THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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WPTLA HONORS ITS 13TH COMEBACK AWARD RECIPIENT

By: Sandra Neuman, Esq.

Pictured above, from L to R: Nominating Attorney Steve Barth with his client, 2013 Comeback Award Winner Kimberly Puryear; 2006 Comeback Winner Joseph David Fleming II; Kimberly Puryear; 2008 Comeback Winner Jennifer Quinio; and 2012 Comeback Winner Davanna Feyrer

On Wednesday, November 20, 2013, the Western Pennsylvania Trial Lawyers Association held its annual comeback award dinner at the Duquesne Club. This is one of WPTLA's most anticipated events that serves as a reminder to our members of why we are trial lawyers while simultaneously honoring a client who refuses to let adversity change their life. This year's recipient was Kim Puryear, an amazing and inspiring 50 year old woman from Pittsburgh.

On July 16, 2010, Air Force Veteran Kim Puryear was riding her bicycle near her home in Munhall, Pennsylvania. Kim was an avid cycler who loved to be on her bike as much as possible. She was biking on Margaret Street, which is a one way street. Unbeknownst to her, a driver in an SUV turned onto Margaret, driving the wrong way. She immediately came into contact with Kim and the collision between SUV and bicycle was violent. According to the driver, Kim's body was thrown 10-15 feet in the air.

Kim suffered severe crush injuries. Her right hip and pelvis were shattered. She severely fractured both hands and wrists. She suffered multiple facial fractures and a closed head injury. She spent months in a hospital or under close medical care. Throughout her recovery, Kim faced many obstacles. At one point Kim was told that her pelvis and hip fractures were so severe that the doctors were going to have to amputate her leg. At another, she was told she may lose her vision in one eye. Through it all, Kim believed that she would survive and return to her pre-injury status. Her unwavering faith and the loyal support of her family carried her through a long, difficult journey.

The driver of the SUV eventually pled guilty to driving with a suspended license, reckless driving, driving the wrong way and operating a vehicle without insurance. Unfortunately for Kim, the last violation meant there was no liability policy from which she could seek adequate compensation for a mountain of unpaid medical bills and her horrific injuries. Within a short period after her accident, Kim faced the hard reality that she would never receive just and fair compensation for her injuries

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UPCOMING EVENTS FOR WPTLA

Tues, Feb. 18, 2014 is the date of a 3-credit **CLE program, presented by Robson Forensic**, at the **Koppers Bldg** in **Pittsburgh**. The title of the program is *Bar Security, It's Not Just the Guards & Alcohol Toxicology 101*.

Our annual **Membership Meeting** is set for **Thurs, Mar 27, 2014** at the **Rivers Casino in Pittsburgh**. Business Partner Gene Scanlon will say a few words.

Two CLE programs are being planned for **April**. One will be a Lunch 'n Learn featuring Forensic Human Resource's Don Kirwan. The other will be a multi-credit program featuring Finley Consulting & Investigation's Chris Finley.

Save the date for our **Annual Judiciary Dinner** on **Fri, May 2, 2014** at **Heinz Field** in **Pittsburgh**.

President
Charles F. Bowers III

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A Message from the President …

By: Charles F. Bowers III, Esq.

As we come to the end of 2013 and the beginning of 2014, we pass an important milestone in the history of the Western Pennsylvania Trial Lawyers Association: the one year anniversary of the establishment of our relationship with our business partners. As you may know, Immediate Past President, Paul Lagnese, was instrumental in establishing our relationship with our business partners. Our business partners include Finley Consulting and Investigations, Covered Bridge Capital, Scanlon ADR Services, Forensic Human Resources, NFP Structured Settlements, Robson Forensic, Alliance Medical Legal Consulting, The Duckworth Group at Merrill Lynch, and FindLaw.

I am pleased to announce to the membership that all of the above business partners have re-engaged with our Association for another year. I am also pleased to announce the addition of Injured Workers Pharmacy to our business partner lineup. I know that they will be a great addition. This was possible due to the hard work of our Vice President, Larry Kelly, his committee, and our Executive Director, Laurie J. Lacher. Obviously, our business partners feel that the association with the Western Pennsylvania Trial Lawyers Association is beneficial. However, to ensure that this partnership remains mutually beneficial, we the membership must avail ourselves to the services that our business partners provide. If we fail to use our business partners, then our partnership will cease to be beneficial and will wither and die. We have come to rely upon our business partners to provide substantial financial support to our organization, which support allows us to advance the causes of the organization and our membership. In order to have a vibrant and strong relationship with our business partners, a relationship that will be mutually self-supporting, we must look to use our business partners whenever possible.

I urge the membership to consider and use our business partners when searching and seeking out the services they provide. If you are unsure if a business partner can help you or provide certain services, pick up the phone, and call our business partners. They will be happy to talk to you. You can also reach out to fellow members who have used the business partners for their recommendation and suggestions as to how they have used the business partners in the past and what they can do for you and your clients. The services the business partners provide are unique and tailored to help trial lawyers with the challenges that we face every day in our practices. Remember, they have made a choice to stand with us as an organization. It is only fair that we return their faith in us by standing with them as true business partners.

WPTLA HONORS ITS 13TH COMEBACK … *(Continued from Page 1)*

because the at-fault driver was uninsured. The only claim that could be made on her behalf was with Pennsylvania's Assigned Claims Plan where the maximum recovery is $15,000.00. Most people, after suffering horrific injuries and then learning that the individual responsible for the injuries did not maintain *any* insurance would become angry, and justifiably so; but not Kim.

Kim's primary focus after her accident was to work hard to return to the activity level she enjoyed prior to the accident. She endured multiple surgeries. Her doctors had to piece together her pelvis, hip, arms, and wrists. The surgeries, rehabilitation, and therapy were brutal, but Kim remained focused on getting better. Kim refused to let her physical and emotional pain limit her progress and she was blessed to be surrounded by a loving family and friends through her church, who helped with her recovery. Kim incurred hundreds of thousands of dollars in medical bills. When she was unable to pay her share of the medical expenses, she received assistance from Veterans' Leadership Program, a local Veteran's charity. Through determination and hard work, Kim learned how to walk again and made her way back to her former life, even though she is different physically and emotionally.

At the awards dinner, Kim spoke eloquently and from her heart about the accident and how it changed her life. Instead of being bitter about her injuries and the fact that she will never be compensated for her medical expenses, pain and suffering, scarring, and disfigurement, Kim marveled at how the accident taught her an invaluable life lesson. Through the support of her family, friends and church, Kim's faith was strengthened and she came to appreciate and value each day. Having faced death, Kim said she is very careful to ensure that her friends and family know how important they are in her life. Kim said she thinks before she speaks now; she chooses her words carefully and lovingly; and she makes sure that the last thing she says in her conversations are positive because you can't take for granted that you will ever speak to that person again.

Kim Puryear is the epitome of "coming back." She conquered and overcame significant obstacles on her road to recovery. Her story is a shining example of determination, faith, and hard work. It was a privilege to meet her and honor her with the Comeback Award. As part of honoring Kim as this year's recipient of the Comeback Award, the WPTLA made a $1,000 donation to the charity of Kim's choosing. Kim selected her church, The Life Church, for all of the support they provided to her during her time of need. Bishop Duane Youngblood, Pastor of The Life Church, was present to accept the donation.

Kim was nominated by her attorney Steve Barth, principal of Barth & Associates of Pittsburgh, Pennsylvania. Steve represented Kim pro-bono and was instrumental in giving Kim the platform to "properly thank" her family and friends for their tireless support during her recovery. Steve graciously sponsored *three* tables of Kim's guests and made a personal donation to the Veterans' Leadership Program as a thank you for helping Kim when she needed it the most. Michael Bodis was in attendance from the Veterans' Leadership Program to both speak as to what a wonderful person Kim is and to accept Steve's donation. Kudos to Steve for going above and beyond the call of duty. Both he and his deserving client are inspirations.

Pictured above, from L to R: Treasurer Liz Chiappetta, Board of Governors Members Deb Maliver, Max Petrunya and Mike Calder; Covered Bridge Capital's Dean Stanton; Past President Veronica Richards.

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COMMUNITY SERVICE EVENT

By: Laura J. Tocci, Esq.

On Saturday, November 9, 2013, a beautiful sunny fall day, WPTLA members Laura Tocci, Lawrence Kelly, Justin Joseph, James Tallman and Greg Unatin accompanied by Laura's Husband, Bill Anderson, 16 year old daughter, Abigail, and our own Laurie Lacher tackled various jobs assigned by the directors of the Habitat for Humanity resale store ReStore in Beaver Falls.

The women were assigned decorating Christmas trees and wreaths inside the store. So skillful were these volunteers that within an hour, one of the trees was already purchased and on its way to the home of a 2 year old—her first Christmas tree.

The men spent the morning in the yard cleaning, organizing and moving larger donations so that they could be sold. Larry Kelly made multiple attempts to join the woman inside and each and every time was shuffled back outside where his skills could be better utilized.

It was a great day of fellowship and we hope to volunteer for Habitat again in 2014--date to be announced.

Above, from L to R: Working hard is Larry Kelly, James Tallman, our ReStore "boss" Jay, Greg Unatin, and Bill Anderson.

At right, Justin Joseph works in the parking area.

Below, from L to R: Laurie Lacher, Abigail Anderson and Laura Tocci take a break from decorating.

After a day spent helping the community, we paused for a photo op. Above, from L to R: Justin Joseph; Board of Governors Member Greg Unatin; Board of Governors Member James Tallman; Abigail Anderson (Laura's daughter); Laura J. Tocci, Bill Anderson (Laura's husband); and our Executive Director Laurie Lacher. Missing from the photo is Vice President Larry Kelly.

RESTITUTION AND ITS ROLE IN REDUCING OR ELIMINATING HEALTHCARE LIENS

By: Robert J. Fisher, Esq.

Navigating the pitfalls of medical liens in personal injury cases is like walking through a mine field. One of the biggest difficulties we as trial lawyers face is attempting to reduce or waive medical liens that severely cut in to a client's personal injury awards. Nothing is more frustrating that obtaining a settlement on behalf of a client, which settlement is generally limited by the available insurance coverage, only to have that settlement eroded by a healthcare lien. In the ever-changing landscape of liens, whether they be private, Medicare, or Medicaid, we must continue evolving our methods to advocate effectively on behalf of our clients.

In appropriate cases, one avenue that should be considered to create leverage in lien negotiations is criminal restitution. District attorneys and victims' services in many of the counties are more than willing to help push claims of restitution for our clients/victims. This is especially true where the defendant has been charged with more than summary offenses, with the prime example being DUI-related offenses.

18 Pa.C.S. § 1106 governs restitution for injuries to person or property, and provides, in relevant part:

§ 1106 Restitution for injuries to person or property:

(a) **General Rule –** upon conviction of any crime . . . wherein the victim suffered personal injury directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribe therefor.

(c) **Mandatory restitution**

(1) The court shall order full restitution:

(i) Regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss. The court shall not reduce a restitution award by any amount that the victim has received from the Crime Victim's Compensation Board or other governmental agency but shall order the defendant to pay any restitution ordered for loss previously compensated by the board to the Crime Victim's Compensation Fund or other designated account when the claim involves a government agency in addition to or in place of the board. The court shall not reduce a restitution award by any amount that the victim has received from an insurance company but shall order the defendant to pay any restitution ordered for loss previously compensated by an insurance company to the insurance company.

(ii) If restitution to more than one person is set at the same time, the court shall set priorities of payment. However, when establishing priorities, the court shall order payment in the following order:

(A) The victim.

(B) The Crime Victim's Compensation Board.

(C) Any other government agency which has provided reimbursement to the victim as a result of the defendant's criminal conduct.

(D) Any insurance company which has provided reimbursement to the victim as a result of the defendant's criminal conduct.

The true purpose of criminal restitution is the rehabilitation of the defendant so that he realizes the error of his ways and will not repeat his acts. Restitution is not the equivalent to an award of civil damage awards despite the fact that restitution may aid the victim of a crime. Our Superior Court has consistently held that such an order of restitution is not the equivalent to an award of civil damages. *See e.g. Commonwealth v. Erb*, 428 A.2d 574, 580-581 (Pa. Super. 1981), *Commonwealth v. Kerr*, 444 A.2d 758, 760 (Pa. Super. 1982), *Pleger*, 934 A.2d 715, 720 (Pa. Super. 2007). While an order of restitution may aid the victim of a crime, its true purpose is the rehabilitation of the defendant by impressing upon him the loss he has caused and his responsibility to repair that loss. *Id*. In light of the above precedent, our Superior Court has rejected the argument that a criminal court's order of restitution is unlawful where it is duplicative of monies paid to the victim through a civil settlement, even where a full release from liability has been signed. *See e.g. Commonwealth v. Guerra*, 955 A.2d 416, 418 (Pa. Super. 2008), *Appeal of B.T.C.*, 868 A.2d 1203,1205 (Pa. Super. 2005).

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RESTITUTION AND ITS ROLE…*(Continued from Page 6)*

In *Guerra*, the defendant was ordered to pay restitution under § 1106 in the amount of $ 20,220 to the victim's parents stemming from a vehicular manslaughter conviction. 955 A2d. at 416. Thereafter, the defendant's insurer paid two civil claims arising from the same accident totaling in excess of $100,000. *Id*. at 417. These settlements included the victim's signature on a waiver for any and all liability arising from the accident in question. *Id*. After the civil settlement, the defendant declared that he was entitled to full credit for restitution because the victim's had received a civil settlement from his insurer. *Id*. The Superior Court disagreed, using *Kerr* and *Erb*'s interpretation of criminal restitution under § 1106. *Id*. at 418. In light of this prior precedent, the *Guerra* court reasoned insurance payments from a subsequent civil settlement could not be credited toward restitution because this action contradicted the rehabilitative purpose of criminal restitution under § 1106.

The case of *Commonwealth v. Brown*, 956 A.2d 992 (Pa. Super. 2008), further expands on the principles that are noted in the statute. The issue in *Brown* involved a motion to modify restitution requesting that the criminal defendant not be required to make restitution to Medicare. The Court was left to address the issue of whether Medicare is a "government agency which has provided reimbursement to the victim as a result of the defendant's criminal conduct" under 18 Pa.C.S. §1106 C.1 (ii). The Court analyzed "to the victim," cited under § 1106, to mean "1. directly to the victim; or 2. indirectly, on the victim's behalf." *Id*.

The court in *Brown*, citing § 1106, indicated that the legislature in 1995 amended the statute to expand the class that is eligible for restitution. The 1995 amendments specifically expanded the term "victim" to include entities such as insurance companies, the Crime Victim's Compensation Fund, and government agencies. In short, the legislature recognized that the defendant should not only provide restitution to the victim directly, but to entities that incurred expenses on the victim's behalf.

In light of § 1106, and the case law that follows, it is beneficial, in personal injury matters dealing with criminal actions of defendants, that the attorneys stay intimately involved with the criminal procedure to be able to elicit restitution when it is available. Specifically, restitution orders can be crafted so that the defendant(s) pays monies directly to the lienholder (i.e. Medicare, Medicaid, or a private lienholder). However, convincing the lienholders that the burden has now shifted to the criminal defendant is an entirely different animal. Most lienholders attempt to ignore such court orders. Of note, Medicaid in particular will not agree to be bound by a criminal restitution order, particularly where Medicaid has not been given notice of the criminal proceedings through which such order was sought. Even if a lienholder will not accept a restitution order as a complete shifting of the lien obligation, these orders do create leverage for lien negotiations.

I recently had a case where the Court of Common Pleas of Clarion County ordered a criminal defendant to pay $74,318.99 directly to Medicare, on behalf of the victim/client. In this case, the client was receiving a ¼ recovery, split among four injured individuals, which did not equal even half of the ordered amount of Medicare restitution. As a result, when making my final demand to Medicare, I quoted § 1106, the *Brown* case, and attached the restitution order, requesting a full waiver of the Medicare lien. After jumping through the multiple Medicare hoops, we were able to appeal to an outside Medicare vendor, Maximus. The appeal also included the "traditional" bases to request a Medicare lien waiver, including hardship regarding the low recovery the client was receiving, the limited insurance funds available, and the ongoing injury considerations. Maximus ultimately granted waiver, indicating that "the beneficiary is without fault. The injuries were caused by an unfortunate situation for which the responsible party has been criminally convicted. The injuries suffered by the beneficiary are serious and permanent in nature. Additionally, the tortfeasor in this appeal will remain responsible to Medicare for $74,318.99." As such, Maximus granted a total waiver of the Medicare lien sought from the client's limited recovery.

When dealing with restitution claims against criminal defendants, many times you will see criminal defense attorneys attempt to reduce or remove restitution claims, alluding to the fact that automobile insurance is available under the tortfeasor's policy. Even though the statute states otherwise, some courts will reduce or remove restitution if our clients have received insurance proceeds from the defendant's carrier. Likewise, some of the District Attorney's offices, most notably in Allegheny County, are very reluctant to pursue restitution claims if there is insurance coverage available to the victim.

As a precaution, it is important to note that at least one lower court has addressed the effects of a civil settlement on criminal restitution and reached a different outcome than the above Superior Court line of cases. *See Commonwealth v. Hoyle*, 48 Pa. D. & C.3d 375 (Chester County Ct. Com. Pl. Apr. 25, 1988). In *Hoyle*, the defendant was ordered to pay restitution to the victim in an amount to be determined at a later date. *Id*. at 375. Prior to the assignment of this restitution value, the victim filed a civil suit against the defendant and accepted a settlement from the defendant's insurer. *Id*. at 377. During the settlement, the victim signed a waiver "releasing and forever discharging" the defendant and his insurer from any claims relating to the accident. *Id*. at 377. The Hoyle court reasoned that because the money paid by defendant's insurance company emanated from the defendant himself, the *Kerr* decision did not apply. *Id*. 384-385. Instead, the Hoyle court held that the defendant was to be given credit for his restitution from the amount paid by his insurer's settlement with the victim. *Id*. at 385-386.

The *Hoyle* decision is much older than the more recent line of Superior Court precedent, and has

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ALLEGING RECKLESSNESS AS A TACTICAL DEFENSE TO CONTRIBUTORY NEGLIGENCE

By: David M. Landay, Esq.

When a plaintiff asserts that the defendant was reckless as well as negligent, the defendant routinely demands that this assertion be stricken, either voluntarily or by Preliminary Objection. Before agreeing to voluntarily strike this assertion, if there's the possibility that plaintiff may have been negligent, consider whether the defendant's conduct was indeed reckless.

The Restatement (Second) of Torts § 500, entitled Reckless Disregard of Safety, has been adopted in Pennsylvania. *See e.g., Daniel v. Wyeth Pharm., Inc.*, 2011 PA Super 23, 15 A.3d 909, 930 (Pa. Super. Ct. 2011), *reargument denied* (Apr. 14, 2011), *appeal granted in part*, 613 Pa. 217, 32 A.3d 1260 (2011). In comment G to that section, entitled "Negligence and Recklessness Contrasted", it provides:

> Reckless misconduct differs from negligence in several important particulars. It differs from the form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or failure to take precaution to enable the actor adequately to cope with a possible or probably future emergency, in that reckless conduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount that that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

If the Defendant's conduct was reckless, as defined in Pennsylvania, and your plaintiff may have been comparatively negligent, it is important to remember that comparative negligence is no defense to reckless conduct. *Krivijanski v. Union Railroad Co.*, 515 A.2d 933, 936 (Pa. Super. 1986).

The defendant will claim that an allegation of recklessness opens the door to punitive damages. Recklessness includes doing an act intentionally, while knowing or having reason to know that the act involves an unreasonable risk of physical harm and knowing that the risk is substantially greater than the risk which is necessary to make the conduct negligent. *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1096-97 (Pa. 1985). Punitive damages, however, must be based on outrageous conduct, which includes conduct which is malicious, wanton, willful, oppressive or shows reckless indifference to the interests of others. *Johnson v. Hyundai Motor America*, 698 A.2d 631, 639 (Pa. Super. 1997). Hence, recklessness is just one type of conduct that may support a punitive damages claim.

As the comments to the PA Suggested Standard Civil Jury Instructions note, the term "reckless indifference to the interest of others" is subordinate to "outrageous conduct" to indicate that something more than garden variety recklessness is necessary to justify a punitive damages award. *Pa. SSCJI 8.00, Subcommittee Note*.

The defendant will also claim that the facts averred do not support a claim of recklessness. Recklessness may be averred generally, however, rather than with particularity. *Archibald v. Kemble*, 971 A.2d 513 (Pa. Super. 2009), is directly on point. Archibald sued when Kemble injured him during a "no-check" ice hockey league game. After the lower court granted Kemble summary judgment, Archibald appealed. The Superior Court first determined that the lower court had imposed the correct standard of care. A hockey player in a no-check league, to be subject to liability for injuries to another player, must have engaged in reckless conduct. Simply negligent conduct is not sufficient to hold a hockey player liable to another player for an injury that occurred during a game.

The *Archibald* court recognized that reckless and intentional conduct are not synonymous. 981 A.2d at 517. In *Archibald*, the Superior Court noted that:

> Reckless, or willfulness, or wantonness refers to a degree of care Prosser describes as "aggravated

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RESTITUTION AND ITS ROLE…*(Continued from Page 7)*

never been favorably cited by the appellate courts. However, to avoid the potential consequences of the *Hoyle* decision, and to avoid any hesitancy from a Court or DA's office, it is beneficial in any claim you believe will involve restitution that you structure releases with third-parties to preserve restitution claims and add language to indicate the same. This will ultimately protect your client, specifically in cases where you are receiving tortfeasor policy limits that inadequately compensate your client for his/her injuries and damages.

ALLEGING RECKLESSNESS…*(Continued from Page 8)*

> negligence." Nevertheless, "[t]hey apply to conduct which is still, at essence, negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is to be treated in many respects as if it were so intended." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 34 (5th ed. 1984). [. . .] Therefore, merely determining the degree of care is recklessness does not give rise to a separate tort that must have been pled within the applicable statute of limitation.
>
> Pennsylvania Rule of Civil Procedure 1019(b) provides: "Malice, intent, knowledge, and other conditions of the mind may be averred generally." An example of a condition of the mind that may be averred generally is wanton conduct. *See Ammlung v. City of Chester*, 224 Pa. Super. 47, 302 A.2d 491, 497 (Pa. Super. 1973) (citations and quotation marks omitted) [. . .] (Wantoness, being in principle a state of mind, has been regarded as included in this rule). Because recklessness is also known as "wanton and willful misconduct" "recklessness" is a condition of the mind that may be averred generally.

Id. at 519.

As the court further noted, the confusion between recklessness and intentional conduct is understandable since the definition of recklessness includes the word "intentionally." Recklessness exists where a person knows that an act is harmful but fails to realize the act will produce the extreme harm that it did produce. In other words, recklessness is the same as "wanton and willful misconduct." 971 A.2d at 519.

The court explained that recklessness, or wanton and willful misconduct, is a condition of the mind. Under Rule 1019(b), conditions of the mind may be averred generally. No specific facts need to be pled to support an allegation of "reckless" conduct, where recklessness is averred in conjunction with negligent conduct. Recklessness allegations do not automatically open the door to punitive damages, and need not be stricken from the Complaint if they are properly pled. If your facts could support a finding of recklessness, be very cautious of voluntarily giving up such a claim as it can be used to potentially shield your plaintiff from comparative negligence allegations.

SPONSOR SPOTLIGHT

NAME: Abe Mulvihill

BUSINESS/OCCUPATION: Robson Forensic – Business Development

FAMILY: Parents Marge & Terry, brother Isaac. Engaged to Abby Lindley

INTERESTS: Golf, Basketball, travel, spending time at parent's in Leland, MI

PROUDEST ACCOMPLISHMENT: Graduating from Butler University and SHE SAID YES!!

FUNNIEST/WEIRDEST THING TO HAPPEN TO YOU ON THE JOB: I entertain well. Maybe sometimes too well. I had a client pass out on the floor of a nice restaurant in San Francisco. That was entertaining.

FAVORITE RESTAURANT: Fischer's Happy Hour Tavern in Leland, MI

FAVORITE MOVIE: Shawshank Redemption

FAVORITE SPORTS TEAM: Butler Basketball

FAVORITE PLACE(S) TO VISIT: Leland, MI

WHAT'S ON MY CAR RADIO: Top 40 Hits

PEOPLE MAY BE SURPRISED TO KNOW THAT: I didn't walk until I was almost 2

SECRET VICE: If there are chips and queso on the menu or in sight, I will devour it.

COMP CORNER

By: Thomas C. Baumann, Esq.

The Supreme Court has issued a Decision in *Tooey and Landis et. al. v. AK Steel et. al.* 2013 Pa. Lexis 2816, interpreting the exclusivity provisions of the Workers' Compensation Act in Section 301(c)(2) where the disease manifests itself outside of the 300-week period. The case represents an important expansion of the rights of individuals afflicted by late developing occupational diseases.

Section 301(c)(2) of the Act provides in relevant part:

> The terms injury, personal injury, occupational disease and injury arising in the course of his employment, as used in this Act shall include . . . [i.e. 77 P.S. Section 27.1]: provided, that whenever occupational disease is the basis for compensation, or disability or death under this Act, it shall apply only to disability or death of resulting from such disease and occurring within 300 weeks after the last date of employment in an occupation or industry to which he was exposed to hazards or such disease: And provided further, that if the employee's compensable disability has occurred within such period, his subsequent death as a result of the disease shall likewise be compensable.

In *Tooey*, the Plaintiff worked as an industrial salesman of asbestos products for nearly twenty (20) years, last working in 1982. In 2007, Tooey developed mesothelioma and died in less than a year. Landis worked for *Alloy Rods Inc*. until 1992, with exposure to asbestos throughout the course of his employment. He was diagnosed with mesothelioma in 2007. The Plaintiffs and their spouses filed a tort action against not only asbestos manufacturers but the employers, Ferro Engineering and Alloy Rods. The employers filed Motions for Summary Judgment alleging that the actions were jurisdictionally barred by the exclusivity provision of Section 303(a) of the Act. The Plaintiffs maintained that the tort action was proper since the disease complained of was not within the jurisdictional scope of coverage of the Workers' Compensation Act. The trial court agreed and denied Summary Judgment. The employers filed an appeal to the Superior Court which reversed the trial court in an unpublished Memorandum Decision. The appeal to the Supreme Court by the Plaintiffs followed.

The Supreme Court identified three (3) issues , only one of which will be covered here. The Court granted review on the following question: "Whether, under the plain language of Section 301(c)(2) the definition of "injury" excludes an occupational disease that first manifested more than 300 weeks after the last occupational exposure to the hazards of such disease, such that the exclusivity provision of Section 303(a) does not apply."

The Plaintiffs argued that occupational disease which manifested more than 300 weeks from the last exposure is not compensable under the Act. Therefore, the exclusivity provision did not preclude the employer from pursuing direct action against the employer.

Employers argued that the express language of Section 303(a) "unequivocally precludes current or former employees from making civil claims for damages against their employers for work-related injuries." Both sides argued their interpretations were supported by the general rules of grammar. Employers further argued that prior decisions of the Supreme Court supported their interpretation.

The Supreme Court conducted a extensive review of the grammar involved in the Act. The Plaintiffs argued that the term "it" in Section 301(c)(2) referred to "this Act" and not to compensation. The employers made the opposite argument. The Supreme Court conducted a review of prior case law and Pennsylvania statutes and noted that in neither incident was there an interpretation of similar language as maintained by the employers. Therefore, the Court determined:

> Accordingly, we construe Section 301(c)(2) as follows: "whenever occupational disease is the basis for compensation, for disability or death under this act, [the act] shall apply only to disability or death resulting from such disease and occurring within three hundred weeks after the last date of employment."

The Court analyzed relevant prior cases including *Lord Corporation v. Pollard*, 548, Pa. 124, 695 A.2d 767 (1997), *Boniecke v. McGraw-Edison Company*, 485 Pa. 163, 401 A.2d 345 (1979), *Greer v. U.S. Steel Corporation*, 475 Pa. 448, 380 A.2d 1221 (1977), *Kline v. Arden H. Verner Company*, 501 Pa. 251, 469 A.2d 158 (1983) and M*offett v. Harbison-Walker Refractories Co*. 339 Pa. 112, 14 A.2d 111 (1940). The Court felt that the first three (3) cases support the Plaintiffs' position while the latter two (2) cases did not mandate the employers'

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COMP CORNER … *(Continued from Page 10)*

position. The Court concluded "indeed, the consequences of employers' proposed interpretation of the Act to prohibit an employee from filing an action in common law, despite the fact that employee has no opportunity to seek redress under the Act, leaves the employee with **no remedy** against his or her employer, a consequence that clearly contravenes the Act's intended purpose of benefitting the injured worker. It is inconceivable that the legislature, in enacting a statute specifically designed to benefit employees, intended to leave a certain class of employees who has suffered the most the serious of work-related injury without any redress under the Act or in common law." (emphasis in original).

Therefore, individuals who develop occupational disease more than 300 weeks from the date of last exposure now have a remedy at common law.

Query: Can this case be used to argue for a direct action at common law in cases where an injured Claimant cannot receive benefits for failure to establish "abnormal working condition" in psychological injury cases? Consider the case of *D'Errico v. WCAB (City of Philadelphia)*, 735, A.2d 161 (Pa. Commw. Ct. 1999). There the Claimant was employed as an Administrative Assistant working for a particularly paranoid Judge in Philadelphia Traffic Court. The Judge was fearful that work phones were tapped and that outside repairmen were spying. Furthermore, the Judge had an enemies list, and the Judge would throw things at the Claimant and curse at her. The Commonwealth Court concluded that "the Court is not convinced that the incidents in this case rise to the level of abnormal working conditions either individually or in the aggregate." The Claimant was clearly injured by conduct in the place of employment that the Court admitted "may be uncivil and perhaps excessive."

Since the Claimant could not prove abnormal working conditions under even these egregious circumstances, could she have proceeded with a direct action?

REMAINING CALENDAR OF EVENTS

Tues, Feb. 18, 2014	**3-credit CLE Program** *Bar Security, It's Not Just the Guards & Alcohol Toxicology 101* Presenter: Robson Forensic 9:00 a.m. - 12:30 p.m. Registration available 8:30 a.m. Koppers Bldg, Pgh
Thurs, Mar. 27, 2014	**Annual Members Dinner** Election of Officers/Board 4:30 - Board Meeting 5:30 - Cocktails 6:15 - Dinner Rivers Casino, Pgh
April, 2014	**2-3 CLE Program** Presenter: Chris Finley **Lunch 'n Learn CLE** Presenter: Don Kirwan
Fri, May 2, 2014	**Annual Judiciary Dinner** 5:00 - Cocktails 7:00 - Dinner & Program Heinz Field, Pgh

Bar Security, It's Not Just the Guards & Alcohol Toxicology 101

A 3-credit CLE program.

Certified Protection Professional Don Decker and **toxicologist Michael McCabe** present on the relationship between your client, their drink and the establishment that is serving them. Their presentation will provide insight into factors contributing to bar violence, what the establishment should be doing to stop such incidents and the risk of letting intoxicated people out their doors. *Presented by: Robson Forensic, WPTLA Business Partner*

Date: Tuesday, February 18, 2014
Place: Grant Rm, 9th Fl, Koppers Bldg, Pittsburgh, PA
Time: 9:00 a.m. - 12:30 p.m. Registration begins 8:30 a.m.
Cost: $125.00 Free for President's Club members with eligible credits remaining.

Register online at www.wptla.org, then Events, then Register.

BY THE RULES

By: Mark E. Milsop, Esq.

Howell v. Clyde – 20 Years Later

I recently argued a Motion for Summary Judgment that centered on the doctrine of assumption of the risk. Coincidentally, as I sat in the courtroom re-reviewing my papers in Clearfield County awaiting Judge Fredric Ammerman, I realized that I was in the same Courtroom that the *Howell* case originated from 20 years earlier (Judge Joseph Ammerman).

Although there are very few cases where there is a true assumption of the risk, defense attorneys like to file motions based on the doctrine. As these issues are often raised in motions for summary judgment, motion for a nonsuit, or as a basis for post-trial relief, I believe an overview of the law is appropriate here.

By way of refresher, in *Howell v. Clyde*, 620 A.2d 1107 (Pa. 1993), the plaintiff had been injured when a fireworks cannon exploded at a party thrown by his neighbors. Both the plaintiff and his neighbors participated in the process of attempting to fire the cannon. As the astute reader has probably anticipated, the plaintiff was injured in the process. At trial, the trial court entered an involuntary nonsuit on the basis of the assumption of the risk. The Superior Court reversed. A divided Supreme Court, voting 2-2-2, reversed the Superior Court and reinstated the nonsuit. The Pennsylvania Supreme Court failed to provide any useful clarity in this area of the law.

In the Court's lead opinion, Justice Flaherty spent considerable time analyzing the four types of assumption of the risk outlined in § 496A of the Restatement (Second) of Torts. The four types of assumption of the risk can be summarized as: (1) express consent; (2) a voluntary relationship with the defendant known to involve risk; (3) awareness of a risk created by the negligence of the defendant and proceeding or continuing to encounter it voluntarily; and (4) conduct in encountering a risk which is unreasonable. Although Justice Flaherty conceded that type 4 assumption of the risk should be abolished as because it conflicts with comparative negligence, he argued for the continued recognition of types 2 and 3 as part of a "no duty" analysis.

Justice Larsen filed a concurring opinion which was joined by Justice Papadakos. Justice Larsen would have analyzed the matter as a joint enterprise in which neither owed the other a duty. Justice Nix dissented noting the defense of the assumption of the risk frustrates the legislative judgment behind the comparative negligence act. Justice Zappala dissented to avoid creating muddy water.

Notwithstanding the fact that the Supreme Court has not yet explicitly rejected the assumption of the risk doctrine by majority opinion[1], the defense should rarely prevail when the following fundamental observations about the assumption of the risk defense are considered:

1. The risk must be subjectively appreciated. *Bullman v. Giuntoli*, 761 A.2d 566, 571 (Pa. Super. 2000).

2. The specific risk resulting in injury must be perceived (risk in the air is not enough). *Barrett v. Freedavid Builders*, 685 A.2d 129, 131 (Pa. Super. 1996).

3. The assumption of the risk **must be beyond question.** *Struble v. Valley Forge Military Acad.*, 665 A.2d 4, 6 (Pa. Super. 1995).

4. The assumption of the risk must be voluntary and knowing. *Id.*

5. Assumption of the risk does not apply to conduct close in time and place to the accident. *Hardy v. Southland Corporation*, 645 A.2d 839 (Pa. Super. 1994).

I6. n premises cases, the condition must be obvious and dangerous. *Struble*, 665 A.2d at 6.

7. Assumption of the risk should not be applied to risks incurred on the job. *Staub v. Toy Factory, Inc.*, 749 A.2d 522, 529-530, (Pa. Super. 2000); *see also Jara v. Rexworks Inc.*, 718 A.2d 788, 795 (Pa. Super. 1998) (product liability case).

8. An acceptance of risk is not voluntary if the defendant's tortious conduct has left no reasonable alternative course in order to exercise or protect a right or privilege of which the defendant has no right to deprive him. *Staub*, 749 A.2d at 531.

It should also be noted that once the Court rules that there has not been an assumption of the risk as a matter of law, the matter should be submitted to the jury only under comparative negligence principles.

[1] A plurality of the Supreme Court found that the doctrine should be abolished "except where specifically preserved by statute; or in cases of express assumption of risk, or cases brought under 402A, (a strict liability theory)." *Rutter v. Northeastern Beaver County School Dist.*, 437 A.2d 1198, 1209 (Pa. 1981).

Continued on Page 13

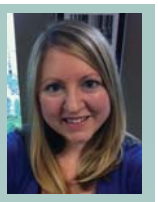
BY THE RULES *(Continued from Page 12)*

Although I hope that this article may be helpful to some of you as a "handy reference" and starting point, obviously this article is not an exhaustive treatise on the law of assumption of the risk, and the individual circumstances will often require additional research.

Striking or Opening a Judgment

Traditionally when a judgment is entered, practitioners have been faced with the question of whether to file a Motion to Strike, A Petition to Open, both, or some type of hybrid. That question has now been resolved. Amended Rule 206.1(b) now provides that "All grounds for relief whether to strike or open a default judgment shall be asserted in a single petition." Fortunately, when it is apparent from the face of the record that the proper remedy is to strike the judgment, the judgment shall be stricken without the issuance of a rule to show cause. Rule 206.4(a)(2).

CROSSING BORDERS – WHAT CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW?



By: Erin Rudert, Esq.

Advances in technology and transportation have certainly made the world a much smaller place. The practice of law is not immune from this change – it is almost necessary for attorneys, personal injury attorneys in particular, to practice in multiple counties and in multiple jurisdictions in order to remain competitive. Gone are the days of the single county practice. The geographical expansion of practice areas, the prevalence of long distance travel, and the fact that the internet is everywhere, all the time create opportunities for more cases, but also the opportunity for ethical pitfalls. One potential issue when dealing with multi-jurisdictional claims is the unauthorized practice of law.

In December 2013, the Supreme Court of Delaware sanctioned a plaintiff's attorney based on the attorney's unauthorized practice of law within the state of Delaware. *In re Nadel*, 2013 Del. LEXIS 606 (Dec. 4, 2013). The attorney was licensed to practice in Pennsylvania and New Jersey, and maintained offices in both states. The attorney maintained a professional relationship with a physician in Delaware. The physician had numerous clients who were injured in motor vehicle collisions, and the physician referred approximately 75 of his patients to the attorney for legal representation. The accidents all occurred in Delaware, and involved Delaware insurance claims. The attorney never actively solicited clients from Delaware, but only received clients through this physician. The attorney attempted to settle the claims on behalf of his Delaware clients, and if he was unsuccessful, he would refer the claim to an attorney in Delaware for litigation. The attorney never filed a lawsuit in Delaware and never held himself out to be licensed to practice in Delaware, but did meet some of the clients in Delaware at the physician's office. Significantly, as part of the findings of fact, the Delaware Supreme Court found that *no actual harm* resulted from the attorney's representation of the Delaware claimants in pre-litigation matters.

The Delaware Supreme Court found that the attorney knowingly violated the Rules of Professional Conduct by handling pre-litigation claims involving Delaware collisions and that the *potential* for injury to the clients existed by the attorney's representation of the clients. The attorney defended the claim by arguing that he had an agreement with a Delaware attorney to handle all claims that were required to be litigated, and that he routinely consulted with Delaware attorneys in handling the claims if need be. He never held himself out to be licensed to practice law in Delaware, never appeared before any Delaware court, and never engaged in any conduct in Delaware other than handling pre-litigation insurance claims. The Delaware Supreme Court found that the clients could have perceived that the attorney was license to practice in Delaware, and upheld the attorney's suspension from the practice of law in Delaware for one year, which suspension was reciprocal in both New Jersey and Pennsylvania.

This opinion serves as a reminder that when it comes to your law license, your reach should not exceed your grasp. Many potential clients come to us having been involved in car accidents out of state, with out of state defendants. The pervasive nature of internet advertising also results in out of state clients reaching out to us based on having seen a website or an advertisement. Even if you are not representing a client in litigation proceedings in another state, your conduct can still be construed as the unauthorized practice of law within another jurisdiction, depending on the specific nature of your actions. Even if your client is from Pennsylvania, if you undertake representation against an out of state defendant, for an out of state collision, with an out of state insurance claim, you must be wary of the potential to be engaged in the unauthorized practice of law, even without stepping foot into a courtroom in the foreign jurisdiction. If your client hires you, with the belief that you are capable of representing the client in a claim in another state, you may have held yourself out, intentionally or otherwise, as being licensed to practice in the foreign jurisdiction. Whether your conduct constitutes the unauthorized practice of law in a foreign jurisdiction will depend on that jurisdiction's Rules of Professional Conduct. Before involving yourself in a claim where there is even the specter of the unauthorized practice of law, make sure you are fully informed as to whether your conduct is permissible under the ethical rules of Pennsylvania, and under the ethical rules of any foreign jurisdiction where you may be construed to be acting on behalf of your client.

HOT OFF THE WIRE!

By: Chris Hildebrandt, Esq.

SUPERIOR COURT OF PENNSYLVANIA

Separate judgments against separate people cannot be consolidated for the purpose of executing against entireties property.

ISN Bank v. Rajaratnam, 2013 PA Super 304 (Nov. 25, 2013)

ISN Bank made a construction loan to Tower Apartment Partnership ("Tower"), said loan being guaranteed by Arasu Rajaratnam, the principal of Tower. The maturity of the loan was subsequently extended, at which time both Arasu and his wife, Emma, both executed guaranty agreements.

The loan subsequently went into default, and a judgment by confession was entered against Arasu pursuant to the original loan guarantee agreement. ISN Bank then filed a suit against Emma pursuant to the subsequent loan guaranty. The property was eventually sold at sheriff's sale and a bench trial was held in the action against Emma. Emma was determined to be liable in an amount to be determined by resolution of a deficiency judgment petition; said petition was disposed of through a court-approved stipulation of deficiency judgment. Thereafter, ISN Bank's predecessor sought to consolidate the judgments against both Arasu and Emma, but the motion was denied.

The Superior Court affirmed the denial of consolidation. First, the Court noted that there is no procedural mechanism for consolidating judgments against different people. Moreover, the Court determined that Pennsylvania substantive law would not permit consolidation in this case. The Court reasoned that "separate actions by spouses resulting in separate judgments are not sufficient to encumber entireties property." According to the Court, to establish a joint debt that may serve as the basis for a lien on entireties property, "the two spouses must act together in the same transaction and in so doing incur a joint liability." Thus, where separate judgments against separate parties were entered pursuant to separate documents in separate transactions for separate considerations, the judgments cannot be consolidated into one for purposes of executing upon entireties property.

A claim for lack of informed consent will not lie against a chiropractor; chiropractic manipulations are non-surgical procedures and the Chiropractic Practice Act does not impose a duty of informed consent upon chiropractors.

Bell v. Willis, 2013 PA Super 293 (Nov. 8, 2013)

The Decedent treated with two chiropractors seeking relief from neck pain, headaches and dizziness. The chiropractors performed cervical neck manipulations/mobilizations. The morning after her last visit, the Decedent suffered a vertebral artery dissection and massive stroke, eventually passing 18 months later due to a massive infection. Decedent's estate sued the chiropractors for negligence and lack of informed consent. Prior to trial, a Motion in Limine was granted, excluding the estate's lack of informed consent claim. Following a nine-day trial, judgment was entered against the estate.

On appeal, the Superior Court affirmed the dismissal of the informed consent claim, noting that "a lack of informed consent claim cannot lie against a chiropractor for performing chiropractic manipulations, because they are non-surgical procedures." The Court also noted that chiropractors are governed by the Chiropractic Practice Act which does not impose a duty of informed consent.

COMMONWEALTH COURT OF PENNSYLVANIA

There is no mathematical or bright-line rule that can be used to determine whether a defect is trivial or not. Instead, when determining whether a defect is "obviously trivial," the court must analyze the "surrounding circumstances" on a case-by-case basis.

Shaw v. Thomas Jefferson Univ. et al., 2013 Pa. Commw. LEXIS 477 (Nov. 20, 2013)

Plaintiff fell on the sidewalk of Thomas Jefferson University ("University"), and sued both the university and the City of Philadelphia, alleging that an unsafe condition of the sidewalk caused her fall. The University filed a Motion for Summary Judgment contending that it was not negligent because the defect was trivial. The trial court granted the University's motion.

On appeal, the Court reversed the trial court and remanded the case. Although the Court recognized that it "is well settled that a sidewalk defect may be so trivial that a court must hold, as a matter of law, that the property owner was not negligent in allowing its existence," the Court also noted that "there is no mathematical or bright-line rule that can be used to determine" whether a defect is "trivial" or not. Instead, the Court reiterated that the "surrounding circumstances" must be analyzed on a case-by-case basis.

Continued on Page 15

HOT OFF THE WIRE *(Continued from Page 14)*

Here, in deeming the defect not to be "obviously trivial," the Court noted that the area of the sidewalk at issue is "heavily trafficked" and Plaintiff tripped "during lunchtime on a weekday, when pedestrian traffic is particularly high." According to the Court, "[t]hese conditions present genuine issues of material fact that must be submitted to the jury in order to determine" whether Defendants negligently permitted the sidewalk defect to remain.

Actions that have been consolidated for purposes of discovery and trial must be separately appealed.

Knox v. SEPTA, 2013 Pa. Commw. LEXIS 466 (Nov. 12, 2013)

A SEPTA bus was rear-ended by an uninsured motorist. Eight separate lawsuits were filed. The trial court consolidated the eight lawsuits pursuant to Pa. R.C.P. Rule 213. Four of the suits (against the Pennsylvania Financial Responsibility Assigned Claims Plan ("Plan")) were dismissed prior to trial; a directed verdict in favor of SEPTA was entered in the remaining four suits after a non-jury trial. An appeal followed.

On appeal, the Plan filed a Motion to Quash, contending that the consolidation of the "Plan" actions with the "SEPTA" actions were merely for the purpose of discovery and trial, and "did not merge the cases into a single action in which a single judgment was rendered," thus separate appeals were required for each final judgment. The Court agreed, noting that "complete consolidation of the Plan actions with the SEPTA actions could not be achieved because they involve different parties, issues and defenses." Thus, because each action "retains its separate character, has its own docket entries, and produces its own verdict and judgment," it was necessary for each action to be separately appealed. Accordingly, the Court granted the Plan's Motion to Quash.

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 our Executive Director.

Send your articles by email to *admin@wptla.org, Attn: Erin.*

MEMBER PICTURES & PROFILES

Name: Steve Barth

Firm: My own firm (Barth & Associates)

Law School: Duquesne University School of Law

Year Graduated: 2002

Special area of practice/interest, if any: Auto/Dram Shop/Products/Premises/Civil Rights – inmate abuse and excessive force by police

Most memorable court moment: When I did my first closing argument as an attorney, I knew that this was what I wanted to do for the rest of my life.

Most embarrassing (but printable) court moment: I have a good amount but my most memorable is asking my client in my first arbitration as a lawyer if he was trying to cover his "a**" by not calling the police to the scene because he was in his car with a woman not his girlfriend. I learned very quickly that "a**" may not be a good legal term to use in a court/arbitration setting.

Most memorable WPTLA moment: Every year at the Comeback Awards Dinner and Steelwheeler 5k.

Happiest/Proudest moment as a lawyer: Any time I get a card or email from a client where they are telling me that they are doing better and are feeling happier in their life.

Best Virtue: Work Ethic

Secret Vice: Messy office

People might be surprised to know that: I do improv with Chad Shannon at Steel City Improv in Shadyside.

Favorite movie (non-legal): Time Bandits or Lord of the Rings Trilogy

Favorite movie (legal): To Kill a Mockingbird

Last book read for pleasure, not as research for a brief or opening/closing: I read a lot of science fiction. Some of my favorites are Lord of Light, American Gods, and anything by Kurt Vonnegut.

My refrigerator always contains: Water and a frozen nut roll from 2008 Christmas.

My favorite beverage is: Mean Old Tom by Maine Brewing Company. My buddy Dan Kleban from high school brews it and it is a great vanilla coffee stout.

My favorite restaurant is: Storms. Rob Storm and Bill Luffey have great big meatballs.

If I wasn't a lawyer, I'd be: An owner of an independent music record shop selling good music locally.

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. Below is the second of 2013's three winning essays.

Throughout the legal history of Pennsylvania, many superfluous laws have been established by the state judiciary. For instance, it is illegal to sleep on top a refrigerator outdoors. Fishermen, take note that it is illegal to use dynamite to catch fish. The Pennsylvanian that aspires to be the next "American Idol" sadly cannot practice singing in the bathtub due to legal issues. Obviously, many laws are outdated and are rarely, if ever, prosecuted within Pennsylvania's judicial system. Contrary to many out of date laws, certain long-standing legal principles within Pennsylvania are still relevant and should remain active. One statute that should be enforced today is the "Rule of Capture." Currently, in the town of Pleasantville, Pennsylvania, George and Martha have refused to sign a lease for New Horizon Drilling to access oil and shale within their property lines. All of George and Martha's neighboring property owners have signed on to allow New Horizon Drilling to access their property, receiving initial monetary compensation with royalties to follow. Due to the new process of drilling and fracking, New Horizons can lawfully extract gas from the unattained property. George and Martha have environmental concerns about the process. They operate a 200 acre family farm on the property adjoining.

While George and Martha's decision to not lease their land to New Horizons Drilling is valid, the company legally should be able to invoke the "Rule of Capture" to extract gas from underneath the couples' property.

First, it key that George and Martha understand how little the "Rule of Capture" will truly affect the Marcellus Shale gas under their property. The practices of horizontal drilling and fracking being used by the New Horizons Drillings will not encroach onto George and Martha's property. The majority of all natural gas that is extracted through the stated methods would be limited to a few hundred feet from the bore of the well. The gas that is tightly trapped in the Marcellus Shale formation will generally not migrate or move much into a neighboring property. The only way that gas could be extracted with the "Rule of Capture" would be if a well bore was within a few hundred feet of George and Martha's property. Even then, the amount of gas that would be retrieved would be proportionally very small to the total amount that is held on their 200 acre farm. The New Horizons Drilling company would not be able to directly drill horizontally or complete hydraulic fracking underneath the property without signed legal consent. Due to the nature of drilling process, the "Rule of Capture" would not greatly affect George and Martha's property. The old legal principle would serve effectively to protect the rights and interests of the corporation and other consenting landowners in the area. George and Martha's farm would remain generally unaffected with the "Rule of Capture." Fortunately, the region would be able to reap the economic benefits of the new Marcellus Shale industry.

Next, the Rule of Capture has the historical basis oflegality through *ferae naturae. Ferae Naturae* is defined in *Black's Law Dictionary* (6th ed. 1990) as, "of a wild nature and disposition." Oil and natural gas laws as well as the Rule of Capture have been backed by the comparison of gas and oil to the wild nature, defaulting it as being *Ferae Naturae.* The case of *Westmoreland & Cambria Natural Gas Co.* v. *DeWitt,* 130 Pa. 235 (1889) was a landmark case, often recognized as one of the first national cases to apply the Rule of Capture theory to oil and gas law. In delivering a decision that applied the Rule of Capture legality due to *ferae naturae,* the judge recognized that gas is a mineral with peculiar attributes that deserved more consideration than other substances due to the fact that, much like animals, gas holds the ability to escape without the volition of the owner. The link between gas and *ferae naturae* is clear and well applied in the case of *Westmoreland & Cambria Natural Gas Co. v. De Witt* which provides a historical legal basis for the Rule of Capture to be common law practice today.

In addition to *ferae naturae,* the Rule of Capture still holds legal basis due to natural gas and oil's similarity to percolating groundwater. In Pennsylvania law, subsurface water is typically treated differently that surface flowing water or streams. Natural gas and oil from shale share many similar qualities with percolating groundwater, therefore giving the Rule of Capture legal basis due to the mineral's location below the property surface. In the case of *Jones v. Forest Oil Co.* 194 Pa. 379 (1900) the court ruled that, "An owner of land may dig a well upon his property, and if, in so doing, he taps the hidden flow of water which supplied his neighbor's spring, it is a loss to the neighbor for which the law provides no remedy," The ruling in *Jones v. Forest Oil Co.* provides a direct link between the behavior of oil to that of subterranean waters. Similarly with water, once oil or natural gas is provided a means to flow, it does not become a set resource that is exclusive to one property. George and Martha have no means of keeping natural gas on their property if a well has already been tapped. The shared characteristics between natural gas, oil, and percolating groundwater are proof of the legality of the Rule of Capture that should still be law in Pennsylvania.

Next, the Rule of Capture should be recognized in Pennsylvania because of the legality of drilling location. Under Pennsylvania law, there is no restriction where a company is allowed to dig or drill on an owned or legally leased property. The case of *Barnard v. Monongahela Natural Gas Co.* 216 Pa. 362 (1907) holds in Pennsylvania that drilling for oil can take place in

Continued on Page 18

2013 WINNING ESSAY *(Continued from Page 17)*

any location within an owned or consenting property. If the gas drilled for is 1 foot or 100 feet from the property edge, then whatever oil that can be retrieved from that drilling point (excepting direct, deliberate horizontal drilling onto the next property) legally belongs to the driller. This ruling again confirms the legality of the Rule of Capture in Pennsylvania courts. There is no way a gas well, once tapped and flowing, allows oil to be deciphered between property lines. If a natural gas well is constructed on a neighboring property to George and Martha, then the couple has no way to prove which natural gas belonged to their property. Natural gas has *aferae naturae* tendency once activated; it's natural tendency cannot be controlled. The Rule of Capture should be in place to avoid the legal confusion of oil distribution over a property line which is not easily quantifiable.

Finally, the Rule of Capture should be legal in Pennsylvania because of the positive economic effects that natural gas drilling from Marcellus Shale will cause. The Marcellus Shale industry would help to restart Pennsylvania'S economy, and will serve to stimulate the United States economy as a whole. All of George and Martha's neighbors have consented to letting New Horizons Drilling have access to their properties. If George and Martha still deny access to the New Horizons Drilling company and the Rule of Capture ceases to be recognized in Pennsylvania courts, then the town of Pleasantville and the surrounding area would experience adverse economic effects. All of George and Martha's neighbors will benefit from royalty and compensation from New Horizons drilling. Without the Rule of Capture, the economic venture would more than likely be lost for their neighbors and the region as whole. Without George and Martha's property New Horizons Drilling may give up on the entire project. This would sacrifice many jobs and positive economic stimulus to the region of Pleasantville. While George and Martha have the right to not sign a lease with New Horizons Drilling, the rights of others to enjoy economic benefits can be saved if the Rule of Capture is recognized within Pennsylvania's courts. The Rule of Capture would help to preserve the rights of American businesses and stimulate the economy by establishing industry in a struggling area. Overall, the Rule of Capture is necessary to protect others interests if George and Martha choose to exercise their legal right to refuse the contract from New Horizons Drilling.

While some Pennsylvania laws, such as the crime of belting out a tune in the bathtub may be outdated, the Rule of Capture is very clearly not. The Rule of Capture should be upheld in the case of George and Martha. The Rule of Capture is backed by *ferae naturae*, similarities with percolating groundwater, and a lack of drilling location restrictions. In addition, the Rule of Capture would help to ensure the positive economic effects that the Marcellus Shale industry could have on the region of Pleasantville, Pennsylvania. Abolishing the law of sleeping on top of a refrigerator outside would be a smart choice for the Pennsylvania courts. However, if the Rule of Capture is not further recognized, the oil and natural gas industry would suffer. The Rule of Capture serves a key purpose to protect interests and rights in the subjective and unquantifiable science of Marcellus Shale natural gas drilling.

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Submitted by Teresa R. Morin, of Mercer High School.

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...Through the Grapevine

Kontos Mengine Law Group is the name of the new firm for **Board of Governors Members Anthony Mengine** and **Katie Killion**, and member **George Kontos**. They can be found at 2 Gateway Center, Ste 1228, 603 Stanwix St, Pittsburgh, PA 15222. P: 412-709-6162. New email addresses are: amengine@kontosmengine.com; kkillion@kontosmengine.com; and gkontos@kontosmengine.com.

A new office location is in the very near future for **Thomas E. Crenney**, **Alicia R. Nocera** and **Board of Governors Member James T. Tallman**, all of the Thomas E. Crenney & Associates firm. As of March 1, 2014, they can be found at 2605 Nicholson Rd, Bldg II, Ste 203, Sewickley, PA 15143.

Congratulations to **Julian E. Gray** on being named to Best Lawyers® 2014 Pittsburgh Elder Law "Lawyers of the Year".

As former Board of Governors Member James J. Ross has moved to the bench in Beaver County, **President Charles F. Bowers III**, **Board of Governors Member Kenneth J. Fawcett**, and **Charles F. Bowers, Jr.** have changed their firm name to Bowers & Fawcett LLC.

Alan H. Perer and **C.J. Engel** have changed the name of their firm to Swensen & Perer. All other contact information remains the same.