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

More photos from the Annual Judiciary Dinner can be found on p. 4.

Pictured above L: Past President Paul Lagnese and Dr. Jack Demos of Surgicorps International. Pictured above R: Liz Dunn of the Pittsburgh Steelwheelers, President Chris Miller, 5K Chair Sean Carmody and Matt Berwick of the Pittsburgh Steelwheelers. Pictured in the center: Judge Caruso and Board of Governors Member Warren Ferry. Pictured L: Past President Steve Moschetta and Judge William Ward.

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Pictured from L to R in #1: Past President Mark Homyak, Board of Governors Member Sean Carmody, Karan Miller, President Chris Miller.

In #2: Past President Billy Goodrich, Ken Arnstein, Past President Veronica Richards, Judge Beth Lazzara.

In #3: President-Elect Larry Kelly and his wife Marisa, Susan Trankocy and Board of Governors Member Rich Trankocy.

In #4: Aaron Rihn, Board of Governors Member Max Petrunya, Board of Governors Member Steve Barth, Secretary Liz Chiappetta, and Mike Gianantonio.

In #5: Board of Governors Member Troy Frederick, Treasurer and Judiciary Dinner Chair Bryan Neiderhiser, President Chris Miller.

In #6: Board of Governors Member Erin Rudert, Business Partner Trisha Ritenour and Business Partner Helen Sims, both of The Duckworth Group/Merrill Lynch.

In #7: Immediate Past President Chad Bowers, Board of Governors Member Sean Carmody, Amy Finley and Business Partner Chris Finley, of Finley Consulting and Investigations.

Photos provided by Martin Murphy of Investigative Photography & Video.
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May 11, 2015

WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION
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Dear Friends,

Thank you so much for your donation of $500.00 (check #5022) to Surgicorps International on 04/30/2015. We are grateful for your generous investment in our mission to provide free surgical and medical care to people in need in developing countries.

In 2015, generous contributors like you are helping to successfully launch Surgicorps' next 20 years of service. We will take two exploratory trips to Uganda and Honduras and make four return trips this year to Bhutan, Guatemala, Zambia and Vietnam. Our volunteers will share their experiences and we'll introduce you to some of the people you're helping to make whole again.

Surgicorps volunteers continue to match your generosity with their donations of time and expertise. They make it possible for us to meet the wide-ranging medical and surgical needs of patients of all ages in new and known locations around the world. Our commitment lasts beyond the short stay in each country as we leave behind supplies and equipment, medical know-how shared with local medical professionals and simple preventative techniques and information.

Stay connected to Surgicorps. Mission reports and the trip calendar may be found at: www.surgicorps.org. Be a "Friend" on Facebook and follow us on Twitter. Updates to your email and/or mailing address to DeNese Olson at: dolson@surgicorps.org. If you have any questions, please call 412-767-4185.

Thank you again for your support.

Sincerely,

Linda Esposto
Director of Logistics and Programs

THANK YOU FOR YOUR KIND + GENEROUS SUPPORT OF OUR WORK AND RECOGNITION OF SURGEONS__ IT'S GREATLY APPRECIATED!!

Surgicorps International is a 501 (c) (3) organization and all gifts are tax deductible to the extent allowed by law. In accordance with IRS regulations, no goods or services were received for this contribution. A copy of the official registration and financial information for Surgicorps International may be obtained from the PA Department of State by calling 717-783-1720, or toll-free within Pennsylvania 1-800-732-0999. Registration does not imply endorsement.

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Meet Incoming President Larry Kelly

lkelly@lgkg.com

Family: I've been married to my wife Marisa for 32 years. We have four daughters. Lauren – 27 and Erica - 26 are graduates from the University of Pittsburgh School of Law. Both Lauren and Erica are employed at Gordon and Rees. Gianna – 22 is a second year law student at Pitt. Ariana – 20 is a junior at Pitt majoring in chemistry. She has visions of going to dental school.

Firm: I've been a partner at Luxenberg, Garbett, Kelly and George since 1985. My practice is concentrated in the areas of personal injury, medical malpractice and workers' compensation. The firm has five attorneys.

Career Highlights: Every day that I can fight for a client who can't fight for him/herself is a highlight for me. I'll also always remember the day that I argued before the Pennsylvania Supreme Court and two of my daughters who were in law school and my wife were in the gallery.

Goals as President: To energize our membership. Ralph Waldo Emerson speaking to the graduating class at Harvard once said that, "nothing great was ever accomplished without enthusiasm." I want the trial lawyers in western Pennsylvania to enthusiastically work to enhance our profession, our community and the lives of the people that we represent.

Why did I want to become President of WPTLA: It was never a goal of mine to be president of WPTLA. But when I was asked to serve, I considered it a distinct honor. Some of the finest trial lawyers in Western Pennsylvania have held the position as President. Just to have my name mentioned along with those who have formally served as President is very humbling.

Why is a WPTLA membership valuable: The WPTLA membership gives its members the opportunity to network and share ideas with the best trial lawyers in Western Pa. The educational programs offered provide the expertise necessary to become better lawyers. In our profession your either moving forward or backward – you're never staying the same. WPTLA's community outreach programs gives its members a platform to make a difference in their community. It's been said that you make a living with what you get but make a life with what you give. WPTLA provides access to business partners who provide the services that greatly benefit our clients. Finally WPTLA offers a junior membership that provides law students and first year attorneys a mentor to advise them as they move forward in their career.

PITTSBURGH STEELWHEELERS 5K 2015 PREVIEW

*By: Sean Carmody, Esq.***

The Western Pennsylvania Trial Lawyers will be sponsoring the 15th annual President's Challenge 5K Run/Walk/Wheel on Saturday, September 12, 2015. The course is set up along the scenic North Shore Riverwalk and we anticipate exceeding last year's race numbers of 250 participants. The net proceeds benefit the Pittsburgh Steelwheelers organization and funds their wheelchair athletic programs including rugby, basketball, track and hand cycling. We encourage Western Pennsylvania Trial Lawyers members to get involved with this great event through participation and sponsorship. We hope to see you on September 12, 2015.

New at this year's race, we will partner with a CrossFit gym and have additional categories to include crossfit training along with running the course.

Also, incoming President Larry Kelly has issued a challenge to member firms to record the fastest team time, which would include 4 members/employees/family members of your firm. Winner will take home the travelling trophy, and have bragging rights for the year.

Sponsorship opportunities, as well as registration information, will be coming to your attention in the very near future.

*** Sean is a WPTLA Member from the firm of Patberg Carmody & Ging, PC*
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We Need Article Submissions!!

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

TRIAL COURT DECISION SUPPORTS PUNITIVE DAMAGES FOR SLEEPING WHILE DRIVING

*By: Bryan Neiderhiser, Esq.***

A claim for punitive damages is multifaceted in its usefulness to a Plaintiff's personal injury attorney. It can be used to maximize the value of a claim. It can also be used to prohibit the defense from "sanitizing" an egregious fact pattern by simply admitting negligence because a claim for punitive damages requires evidence establishing the outrageous conduct giving rise to the claim. While a claim for punitive damages is helpful to a Plaintiff's attorney, even if the same are not ultimately awarded or collectible, establishing a claim for punitive damages, however, is not always easy.

A recent trial court decision from Indiana County has helped to clarify the facts and quantum of proof necessary to recover punitive damages where an individual causes an accident due to falling asleep behind the wheel of a vehicle. In Freeburg v. Estate of Luciano, the Plaintiff pursued a claim seeking to recover for personal injuries and compensatory damages as well as for punitive damages. The request for punitive damages was based upon the allegation that the vehicle collision that formed the basis of the suit occurred because the Defendant fell asleep while she was driving her vehicle. Unfortunately, the Defendant passed away after the collision for reasons unrelated to the collision itself. Therefore, in order to establish liability and to pursue the claim for punitive damages, the deposition of the responding Trooper was recorded. Fortunately, the Trooper had interviewed the parties upon his arrival at the scene. During his deposition, he testified that the deceased driver informed him that she had been going through a rough time with a divorce and that she had not been sleeping well. The driver also stated that, while she did not remember why she had crashed, she believed that she may have fallen asleep while driving. After the close of discovery, the Defendant filed a Motion for Summary Judgment on the issue of punitive damages alleging, in essence, that Pennsylvania case law does not support the imposition of punitive damages for falling asleep behind the wheel of a car.

In its Opinion, the Court correctly stated that "[a] search of the relevant case law provided no authoritative Pennsylvania case conclusively addressing the issue before the Court – whether falling asleep at the wheel is conduct sufficient to support an award of punitive damages. The Court finds instructive two Common Pleas Court decisions, and recognizes that neither case involved this issue in the context of a motion for summary judgment." The first of the two decisions that the Court considered was the Court of Common Pleas of Butler County's decision in Claypoole v. Miller, 43 Pa. D.&C. 4th 526, 527 (Com. Pl. 1999). In that matter, the Plaintiffs had sought leave to amend their Complaint to include a claim for punitive damages. In that case, the Defendant had admitted that she was aware that she was having difficulty staying awake while she was driving her vehicle. In fact, the Court summarized her testimony by stating "she [defendant] was operating her automobile in an unsafe manner when she knew she was physically exhausted. Defendant Miller stated during the deposition she had fallen asleep and had problems operating her automobile twice before falling asleep a third time and colliding with plaintiff's [] vehicle." Claypoole v. Miller, 43 Pa. D.&C. 4th 526, 528 (Com. Pl. 1999). Based upon those facts, the trial court granted the requested amendment to the Complaint. The second opinion reviewed by the Court was the Monroe County Court of Common Pleas' decision in Grant v. Daubenspeck, 83 Pa. D.&C. 4th 534 (Com. Pl. 2006). In that case, the Court granted the Defendant's Preliminary Objections seeking to strike the Plaintiff's claim for punitive damages. That Court granted the Preliminary Objections holding that merely pleading that the Defendant fell asleep at the wheel was not sufficient to establish outrageous conduct. Grant v. Daubenspeck, 83 Pa. D.&C. 4th 534, 537-38 (Com. Pl. 2006).

The trial court in Indiana County reconciled those two opposing decisions by holding, in essence, that where the Plaintiff can establish something more than the mere fact that the tortfeasor fell asleep, the issue of punitive damages belongs in the hands of the jury. In Freeburg, the Court was compelled to deny the Motion for Summary Judgment because the Defendant had admitted that she was not sleeping well, that she was going through a rough time with her divorce, that she did not know why she wrecked and that she believed she may have fallen asleep. The Court held that the jury could, based upon those facts, reasonably infer that the Decedent knew she was tired yet chose to drive while tired. According to the Court, the jury could reasonably find that this conscious decision to drive while tired constitutes the type of outrageous conduct that would support an award of punitive damages.

The takeaway from this case is that the mere allegation that a Defendant fell asleep while driving may not be sufficient to present the issue of punitive damages to the jury. Rather, under this holding it seems as though something more is needed. That something is evidence that the Defendant was aware that he or she was tired. The reason for this appears to be the prerequisite of establishing the tortfeasor's state of mind. Since no "state of mind" is required to merely fall asleep, the state of mind necessary to warrant the imposition of punitive damages must be established by demonstrating that the individual knew of sleep's approach yet continued to drive. It is that conscious decision to operate a heavy and dangerous piece of machinery, despite knowing that one is tired, which can lead to a finding that the person acted outrageously or with a disregard for the safety of others. It is this knowledge that appears to be the key to successfully presenting a claim for punitive damages where an accident is caused by an individual who falls asleep while operating a vehicle.

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22nd ANNUAL ETHICS SEMINAR AND GOLF OUTING

*By: Charles H. Alpern, Esq.***

On Thursday, May 21, 2015, 32 golfers attended the 22nd Annual Ethics and Golf Outing, held at at Shannopin Country Club in Ben Avon.

Notwithstanding a very trying judicial campaign that ended only two days earlier, our Resident Ethics 'Professor,' Rich Schubert, once again provided an excellent 1 credit CLE ethics seminar that focused on Fee Disputes among lawyers in both personal injury and worker's compensation cases.

Following the seminar, box lunches were provided as the golfers prepared for a shotgun start.

One of the biggest challenges was the weather, which had been predicted to be dry and in the low 60s, but was anything but: the golfers braved a high of 51, with falling temperatures, gusty winds and rain.

Laurie Lacher and Maria Fischer, our intrepid WPTLA Staff, braved the elements as well, and despite (somehow!) stalling their electric golf cart on the 6th hole, managed to get around the course and photograph all of the foursomes.

Cocktails and an expansive buffet dinner warmed all of the golfers, and the event concluded with dessert and the award of golf prizes.

The outing was very well attended by our Business Partners, including Don Kirwan of Forensic Human Resources, Chris Finley of Finley Consulting & Investigations, Abe Mulvihill of Robson Forensic, Kevin Prag and Steve Williams of FindLaw, and Nancy DiBattiste and Lisa Caligiuri of IWP.

*** Chuck is a WPTLA Member from the firm of AlpernSchubert P.C. Email: calpern@alpernschubertlaw.com*

More photos on page 12.

Pictured above, from L to R: Golf Outing Co-Chair and Board of Governors Member Chuck Alpern, Larry Chaban, Business Partner Nancy DiBattiste of IWP, and Past President Rich Schubert.

MEMBER PICTURES & PROFILES

Name: James T. Tallman

Firm: Thomas Crenney & Associates, LLC

Law School: Widener University School of Law

Year Graduated: 1996

Most memorable court moment: Jury question: Is there any limit to how much we can award [client's name]?

Most embarrassing (but printable) court moment: Having to explain to Judge Wettick that I missed my case being called at happy hour (fortunately, my motion was heard and I won)

Most memorable WPTLA moment: Working on a house for Habitat for Humanity

Happiest/Proudest moment as a lawyer: Being thanked by my client after winning my first jury verdict

Best Virtue: Doing whatever it takes to get the job done

Secret Vice: The O fries

People might be surprised to know that: I was born in LA.

Favorite movie (non-legal): Pulp Fiction

Favorite movie (legal): The Sweet Hereafter

Last book read for pleasure, not as research for a brief or opening/closing: American Pastoral (P. Roth)

My refrigerator always contains: Spinach

My favorite beverage is: Water or beer, depending on time of day.

My favorite restaurant is: Alla Famiglia

If I wasn't a lawyer, I'd be: A political consultant

STATUTE OF REPOSE DOES NOT PROTECT UNLAWFUL ACTIVITY*

*By: David C. Moran, Esq.***

In *Brunken v. N. Lee Ligo & Associates, et al.*, AD No. 13-10855, 2015 WL 1206507 (Butler Co. Common Pleas, Feb. 24, 2015) the trial court, ruling on preliminary objections, examined whether a wrongful death action alleging architectural malpractice that occurred more than 20 years prior to a 2013 accident was barred by the Statute of Repose.[1] The case involved a restaurant patron who stumbled and fell into a plate glass entrance door that shattered into large shards causing fatal neck lacerations. The patron's estate alleged that local building code ordinances and a Pennsylvania safety glazing statute[2] in effect when the architect designed an addition to the building in 1989 mandated the use of safety glass in all glass entrance doors and prohibited the use of plate or annealed glass.

The ruling focused on the interpretation of the word "lawfully" in the phrase within the statute that states:

> [A] civil action or proceeding against any person **lawfully** performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property. (Emphasis added).

No published Pennsylvania appellate case had previously interpreted the statute's use of the word "lawfully" and the legislature did not provide a definition. The architect argued that "lawfully" refers to the words "any person" and, therefore, any person properly licensed or otherwise authorized by the State to engage in certain construction activities would be acting lawfully and, consequently, protected under the statute.

In rejecting the architect's licensure interpretation of the statute, the court noted that Pennsylvania cases have held that when a party moves for protection under the Statute of Repose "the activity of the moving party must be within the class which is protected by the statute"[3] and that the class of persons protected is defined "not by the status or occupation of its members but rather by the contributions or acts done in relation to the improvement to the real property."[4]

The patron's estate argued that "lawfully" refers to the actual design, planning, supervision or construction activities a person is "performing or furnishing." Therefore, if an architect's designs or specifications violated applicable building codes or laws, an architect would not have been acting "lawfully."

The court also examined the legislative history of the statute and noted that the legislature is presumed to attach importance to every word, further noting that, grammatically, "lawfully" is an adverb that modifies the verbs "performing or furnishing," and cannot modify the noun phrase "any person." The court also cited four Common Pleas Court opinions[5] and a memorandum opinion from the Western District of Pennsylvania[6] that support the conclusion that the legislature obviously intended the Statute of Repose to "protect activities that were lawful, not persons who were lawfully licensed by the State." As a result, the court held that alleged unlawful violations of local building code ordinances and safety glazing laws placed the architect, in this case, "outside the class of persons protected by the Statute of Repose."

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* Originally published in PaJustice News and reprinted with permission of the author and Pennsylvania Association for Justice.

[1] The Statute of Repose for construction projects, 42 Pa.C.S.A. § 5536(a), states in relevant part:

> **(a) General rule**.--Except as provided in subsection (b), a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement to recover damages for:
>
> (1) Any deficiency in the design, planning, supervision or observation of construction or construction of the improvement.
>
> (2) Injury to property, real or personal, arising out of any such deficiency.
>
> (3) Injury to the person or for wrongful death arising out of any such deficiency.
>
> (4) Contribution or indemnity for damages sustained on account of any injury mentioned in paragraph (2) or (3).

[2] 35 P.S. § 5811 *et seq.*

[3] *Noll by Noll v. Harrisburg Area YMCA*, 643 A.2d 81, 84 (Pa. 1994).

[4] *Leach v. Philadelphia Sav. Fund. Soc*., 340 A.2d 491, 493 (Pa.Super. 1975).

[5] *Emery v. Faxon Construction Co.,* No. 78-2697, (Lycoming Cty., October 20, 1981); *Yoon v. Faxon Const. Co*., 38 Pa. D. & C.3d 568 (Pa. Com. Pl. 1984) and *Friedman v. Bar Development Co., et al*., No. 6172 of 2004, (Westmoreland Cty., March 13, 2006).

[6] *AMCO Ins. Co. v. Emery & Associates, Inc.,* No. 2:09cv904, Memorandum Opinion (W.D.Pa. Oct. 29, 2010).

*** David C. Moran is a WPTLA member and shareholder of MORAN & MORAN, P.C., located in Wexford and Somerset, Pa.*
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Whatever made you want to change your mind Sara, Bob Dylan*

*By: Steven H. Lupin, Esq.***

It is likely not too much of a stretch to assume that most litigation attorneys have been, or at some time in their career will be, confronted with a scenario wherein a client agrees to and enters into a settlement, and thereafter expresses dissatisfaction with the terms of the settlement, perhaps even suggesting that the attorney was negligent in advising the client as to the settlement. The recent case of Silvagni v. Shorr, 2015 PA.Super. 62 (Pa.Super. 2015) should provide some assurance that it will be difficult for the client to sustain a cause of action against their attorney arising out of the client's change of heart over a settlement, absent clear evidence that the client was misled regarding the terms or effect of the settlement.

In Silvagni, the plaintiff, Phillip Silvagni ("Plaintiff") was injured on the job from a falling overhead crane. In addition to the worker's compensation claim, Plaintiff also instituted a third-party action against the crane manufacturer. Plaintiff was represented by separate counsel in connection with each proceeding.

After Plaintiff entered into an agreement to settle his worker's compensation claim, Plaintiff brought a legal malpractice action against the attorneys who had represented him in the worker's compensation action. Plaintiff contended that Defendants had negligently advised him as to the effect of the worker's compensation claim on his pending third party action, and that he would not have settled the worker's compensation claim if he had understood that doing so would terminate his medical and wage benefits. The trial court in the legal malpractice action granted summary judgment to the Defendants, and Plaintiff appealed.

On appeal, the Pennsylvania Superior Court applied the principles set forth in Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 526 Pa. 541, 587 A.2d 1346 (Pa. 1991), wherein the Pennsylvania Supreme Court held that where a party voluntarily enters into a settlement agreement, he will not be permitted to maintain a malpractice action against his attorneys under negligence or contract principles, absent evidence that he was fraudulently induced to enter into the settlement. "Simply stated, we will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed, unless that plaintiff can show he was fraudulently induced to settle the original action. …To permit otherwise results in unfairness to the attorneys who relied on their client's assent and unfairness to the litigants whose cases have not yet been tried." *Id.*, 526 Pa. at 546, 552, 587 A.2d at 1348, 1351.

Taking note of the principles espoused in Muhammad, the Court in Silvagni took note of the colloquy that had taken place before the judge in the prior worker's compensation proceedings, wherein Plaintiff indicated that he understood the terms of the settlement, and acknowledged that in exchange for the settlement proceeds, he would not be receiving any additional wage or medical benefits under the Workers' Compensation Act. The Court stated that Plaintiff's contention that he would not have entered into the settlement if he had known it would terminate his medical coverage and wage benefits that he was receiving under the Workers' Compensation Act, was contradicted by the record.

Accordingly, the Court held that unless Plaintiff had specifically pled and could prove that Defendants fraudulently induced him into signing the settlement agreement, or that the Defendants had failed to explain the effect of the settlement or that the settlement was legally deficient, Plaintiff was barred from maintaining an action in negligence against Defendants. Viewing the record in the light most favorable to Plaintiff and resolving all doubts against Defendants, the Court held that Defendants were entitled to judgment as a matter of law.

Accordingly, the practitioner should take some solace that where a client has agreed to the terms of a settlement, it will be difficult, absent evidence of fraud, for the client to maintain an action against their attorney arising out of the client's "buyer's remorse" over the terms of the settlement. However, it should be noted that in Silvagni, Defendants had the benefit of the extensive colloquy that had taken place on the record in the underlying proceedings, wherein Plaintiff was questioned extensively as to his acceptance of the settlement and understanding of the settlement terms. It is probably a safe assumption that most settlements are not prefaced by such evidentiary proceedings. Therefore, to avoid any subsequent misunderstandings and potential exposure to further litigation, the practitioner is probably well-advised to maintain a thorough documentary trail evidencing that the terms of a settlement have been fully explained to, understood by and agreed to by the practitioner's client.

* Originally published in PaJustice News and reprinted with permission of the author and Pennsylvania Association for Justice

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Western District allows bad faith claims to proceed in case accusing insurer of misleading its insured as to its settlement position, causing the insured to contribute her own money. *McMahon v. Med. Protective Co.*, No. CIV.A. 13-911, 2015 WL 1285790 (W.D. Pa. Mar. 20, 2015) (Conti, C.J.). *

*By: Joe Roda, Esq. and Jennifer Snyder, Esq.***

This case arose from the settlement of a dental malpractice action, in which the dentist, McMahon, was insured by Medical Protective Co. for a policy limit of $2 million. *Id.* at *1. In accordance with the policy, Medical Protective assigned counsel to defend the malpractice case. *Id.* Due to concerns about an excess verdict, McMahon—who had been pressing Medical Protective to settle—also retained her own counsel ("Decker"). *Id.* at *1-2. Roughly a week before the case was set for trial, the case went to mediation. *Id.* at *2.

Before mediation, Medical Protective's CEO e-mailed Medical Protective's national dental claims manager ("Ball") and his superior, the senior vice president of claims ("Ignasiak"), granting ultimate settlement authority up to the $2 million policy limit, but saying that the case should be settled for "far less." *Id.* Based on this, Ignasiak gave Ball authority of $1.5 million for the mediation, keeping the $500,000 balance in authority off the table for potential future negotiations, if the mediation were unsuccessful. *Id.* Ball, in turn, gave that $1.5 million in authority to the field claims manager ("Marshall"), who was to attend the mediation as Medical Protective's representative. *Id.* Ball did not, however, tell Marshall that Medical Protective ultimately would be willing to pay the full $2 million policy limit if the case did not settle at mediation. *Id.* Ball also did not tell counsel assigned to defend the case what the settlement authority was for mediation, and Marshall did not divulge the $1.5 million settlement authority to anyone at the mediation until he reached it. *Id.*

Medical Protective ultimately agreed to pay $1.5 million at mediation. *Id.* at *3. When the malpractice claimant would not accept this, McMahon—unaware of the ultimate settlement authority of $2 million—agreed to contribute $50,000 of her own money, at which point the case settled. *Id.* at *4.

There was a dispute between the parties as to who, at the mediation, first suggested the personal contribution by McMahon. *Id.* at *3. Earlier in the day, when Medical Protective only had $1.3 million on the table, Decker called Ball, pressing him to disclose the insurer's settlement authority, but Ball refused, purportedly saying that $1.3 million was the ultimate limit on the file. *Id.* (Later, of course, it was revealed that the limit was at least $1.5 million, when Marshall offered that amount. *Id.*) During that same conversation, a personal contribution by McMahon was discussed. *Id.* Decker commented that if McMahon were to contribute her own money, it would only be under protest and with a reservation of her rights against Medical Protective. *Id.* According to his testimony, Ball urged that McMahon not make a "voluntary payment" and let negotiation "play its course." *Id.*

After the settlement, McMahon sued Medical Protective for breach of contract to recover the $50,000 contribution that she had made, and also asserted claims for common law and statutory bad faith. *Id.* at *1.

On the parties' cross-motions for summary judgment, the court held that Medical Protective did not breach of the terms of the policy by failing to pay the full amount of the settlement. *Id.* at *5-9. The policy clearly prohibited an insured from settling a claim without Medical Protective's written authorization except at the insured's own cost and responsibility, and the court rejected McMahon's arguments attempting to avoid application that exclusion. *Id.*

The court then turned to the common law bad faith claim, holding first that a negligence standard applied, *id.* at *10, and then that:

> "A reasonable jury could find that Medical Protective acted negligently, given its duty to afford McMahon's interests the same consideration as its own, because: (1) Ball told Decker that Medical Protective would not offer more than $1.3 million, even after the mediation; (2) Ball did not tell Marshall that Medical Protective would consider offering more than $1.5 million after the mediation, if necessary to settle the claim; (3) Marshall told McMahon and Decker that $1.5 million was the limit of his authority; and (4) when McMahon placed her own money on the table, neither Marshall nor Ball told her that Medical Protective would offer more, if necessary, to settle the case. A reasonable jury could conclude that these actions or inactions caused McMahon to contribute her own money to the settlement."

Id. at *15.

Continued on Page 12

Western District allows … *(Continued from Page 11)*

The court next considered whether an insurer's insistence that an insured contribute to a settlement within the policy limits could support a contractual bad faith claim, predicting that the Pennsylvania Supreme Court would allow such a claim "in an appropriate case," but finding that this was not one, since the facts did not support a claim that Medical Protective had insisted on McMahon's contribution. *Id.* at *15-16. At most, one of the attorneys that Medical Protective had hired to defend McMahon had made negligent statements, but those could not be attributed to Medical Protective. *Id.* at *16.

Turning to the statutory bad faith claim, the court held that it, like the common law bad faith claim, could proceed to the jury on the issue of whether Medical Protective acted in bad faith by failing to disclose to or misleading McMahon as to its internal position on settlement. *Id.* at *17-18.

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Golf Outing 2015


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Pictured from L to R in #1: Business Partner Kevin Prag of FindLaw, President-Elect Larry Kelly, Business Partner Lisa Caligiuri of IWP, and Rob Taylor. In #2: Business Partners Nancy DiBattiste and Lisa Caligiuri of IWP. In #3: Hamka Abdullah, Bill Flannery, Philip Clark and Past President Mark Homyak. In #4: Jason Tetlow, Jim Moyles, Judge Richard Mancini, and Board of Governors Member Dave Zimmaro. In #5: Past President Rich Catalano, Board of Governors Member Sean Carmody, and Business Partner Steve Williams of FindLaw. In #6: Jim Burn, Mike Duzicky, Roger Horgan and Ed Abes. In #7: Business Partner Chris Finley of Finley Consulting & Investigations, Past President Josh Geist, Past President Billy Goodrich, and Business Partner Abe Mulvihill of Robson Forensic. In #8: Jim Lestitian, Past President John Becker, Business Partner Don Kirwan of Forensic Human Resources, and John Becker.


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COMP CORNER

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

Commonwealth Court Hears Arguments on Constitutional Challenge to Use of AMA Guides

On April 15, 2015, an en banc panel of the Commonwealth Court heard oral arguments *in seriatim* for *Protz vs. WCAB (Derry Area School District)*, No. 1024 C.D. 14, and *Winchilla vs. WCAB (Nexstar Broadcasting)*, No. 213 C.D. 204. The cases involved Petitioners' position that their use of periodically changing AMA Guides to the Evaluation of Permanent Impairment to change the status of injured workers from total disability to partial disability constitutes an unconstitutional delegation of authority by the state legislature.Vincent Quatrini, Esquire, represented Winchilla and the author represented Protz.

Three recent cases, one from the Pennsylvania Supreme Court and two from the Commonwealth Court, address the issues raised by Petitioners. In *Pennsylvanians Against Gambling Expansion Fund, Inc. vs. Commonwealth*, 583 Pa. 275 (2005), the Supreme Court dealt with numerous Constitutional challenges to the Pennsylvania Race Horse Development and Gaming Act.The Act was challenged as unconstitutional as being passed in violation of Article 3, Sections 1, 3, 4, 6, and 10 of the Pennsylvania Constitution.It was also challenged as violating Article 2, Section 1 of the Constitution dealing with delegation of authority by the legislature. The Petitioners maintained that Section 1506 of the Gambling Act impermissibly delegated legislative authority to the Gaming Control Board.The Board was granted essentially unfettered control over local zoning issues.The Supreme Court, in determining whether an unconstitutional delegation was made, looked to two limitations: (l) The basic policy choices must be made by the legislature; and, (2) the legislation must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions.The Supreme Court concluded that the General Assembly failed to provide adequate standards and guidelines under Section 1506 of the Gambling Act to qualify as a constitutional delegation of authority.

Since the above-mentioned Supreme Court case, the Commonwealth Court has dealt with the General Assembly's delegation of authority in two cases.The first is *Pa. Builders Association vs. Department of Labor and Industry*, 4 A.3d 2015 (Pa. Commw. 2010). The second case is *MCT Transportation vs. Philadelphia Parking Authority*, 60 A.3d 899 (Pa. Commw. 2013). The two cases are interesting in that Judge Leavitt filed a concurring opinion in *Pa. Builders* and expanded on that opinion when writing for the Court in *MCT Transportation*.

Pa. Builders dealt with a challenge to the adoption by the Department of Labor and Industry of the 2009 I.C.C. as Pennsylvania's Uniform Construction Code. The Court found that the manner in which the Codes were adopted by the Department of Labor and Industry in 2009 did not constitute in improper delegation of authority. However, it did conclude that the process used to adopt the Uniform Construction Code in 2006 failed to pass constitutional muster. The difference between the two years was an amendment to the Pennsylvania Construction Code Act occurring prior to the adoption of the 2009 codes. Prior to the amendments, Labor and Industry did not go through notice and comment and the parties affected by the changes in the Code had no opportunity to express concern about how they would be affected by changes to the Code. By 2009, the PCCA had been amended to create an advisory board which included stakeholders affected by changes to the codes. The advisory council was to hold hearings and receive input from stakeholders before adopting the new codes. In Judge Leavitt's concurring opinion, she stated "the legislature cannot adopt, *sight unseen*, the future work product of the ICC without offending Article 2, Section 1" (emphasis added). The Majority opinion actually utilized the "sight unseen" language in its opinion. It found that the amendments to the PCCA "meant that L&I could no longer adopt ICC's codes 'sight unseen.'" This language is of some import to the two cases challenging the use of the AMA guides. This will be discussed further below.

MCT Transportation dealt with a challenge to the Parking Authority Law. Said law required taxi companies to pay fees to the Philadelphia Parking Authority in order to receive a license to operate.There was no provision for the affected parties to be able to challenge the fee schedule at any time.The Commonwealth Court, per Judge Leavitt, concluded that there was a due process violation and that the General Assembly unconstitutionally delegated authority to the Parking Authority without any guidelines to how it set fees for the companies it regulated.

Under the three cases mentioned above, the legislature, in delegating authority, must do so with the policy choices being made by the legislature and with the delegation subject to sufficient standards and conditions to

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COMP CORNER … *(Continued from Page 14)*

guide the exercise of the power delegated. If an act of legislature does not meet that standard, it is then unconstitutional.

In the Worker's Compensation Act, Section 306(a.2) provides for an impairment rating exam to be conducted under "the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment."The most recent edition of the guides has been interpreted by the Commonwealth Court to mean the guides in effect at the time of the rating evaluation. The guides themselves are updated approximately every 7-8 years. When the Act was amended to include use of the guides in 1996, the fourth edition was in effect. Presently, the sixth edition is in effect.The seventh is likely to come out at any time.As practitioners have realized, the guides change significantly from edition to edition, often in a direction to the injured workers' disadvantage.Your author argued to Commonwealth Court that the legislature had adopted the future work product of the AMA "sight unseen."

It was respectfully submitted to the Court that to use the guides in the manner prescribed by the legislature failed to pass Constitutional muster under the Supreme Court's decision in *Pennsylvanians Against Gambling Expansion Fund, Inc.* and the Commonwealth Court's decision in *Pa Builders* and *MCT Transportation*.

As of this writing, the Decision has not yet been rendered. It may come out by the time this column is published. The author will update the readers once the Decision is published.

Kudos to Vincent Quatrini for his passion and leadership of this issue. Kudos to Adam Quatrini, Esquire for an excellent brief in Winchilla. Many thanks to Dan Bricmont, Larry Chaban, Sandy Kokal and Doug Williams for their help to the author in the Protz case.

Stay tuned.

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TRIVIA CONTEST

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

Trivia Question #3

What is the Surgicorps motto? (Hint – the answer can be found elsewhere in The Advocate!)

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by Friday, August 21, 2015. Prize for this contest is a $100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #3 will be published in the next edition of The Advocate.

Rules:

- Members only!
- One entry per member, per contest
- Members must be current on their dues for the entry to count
- E-mail responses must be submitted to admin@wptla.org and be received by the date specified in the issue (each issue will include a deadline)
- Winner will be randomly drawn from all entries and winner will be notified by e-mail regarding delivery of prize
- Prize may change, at the discretion of the Executive Board and will be announced in each issue
- All entries will be considered if submitting member's dues are current (i.e., you don't have to get the question correct to win – e-mail a response even if you aren't sure of your answer or have no clue!)

The correct answer to each trivia question will be published in the subsequent issue of The Advocate along with the name of the winner of the contest. If you have any questions about the contest, please contact Erin Rudert – er@ainsmanlevine.com.

Answer to Trivia Question #2 - **What can travel around the world while staying in a corner? A stamp.**

Congratulations to Question #2 winner Sandy Neuman, of Richards & Richards!

BY THE RULES

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

REQUESTS FOR MEDICAL RECORDS

It is no longer uncommon to receive a large stack of subpoenas for medical, insurance and employment records from defense counsel to be served under the procedure set forth in Pa.R.C.P. No. 4009.21. The documents sought often exceed those which strictly pertain to the injury claimed. A recent decision authored by Judge Terrence Nealon of Lackawana County is instructive. Bandru v. Fawzen, 2015 Pa. Dist. & Cnty. Dec. LEXIS 5 (Pa. County Ct. 2015).

In Bandru, the plaintiff filed a suit arising out of a motor vehicle accident resulting in closed head, jaw and neck related symptoms. The defendant noticed the intent to serve subpoenas upon a number of providers. The plaintiff thereafter filed objections. Judge Nealon saw the issue as requiring "the proper balance between the liberal allowance of broad discovery in civil litigation and the proscription against overly expansive 'fishing expeditions' into matters of dubious relevance." The defendant supported her position by pointing to prior motor vehicle accidents, prior treatment for a concussion, knee and back conditions. The plaintiff pointed to various items of treatment covered by the subpoenas including internal medicine issues and mental health issues that were not at issue in his case. He pointed out that after the prior knee and back injuries he returned to working as a personal trainer and running marathons and ultra marathons. The plaintiff further adeptly noted that the defendants were "try to dig up some ancient record which could be used to distract and misdirect a jury from the issues in this case." After generally discussing the broad nature of discovery as well as its limits, Judge Nealon turned his attention to the facts of the case before the court. Judge Nealon then surveyed case law that indicated that evidence of prior accidents and injuries may be admissible when they are connected to the medical complaint or injuries at issue. Ultimately Judge Nealon defined a clear and easy to apply test to determine when the Court should allow a party to subpoena medical records. Specifically, Judge Nealon held:

> Absent some basis to find that the medical conditions which were treated by those health care providers are possibly "connected to" the complaints or injuries in dispute in this matter, their records are not reasonably calculated to lead to the discovery of admissible evidence.

It is also noteworthy that in Bandru, Judge Nealon cited with approval Slayton v. Biebel, 37 D.&C.4th 140 (Crawford County 1998), dealing with the right of the plaintiff to screen subpoenaed records before they are received by the defendant. The Slayton procedure was previously discussed in this column in Volume 23 No. 3 (2011).

In another unrelated matter, Attorney Fred Goldsmith won a victory for Plaintiffs' rights in Brunner v. Ritchey, No GD 12-017122 (Allegheny County 2015). In that case the issue was whether the plaintiffs were entitled to a protective order covering; medical, mental health, financial, social security and school records concerning the right of the plaintiff to limit the dissemination of medical records produced in the case and preclude the placement of such records in a database. The issue was resolved favorably to the plaintiff. In a protective order issued by the Honorable R. Stanton Wettick, Jr., dissemination of the medical records were limited to the parties, and their use was limited to the adjustment and defense of the claim. In order to effectuate the Order, defendants and their counsel were required to provide any other party to receive the records a copy of the order and a written agreement to keep the records confidential and destroy the documents at the conclusion of litigation.

The Brunner case is significant in that the underlying motion for protective order placed before the court the realities of modern personal injury claims including the fact that medical records are now stored electronically and easily disseminated among parties who have no right to review the records. The Motion in the Brunner case specifically averred that "certain domestic insurers, … may have the ability and/or practice of sharing and/or obtaining information on claimants' personal data through ISO …".

The Brunner case is also important because in the underlying motion, counsel reminded the Court that the plaintiffs were innocent victims that were hit by a drunken driver; and that they did not create their own situation of needing to pursue litigation merely to be put in the position they would have been in without their traumatic injuries. This is something that the Plaintiff's bar should be constantly reminding the Courts and anyone else who has an opinion on personal injury actions. Unfortunately, the reality is that personal injury victims are often treated worse than criminal defendants including substantial intrusions upon their privacy rights.

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BY THE RULES … *(Continued from Page 16)*

ALLEGHENY COUNTY LOCAL RULE OF JUDICIAL ADMINISTRATION 1901

As many of you are aware, the Pennsylvania Supreme Court under the leadership of Former Chief Justice Castille became increasingly concerned with case disposition status. This has prompted a number of counties to feel pressure to enact local rules to eliminate inactive cases. This has most recently led to the promulgation of Allegheny County Local Rule Of Judicial Administration 1901. Under the new rule, the office of Court records will be preparing lists of cases that have been "dormant" for more than two years. The lists will be published in the Pittsburgh Legal Journal and available on the Department of Court Records' website. If no action is taken or written objections filed within 30 days, a listed case will be administratively terminated. The rule further provides that terminated cases may not be reinstated except upon written motion to the calendar control judge.

The full text of the rule can be found at https://www.alleghenycourts.us/downloads/LOCAL%C2%A0RULE%C2%A0OF%C2%A0JUDICIAL%C2%A0ADMINISTRATION%C2%A01901.pdf.

It should be noted that the first batch of cases to be terminated was published June 4 and can be found at https://dcr.county.allegheny.pa.us/cvstat/. This list includes 5,285 cases prior to 1995. Additional batches of cases for termination will be compiled in the near future. One bright spot is that the list of cases is searchable by criteria such as attorney name and attorney number. I would suggest searching under both your name and number in case there was an error in inputting one of the two.

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

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

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

Send your articles to er@ainsmanlevine.com

HABITAT FOR HUMANITY PROJECT

Sat, April 11, 2015

A group of WPTLA members and their families gathered in the early morning hours on a beautiful Saturday in Ambridge to help a single mom reconstruct a new home for her children and herself. We were welcomed with coffee and doughnuts, generously donated by **Drew Leger**. Habitat foreman Jim Huselton gave us direction and the work began.

A crew worked on the main floor, removing windows and frames to install new windows. Meanwhile, another crew took over the upper floor and laid subflooring in the main bathroom.

A much needed break was taken mid-day, with pizza and sodas generously donated by **Chris Miller** and **Greg Unatin**.

After we left and the dust in the house settled, foreman Jim commented "We had a great day Saturday! I really appreciated everyone from your group coming to support and participate in this ministry opportunity. We accomplished some much needed tasks, hopefully learned a few things that every one might be able to use in their own homes, and had fun. It doesn't get much better! Many of your team members expressed an interest to come back again and maybe see the house as it draws closer to completion. We would love to have your group return. Just get in touch with us and we'll set a time. "

Thanks to Community Outreach Co-Chair Greg Unatin for organizing this great event!

Pictured above, from L to R: Immediate Past President Chad Bowers, Board of Governors Member Ken Fawcett, Laura Tocci, Bill Anderson, Abigail Anderson, the homeowner, her daughter and her friend, Board of Governors Member Mark Milsop, Board of Governors Member and Community Outreach Co-Chair Greg Unatin, President and "wannabe foreman" Chris Miller, and Jim Huselton of Habitat for Humanity of Beaver County.

Additional photos can be seen on page 21.

HOT OFF THE WIRE!

*By: James Tallman, Esq.***

Insurance Law: Motor vehicle exclusion in homeowner's insurance policy was not ambiguous and barred coverage of fatal dirt bike accident where deceased minor had been furnished alcohol by the homeowner and where the dirt bike was a vehicle owned by the homeowner.

Wolfe v. Ross, 2015 Pa. Super. LEXIS 246, 2015 PA Super 110 (May 7, 2015) (dissenting opinion by Wecht, J.)

Wrongful death and survival action claims were brought by the estate of a nineteen-year-old killed in a dirt bike accident. The defendant was the adult host of a graduation party where alcohol had been furnished to the minor guests, including the decedent. It was alleged that the decedent was impaired by his consumption of alcohol when he left the party on a dirt bike owned by the adult host's son. The adult host's homeowner's insurer, State Farm, refused to defend the claim and denied coverage based on its policy exclusion for injuries arising out of the maintenance and use of a motor vehicle owned by an insured. The trial court granted summary judgment for State Farm. *Id*. at. *3.

On appeal to the Superior Court, the decedent's estate raised two related issues: (1) Whether the homeowner's insurance policy's motor vehicle exclusion was ambiguous because the exclusion did not define whether it excluded injuries proximately caused by a motor vehicle or injuries causally connected with the motor vehicle; and (2) Whether the exclusion was inapplicable where the claim against the homeowner was for furnishing alcohol to a minor who was subsequently injured in a motor vehicle accident involving a vehicle owned by the insured. *Id*. at *5-6.

The Superior Court affirmed the trial court. In reaching its decision to affirm the trial court's grant of summary judgment in favor of the State Farm, the Superior Court discussed at length its prior opinions in *Eichelberger v. Warner*, 434 A.2d 747 (Pa. Super. 1981) and *Wilcha v. Nationwide Mutual Fire Ins. Co.*, 887 A.2d 1254 (Pa. Super. 2005), as well as case law from other jurisdictions. In *Eichelberger*, the Superior Court found coverage existed under both an auto policy and homeowner's policy where the insured was injured outside of her vehicle while overseeing the refueling of her car. Notably, the court held the homeowner's motor vehicle exclusion to be ambiguous because it did not specify whether it excluded all injuries causally connected to a motor vehicle or only those proximately caused by the motor vehicle. *Wolfe*, at 11-12. In *Wilcha*, a minor was injured while operating a dirt bike in a collision with another motor vehicle. The minor's parents brought claims against the driver of the motor vehicle. The driver, in turn, asserted claims against the parents for negligent entrustment. The issue before the Superior Court in *Wilcha* was whether the parents' homeowner's policy insurer owed a duty to defend. *Id*. *12-13. The *Wilcha* court found no ambiguity in the motor vehicle exclusion in the homeowner's policy. The injuries arose from the use of the dirt bike, therefore, the exclusion applied. *Id*. at *15.

The Superior Court in *Wolfe* chose to follow *Wilcha* over *Eichelberger* finding no ambiguity in the exclusion. The Superior Court rejected the estate's argument that there should be a distinction between social host liability claims and negligent entrustment claims on the basis that use of motor vehicle is a necessary element of negligent entrustment claim; whereas, a claim based on providing alcohol to a minor does not. The court explained: "The fact that the serving of alcohol to a minor subjected [homeowner] to liability does not change the fact that the policy language excludes coverage for injuries arising out of the use of a motor vehicle. It is undisputed that that decedent's use of the ATV was both the proximate cause and cause in fact of his injury. We find no ambiguity in the exclusionary language here." *Id*. at 19.

The Superior Court also rejected the estate's argument that the furnishing of alcohol and the dirt bike accident were concurrent causes of the decedent's death–one of which (the furnishing of alcohol) was a covered occurrence. The Superior Court rejected the estate's arguments that the furnishing of alcohol was either the sole proximate cause of the decedent's death or was an independent concurrent cause. *Id*. at *19-31.

Judge David N. Wecht issued a thorough and well-reasoned dissent. In his dissent, Judge Wecht pointed out that the majority did little to justify applying *Wilcha* over *Eichelberger* beyond noting the *Wilcha* was more recent. Judge Wecht found *Eichelberger* to be consistent with proper interpretation of insurance contracts. Further, Judge Wecht agreed with the estate that *Wilcha* was distinguishable because it dealt with negligent supervision and entrustment claims which inherently involved use of a motor vehicle. Judge Wecht concluded that the exclusion was ambiguous and that the furnishing of alcohol should be viewed as an independent tort covered by the policy, notwithstanding the involvement of a motor vehicle. *Id*. at *32-68.

Insurance Law: "Named driver only" *Continued on Page 19*

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

automobile policy did not violate the named driver exclusion in § 1718(c)(2) of the MVFRL and is not contrary to public policy.

Byoung Suk An v. Victoria Fire & Cas. Co., 2015 Pa. Super. LEXIS 185, 2015 PA Super. 84 (April 17, 2015)

The plaintiff-appellant brought an action for injuries suffered in a motor vehicle accident. The action asserted claims against the driver of the other vehicle involved in the accident and against the owner of that vehicle for negligent entrustment. The vehicle owner's insurer, Victoria Fire & Casualty Co. ("Victoria"), refused to defend any of the claims and denied coverage based on language in the policy that it provided liability coverage only for individuals listed as a named driver and no one else. The owner was the sole driver listed on the policy. The at-fault driver was apparently otherwise uninsured. The plaintiff-appellant filed a declaratory judgment action seeking a declaration that Victoria owed a duty to defend and to indemnify both defendants. The trial court granted summary judgment for Victoria. *Id*. at *3-4.

The plaintiff-appellant raised two issues on appeal to the Superior Court: (1) Whether the "named driver only" policy conflicted with "named driver exclusion" set forth in § 1718(c)(2) of the MVFRL; and (2) Whether "named driver only" policy was contrary to the public policy of Pennsylvania. *Id*. at *5-6.

The plaintiff-appellant maintained that the "named driver only" policy language impermissibly expands § 1718(c)(2) to exclude from coverage any person not specifically listed as an insured on the policy. Such a policy is inconsistent with § 1718(c)(2), which provides that an insured may specifically exclude by name a driver who would otherwise be insured under the policy. *Id*. at *7-8. The plaintiff-appellant's argument hinged on the notion that in drafting the MVFRL, the legislature implicitly intended that a policy of insurance covered any permissive driver of an insured vehicle, unless specifically excluded. The Superior Court dismissed this interpretation of the MVFRL as absurd. In doing so, however, the Superior Court failed to address why its interpretation does not render the named driver exclusion in § 1718(c)(2) unnecessary and meaningless or why a "named driver only" policy is a special low cost insurance product. Thus, the Superior Court rejected plaintiff-appellant's first argument holding that the policy at issue did not contain a named driver exclusion governed by § 1718(c)(2) and that § 1718(c)(2) has no application to a "named driver only" policy. The court further held that the Victoria policy was clear and unambiguous in its language limiting coverage only to the named driver.

The second issue on appeal was whether a "named driver only" policy conflicts with the public policy of Pennsylvania. The policy at issue did not cover any driver not named in the policy regardless of whether such an excluded driver is otherwise insured. In contrast, the named driver exclusion in § 1718(c) applies only when the excluded driver is otherwise insured. The plaintiff-appellant argued that § 1718(c) reflected the public policy of Pennsylvania of not increasing the number of uninsured drivers on Pennsylvania roads. The Victoria "named driver only" policy was inconsistent with this public policy. The Superior Court disagreed. Essentially, the Superior Court held that the public policy of providing low cost insurance was more important. *Id*. at *16-18.

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

2015-2016 UPCOMING EVENTS

Thu, Aug 20-Fri, Aug 21 - Erie Retreat - Sheraton Bayfront Hotel, Erie

Sat, Sep 12 - President's Challenge 5K Run/Walk/Wheel - North Shore, Pittsburgh

Mon, Sep 21 - 1 credit CLE with IWP & Member Reception - Willow Restaurant, Pittsburgh

Thu, Oct 8 - Legislative Meet & Greet - Storms Restaurant, Pittsburgh

Fri, Oct 9 - 3 credit CLE featuring Mark Kosieradzki, speaking on Rule 30(B)(6), Pittsburgh

Mon, Oct 26 - Member Reception & Business Partner Talk, Wooden Angel Restaurant, Beaver

Fri, Nov 6 - Lunch 'n Learn CLE Program, Gulf Tower, Pittsburgh

Fri, Dec 18 - Ethics Lunch 'n Learn CLE Program, Gulf Tower, Pittsburgh

Habitat for Humanity - Apr 11, 2015

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 28, 2015-2016

	Article Deadline	Publication Date
Volume 28, No. 1	September 18, 2015	October 2, 2015
Volume 28, No. 2	December 4, 2015	December 14, 2015
Volume 28, No. 3	March 7, 2016	March 21, 2016
Volume 28, No. 4	June 6, 2016	June 20, 2016

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...Through the Grapevine

Congratulations to all of our members who were named Super Lawyers and Rising Stars for 2015.

Tim Conboy has a new office, and can be found at Conboy Law LLC, 633 Washington Rd, Pittsburgh 15228. P: 412-343-9060 Email: timconboylaw.com

Board of Governors Member Matthew T. Logue has joined forces with **Lisa Vari**, to form Vari & Logue. They can be reached at Vari & Logue, LLC, 564 Forbes Ave, Manor Bldg PH, Pittsburgh 15219. P: 412-281-9906 F: 866-480-4630 Email: matt@variandlogue.com

Congratulations to **Craig Coleman**, who has been named partner in the firm of Caroselli Beachler McTiernan & Coleman.

Julian Gray has a new address at 954 Greentree Rd, Pittsburgh 15220. P: 412-833-4400 F: 412-308-6324

Elizabeth L. Jenkins is now with the Law Offices of John A. Caputo. Liz can be contacted at 100 Ross St, Pittsburgh 15219. P: 412-246-4775 Email: ejenkins@jcaputo.com

Grant C. Travis's firm has a new address at 100 State St, Ste 210, Erie 16507. P: 814-455-3839

And finally, best of luck to Maria Fischer, WPTLA Staffer, who has accepted a full-time position at Duquesne University.