THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

Volume 25, No. 3
Spring 2013

UPCOMING EVENTS FOR WPTLA

The **Annual Judiciary Dinner** will be held on **Friday, May 3** at **Heinz Field's East Club Lounge** in Pittsburgh, PA.

Saturday, May 11 is the date of a community service endeavor with **Pittsburgh Cares' Beautifacation Saturday** project. Contact our Executive Director to find out how you can get involved.

Thursday, May 23 will be our **Annual Ethics Seminar & Golf Outing** at **Shannopin Country Club**. The CLE program begins at 10:45, lunch follows at 11:45 and shotgun start for golf is at 1:00. Register now.

PAST PRESIDENTS' DINNER RECAP

By: Joshua P. Geist, Esq.

Pictured above, from L to R: WPTLA Past Presidents Stephen P. Moschetta, Charles E. Evans, The Honorable Christine Donahue, Joshua P. Geist, Richard J. Schubert, John F. Becker, Mark J. Homyak (back row), Louis M. Tarasi, Jr., (front row), Carl R. Schiffman, Richard J. Catalano, Bernard C. Caputo, Veronica A. Richards, and Jason E. Matzus.

On January 30, 2013 the Past Presidents' Dinner was held at the scenic Rivers Casino on Pittsburgh's North Shore, a new location for the WPTLA. The dinner featured panoramic views of downtown Pittsburgh, Mt. Washington, and Point Park, as well as free, covered parking (a rarity in Pittsburgh). A cocktail reception sponsored by Bill Goodman and NFP Structured Settlements was held before the dinner to start the evening's activities.

Our current president, Paul Lagnese, welcomed 80 members and guests to the evening's festivities, including 14 past presidents of WPTLA: John F. Becker, Bernard C. Caputo, Richard J. Catalano, Hon. Christine Donohue, Charles E. Evans, Joshua P. Geist, Mark J. Homyak. Jason E. Matzus, Stephen P. Moschetta, John E. Quinn, Veronica A. Richards, Carl R. Schiffman, Richard J. Schubert, and Louis M. Tarasi, Jr. The past presidents received a gift of a set of slate coasters with the WPTLA logo, thanking them for their past service and continued dedication to WPTLA.

Each decade from the 1970's to 2010's was represented by at least one past president. Many of our past presidents have continued distinguished careers as trial lawyers, and some have served as judges in the Superior Court (Christine L. Donohue) and the Court of Common Pleas (Joseph P. Moschetta and Beth A. Lazzara).

Several of the WPTLA business partners were in attendance, including Abe Mulvihill and Lee Martin from Robson Forensics, Helen Sims and Mary Arena Hagan from The Duckworth Group of

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President
Paul A. Lagnese

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A Message from the President …

By: Paul A. Lagnese, Esq.

I am pleased to announce that the Board of Governors has created an annual community service award to honor one of our members for their outstanding work helping others. The Board named the award the "Daniel M. Berger Community Service Award" in honor of WPTLA past president and my mentor, Dan Berger. The individual who receives the award will be asked to designate a charity to which WPTLA will make a $500 donation. Berger & Lagnese, LLC, and WPTLA business partners, NFP and Findlaw have all agreed to match the $500 donation, bringing the total donation to $2000.

I am honored to acknowledge Jon Perry as the recipient of the first annual Daniel M. Berger Community Service Award. For those of you who don't know, Jon's son Trevor was diagnosed with acute lymphocytic leukemia when he was 2 ½ years old. During Trevor's stay at Children's Hospital of Pittsburgh, Jon and his wife, Joni, learned how difficult it was for many families to take time off of work to stay with their children during long hospital stays. Jon and Joni decided that they were going to start a charitable organization to raise money to give financial assistance to families so that parents would be able to be with their children during hospital stays. They named the charity "Pennies From Heaven."

Incredibly, Pennies From Heaven has raised and donated over $1,000,000, which has helped over 16,000 families. Every penny raised has gone to help a family in need. I would encourage each of you to take a look at the Pennies website www.penniesfromheavenpittsburgh.org to learn more about the great work they are doing and to read the article below about Pennies From Heaven. I would also encourage each of you to attend one of the fundraising events Pennies puts on each year. I have been to many of them and I can tell you that besides donating to a wonderful charity, the events are always a lot of fun.

We will be presenting Jon with the award and the $2000 donation to Pennies From Heaven at the Judiciary Dinner on May 3, 2013. The presentation of this award is yet another reason to attend this signature event at Heinz Field.

HOW IT STARTED

By: Jon R. Perry, Esq.

It started in an old closet that had been "renovated" to include a small refrigerator where parents could get beverages for their sick children on the oncology floor at Children's Hospital of Pittsburgh. It was well past eleven o'clock on the first evening of 2 ½ year-old Trevor Perry's admission when his dad, Jon, entered that closet for the first time. Once inside, he was greeted by the worried and tired face of another father. The conversation that followed revealed that both dads were newly admitted knowing that their children had some form of cancer but waiting, and praying, that the pathology reports would show a "good" cancer. These late night meetings became a regular occurrence for the troubled dads.

During a meeting several days later, the dads shared their pathology news – one good, one bad. Trevor had acute lymphocytic leukemia (the kind his parents had prayed for), the other child unfortunately had a very bad bone cancer and needed to have her leg amputated at the hip on Friday. The father of this teenage athletic superstar was devastated. Jon went to the meeting room Friday night waiting for his new friend and an update on how the surgery went. Jon's friend never showed up and Jon was concerned that something very bad may have happened. To Jon's relief, he saw his friend in the meeting room the following night. Jon joked with him about not having the courtesy to show up and provide an update on Friday night. At that point, Jon was informed through the man's tears that he could not afford to miss another day of work so he was unable to be at the hospital for his daughter's surgery. The weight of that reality nearly caused Jon to collapse. Jon returned to Trevor's room and shared the story with his wife, Joni, and she too was horrified.

Trevor's chemotherapy was going very well. So well, that Jon was able to put a pillow on the base of Trevor's IV infusion pump and push him around the floors of the oncology wing.

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HOW IT STARTED *(Continued from Page 2)*

That little race car provided much needed entertainment for Trevor. During these laps, Jon noticed many, too many, children alone in their hospital rooms. The frightened and lonely eyes of these children peering through their hospital doors were a sight Jon could not get out of his mind. Jon was so upset and angry with the parents who would leave their children that he confronted a nurse. Jon was saddened to learn that most of the children had loving parents who simply couldn't afford to stay with their sick child. Trevor eventually was healthy enough to be discharged and the Perry family returned home. Their lives were changed in many ways.

Eventually Jon and Joni were able to discuss the hospital admission and both remained terribly troubled by the amputation story and the eyes of the children left alone. Jon and Joni were fortunate enough to be in an economic position that allowed them both to be at Trevor's bedside for his entire admission. The Perrys were also convinced that being with Trevor contributed to his amazing response to treatment. By the end of their discussion, the idea for Pennies From Heaven was formed and a goal was set to eliminate the lonely eyes of children left alone. As its mission, Pennies From Heaven set out to provide economic assistance to needy families thereby allowing parents to remain with their sick child during hospital admissions at all times. Keeping families together during difficult times is important to the healing process, to parents, and most importantly to sick children. Pennies From Heaven provides whatever is needed to allow parents to remain with their children during hospital stays. Gifts range from small overnight toiletry bags and brown bag lunches to paying lost wages, utility bills, and even mortgage payments. Needy families are identified by social workers and a well-coordinated system grants gifts expeditiously for immediate help.

There are many touching family stories including this recently shared by a social worker:

> The impact and importance of the Pennies From Heaven Fund is often overlooked and certainly not recognized enough. I have a patient who was recently diagnosed with a malignant brain tumor. He is 15 months old. Because of his young age and the cell type of the tumor, the only chance at survival is a very rigorous chemotherapy program that will include autologous bone marrow transplant after ultra high dose chemotherapy. Even with this heavy duty chemotherapy regimen, his survival odds are 10 to 20 %. The chemotherapy regimen will take 6 to 9 months to complete. The tumor could recur during the treatment, and all that preceded it would have been for nought. The patient lives in a single parent family. His mother was working at a minimum wage job prior to his diagnosis and living from paycheck to paycheck, but proud of her independence. Needless to say the diagnosis was devastating for the mother. She wants to spend all of her time with the child and has not returned to work. She is in a no work/ no pay position. She is not covered by FMLA. She has no paid vacation days or sick days to use as her job provides none. The Pennies Fund has allowed her to remain with her child in the hospital (length of stay of the first admission is at 24 days and counting). The Pennies Fund is the bridge that has allowed this loving mother to remain with her very sick child during his worst times. Without financial help, she would be broke and heart- broken facing her own form of Sophie's choice between time with her son and trying to support herself. She is grateful to all who have made it possible for her to have every moment she can get with a son she knows she will likely lose.

With the help of a volunteer board of friends, Pennies has raised more than $2,000,000 and distributed gifts to more than 40,000 families. This same board is largely responsible for the majority of the fundraising activities including an annual golf outing and an outdoor Oktoberfest. In keeping with the initial promise, every penny raised has gone directly to a family in need and there has never been an administrative charge of any kind.

The Pennies From Heaven Fund is a charitable 501(c)(3) organization and donations are federal tax deductible.

The United Way Pennies From Heaven Contributor Choice Code is 223461.

For additional information, please contact Jon Perry at 412-281-4200 or jperry@caringlawyers.com

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WHY JOIN THE PRESIDENT'S CLUB?

By: Steve Barth, Esq.

WPTLA is proud to announce that our website is receiving a major overhaul (courtesy of our business partner, Cindy Miklos at FindLaw) to improve the design, content, and user interface of the site. If you have not visited the new and improved website, please take an opportunity to do so at your earliest convenience at *www.wptla.org*. We hope that our new website will be beneficial for both our membership and the public to gain information regarding our organization, our members, and our activities and goals.

One of the most valuable features of the new website is an enhanced member profile and biography that will be made available exclusively to President's Club members. As a President's Club level member of WPTLA, you will have the option to have your picture and biography on the new WPTLA website. The biography will be in a searchable directory, called "Member Profiles," and will feature information regarding each President's Club member, including practice area and contact information, and a link to the member's external website. The Member Profiles will be effective for the 2013-2014 fiscal year, which begins July 1, 2013.

The total cost for President's Club level membership is $250.00, as compared to $125 for a regular membership. When you consider the added value of the President's Club level membership, I'm sure you will agree that the benefits are well worth the investment. Your online member profile will be an added resource for you individually and for WTPLA as a whole. Your personal profile will showcase you to members of the public who use our website as a resource for finding an attorney and for other members to put a face with the name. It also allows us to show the public the human face of the trial attorneys who make up this organization. By investing at the President's Club level, your profile and face will help our organization show the public that we are a group of people who want to help people who need it the most. Our website will also benefit in terms of internet search results based on an increased amount of content.

In addition to an online member profile, your President's Club level membership also entitles you to 3 free CLE credits through WPTLA organized CLE programs during that year. When you consider that most 3 credit CLE programs cost around $150 through PBI, the President's Club membership more than pays for itself through the free CLE credits and the online member profile. If you are already a President's Club member, we hope you will continue to participate at this level next year. If you are not a President's Club member, please consider joining either now or when you receive your next dues notice this Summer.

Save The Date!

Thursday, May 24, 2013

WPTLA Ethics Seminar/Golf Outing

10:45 CLE / 11:45 Lunch / 1:00 Golf

Shannopin Country Club
Pittsburgh, PA

PAST PRESIDENTS' DINNER RECAP... *Continued from Page 1*

Merrill Lynch, Varsha DeSai of Alliance Medical Legal Consulting, Robyn Levin of Covered Bridge Capital, Cynthia Miklos of FindLaw, Chris Finley of Finley Consulting & Investigations, Don Kirwan of Forensic Human Resources, Maggie Alexander and Bill Goodman of NFP Structured Settlements.

Each member and guest in attendance also received $10 in free slot play from the Rivers Casino to try his or her luck after dinner concluded. Many WPTLA members were spotted at the Craps and Blackjack tables following the meal, leading to the conclusion that the popularity of last summer's casino trip in Erie was not an aberration. We look forward to honoring our Past Presidents again in 2018.

PENNSYLVANIA SUPERIOR COURT RECOGNIZES SUDDEN MEDICAL EMERGENCY AS AN AFFIRMATIVE DEFENSE

By: Troy M. Frederick, Esq.

In *Shiner v. Ralston*, 2013 PA Super 33 (Pa. Super. Ct. Feb. 22, 2013), the Superior Court recognized, for the first time, the affirmative defense of Sudden Medical Emergency as separate and distinct from the Sudden Emergency Doctrine and established that the party asserting the defense must plead and prove the same.

Shiner involves a motor vehicle collision which occurred in Centre County when the defendant's decedent, a 77 year old male, was returning from an auto parts delivery traveling southbound on Route 6026 in the left-hand lane. The pickup truck the decedent was operating veered to the left, crossed rumble strips, traveled approximately 260 feet across a grassy median, crossed the northbound rumble strips, and crossed one lane of travel before striking plaintiff Glenn Shiner's vehicle almost head-on. The decedent did not take any evasive action after leaving the roadway.

The decedent was pronounced dead shortly after the collision. An autopsy was conducted and revealed that he suffered a cardiac dysrhythmia secondary to severe coronary atherosclerosis (CAD) which rendered him unconscious prior to the collision.

Defendants hired an accident reconstructionist who found that the decedent did not take any evasive action after leaving the roadway. Defendants also retained a forensic pathologist who concluded that the decedent's heart exhibited significant coronary atherosclerosis (CAD) with overlying fibrosis, which was consistent with the decedent suffering a cardiac dysrhythmia prior to the collision. However, none of defendants' experts opined that the decedent's alleged medical emergency was unforeseen.

Depositions were secured and the decedent's wife and son both testified that the decedent had never experienced any cardiac issues to their knowledge. The decedent's wife testified that, on the morning of the subject collision, the decedent appeared fine during breakfast and while saying his rosary.

Plaintiffs retained Dr. Bennet Omalu who opined that physical changes in the tissue slides of the decedent's heart proved that the "cardiac syncope was not hyper-acute and did not begin at the moment he lost control of the truck that he was driving." Further, Dr. Omalu explained that the histologic tissue evidence indicated "that the decedent must have started experiencing severe signs and symptoms of his acute CAD exacerbation 12 to 24 hours before his motor vehicle crash and death."

Defendants filed a motion for summary judgment arguing that the decedent could not have been negligent, pursuant to the "Sudden Medical Emergency Doctrine", because he was unconscious at the time of the collision and his loss of consciousness was unforeseeable. In response, Plaintiffs argued that the Sudden Medical Emergency Defense did not apply because the defendants failed to meet their burden of proof as none of the defendants' experts opined that the decedent's cardiac syncope was unforeseen. The trial court granted defendants' motion for summary judgment on the grounds that the defendants had successfully asserted the Sudden Emergency Doctrine, based upon the undisputed fact that the decedent was unconscious at the time of the collision, and therefore it was impossible for the decedent to have been negligent.

On appeal, Plaintiffs argued that the trial court committed error and/or abused its discretion in finding that defendants had satisfied the burden of proof required to successfully assert the affirmative defense of Sudden Medical Emergency. Initially, in September 2012, the Superior Court issued a non-precedential decision reversing the trial court and remanding the case for further proceedings. The defendants subsequently filed a motion for reconsideration which the Superior Court granted. On February 22, 2013, the Superior Court again ruled in favor of plaintiffs, this time formally recognizing the affirmative defense of Sudden Medical Emergency.

The Superior Court found that the defendants failed to plead the Sudden Medical Emergency Defense as new matter and, therefore, the defense was waived. Further, the Court found that both the trial court and the defendants conflated the Sudden Emergency Doctrine and the Sudden Medical Emergency Defense.

The Court explained that the Sudden Emergency Doctrine in Pennsylvania is not an affirmative defense but rather a legal principle that does not completely forgive negligence. The Sudden Emergency Doctrine applies where someone acting in a prudent manner is confronted with a sudden and unforeseeable occurrence, caused through no fault of their own, and because of the shortness of time in which to react, should not be held to the same standard of care as someone confronted with a foreseeable occurrence. The sudden emergency doctrine therefore modifies the *duty* owed by the tortfeasor and is not truly a "defense" to the claim. For example, Ms. A is prudently driving down the road when, suddenly, a utility pole falls across the roadway in front of her.

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PA SUPERIOR COURT … *(Continued from Page 6)*

To avoid the pole, Ms. A jerks her vehicle to the right and strikes Mr. B, a pedestrian who was walking on the side of the road. Ms. A was negligent in striking Mr. B, but may be relieved of that negligence because she was confronted with a sudden emergency and her duty to Mr. B is viewed in light of that sudden emergency.

The Sudden Medical Emergency Defense, by contrast, is an *affirmative defense* that seeks to completely avoid negligence. Under the Sudden Medical Emergency Defense, Ms. A would not have been negligent in striking Mr. B if she could prove that she experienced an unforeseen medical occurrence which rendered her unconscious or otherwise incapable of operating her vehicle – the rationale being, that because of the medical condition Ms. A experienced, she was incapable of being negligent.

In reaching its conclusion, the Court found that the defendants could not rely upon the absence of a medical condition in the decedent's medical records or statements of family members to meet the burden of proof necessary to successfully assert the Sudden Medical Emergency Defense. Despite the fact that plaintiffs offered an expert report on the matter, the Court found that plaintiffs, at no time, were required to offer evidence to disprove the alleged sudden medical emergency and that it was the defendants burden to prove a sudden, unforeseen medical condition caused the collision.

What this opinion means going forward is that defendants must affirmatively plead the Sudden Medical Emergency Defense as new matter and provide expert evidence that establishes, within a reasonable degree of certainty, that the defendant's alleged medical condition was unforeseeable and was the cause of the incident.

President's Challenge
5K Run/Walk/Wheel event
to support the
Pittsburgh Steelwheelers
is set for
Saturday, September 21, 2013

Mark your calendar now to attend this event!

SPONSOR SPOTLIGHT

NAME: Helen L. Sims

BUSINESS/OCCUPATION: Financial Advisor, Certified Special Needs Advisor/The Duckworth Group at Merrill Lynch

EDUCATION: University of Pittsburgh, with a degree in accounting

INTERESTS: Tennis, Hiking, Cooking, doing anything outdoors!

PROUDEST ACCOMPLISHMENT: Establishing a career that is truly my passion. Every day I have opportunity to work with and listen to our clients to help change their lives.

FUNNIEST/WEIRDEST THING TO HAPPEN TO YOU ON THE JOB: I had meetings with our clients who live New York City during Hurricane Sandy and was stuck with the dilemma between 4 hour gas lines and a gas tank on E. My best friend from childhood drove up from DC to bring me enough gas to get to Pennsylvania where the lines were much shorter. (I still haven't figured out how to repay that favor!)

FAVORITE RESTAURANT: Point Brugge and Tamari

FAVORITE MOVIE: When Harry Met Sally

FAVORITE SPORTS TEAM: The Pittsburgh Steelers

FAVORITE PLACE(S) TO VISIT: St. Pete Beach, Florida

WHAT'S ON MY CAR RADIO: NPR

PEOPLE MAY BE SURPRISED TO KNOW THAT: I performed the National Anthem at the Mellon Arena and at PNC Park for a Pittsburgh Pirates game.

SECRET VICE: Chocolate

CONSTRAINTS ON THE USE OF AUTHORITATIVE TEXTS AND OTHER MEDICAL LITERATURE DURING EXPERT WITNESS TESTIMONY

By: David M. Landay, Esq.

Using Medical Literature during Direct Examination of Expert Witnesses

Medical texts and other medical literature, when offered to establish principles or theories from their contents, are traditional hearsay. *Majdic v. Cincinnati Machine Co.*, 370 Pa. Super. 611, 621-22, 537 A.2d 334, 338-39 (1988) *(en banc)*. However, this does not mean these materials cannot be used during direct examination of an expert witness. As explained by the Supreme Court in the leading case on this issue, *Aldridge v. Edmunds*, 561 Pa. 323, 750 A.2d 292 (2000), it would be unreasonable to assume that an expert's opinion is not in some way dependent on such materials. Therefore, if published material is authoritative and relied upon in experts in the field, an expert may rely upon it in forming his opinion even though it is hearsay.

"Pennsylvania courts have . . . permitted, subject to appropriate restraint by the trial court, limited identification of textual materials (and in some circumstances their contents) on direct examination to permit an expert witness to fairly explain the basis for his reasoning." *Aldridge, supra*, 561 Pa. at 332, 750 A.2d at 297. This is consistent with Pa.R.E. 705, which provides that an expert may testify in terms of opinion or inference and give his reasons.

As the *Aldridge* court explained further, the purpose for which treatises may be referenced on direct examination is limited to explaining the reasons underlying the expert's opinion. Hence, the trial court should exercise careful control over their use to prevent them from being made the focus of the examination. 561 Pa. at 334, 750 A.2d at 297. In *Aldridge*, the court found that the trial court abused its discretion in permitting the defendant doctor's attorney to present excerpts from the texts enlarged on poster board and then lead the expert through a lengthy series of leading questions further emphasizing the specific contents. It was also an abuse of discretion to admit these materials into evidence.

Using Medical Literature During Cross Examination of Expert Witnesses

It is well settled that an expert witness may be cross-examined on the contents of a publication upon which he relied in forming an opinion and also with respect to any other publication which the expert acknowledges to be a standard work in the field. *Brannan v. Lankeneau Hospital*, 385 A.2d 1376 (Pa. Super. 1978), *rev'd on other grounds,* 417 A.2d 196 (1980). The publication is thus not admitted for the truth of the matter asserted, but only to challenge the credibility of the witness' opinion and the weight to be accorded to his opinion. In this context, the text is therefore *not* within the definition of "hearsay."

Even if the expert does not recognize a particular publication as a standard work or authoritative in the field, he may still be tested by reference to those publications if another expert has verified that the particular publications are authoritative. *McDaniel v. Merck, Sharpe & Dohme*, 533 A.2d 436, 447 (Pa. Super. 1987). It is also proper to show that an expert is unfamiliar with the literature in a particular field. *Evanuik v. University of Pittsburgh,* 338 A.2d 636, 638 (Pa. Super. 1975).

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 25, 2012-2013

Issue Date	Article Deadline	Publication
Vol. 25, No 4	June 3, 2013	Late June, 2013

Are you running for a seat on the bench?

Let your fellow WPTLA members know so that they can support you.

Contact our Executive Director
Laurie Lacher at admin@wptla.org
and ask for the bio form.

THE CONUNDRUM OF ESTABLISHING AN EXPERT IS A "PROFESSIONAL WITNESS" UNDER *COOPER*

By: James T. Tallman

In *Cooper v. Schoffstall*, 905 A.2d 482 (Pa. 2006), the Supreme Court of Pennsylvania held that expert witnesses who "may have entered the professional witness category" were subject to supplemental discovery regarding the expert's work on legal matters other than the particular case at hand. The court found that such information could be relevant to showing bias based on the expert's financial incentives and ties to a particular class of litigants (i.e., defendants or plaintiffs), insurers, or law firms. This article explores the practical problems created by the threshold burden of *Cooper* requiring that before the expert is subject to supplemental discovery regarding his or her medical-legal work the proponent must show that the expert is a "professional witness."

The issue of whether an expert is a "professional witness" is of particular importance in cases involving medical doctors who conduct independent medical examinations and also maintain a medical practice. Over the last year, this author has repeatedly encountered the defense tactic of refusing to answer "*Cooper* Interrogatories"[1] on the basis that "good cause" for supplemental discovery was not shown because the IME doctor was not a professional witness. In my recent experience, the Court of Common Pleas of Allegheny County has been receptive to this argument, even where there is evidence that the doctor conducts IMEs on an almost weekly basis.

The basis for such arguments lies in the loose language used by the *Cooper* court. For example, a key passage in *Cooper* is the following:

> Therefore, we believe that the appropriate, threshold showing to establish cause for supplemental discovery related to potential favoritism of a non-party expert witness retained for trial preparation is of reasonable grounds to believe that the witness may have entered the professional witness category. In other words, the proponent of the discovery should demonstrate a significant pattern of compensation that would support a reasonable inference that the witness might color, shade, or slant his testimony in light of the substantial financial incentives. In the present case, we have no difficulty in supporting Judge Lewis's decision to authorize some supplemental discovery in Dr. Eagle's situation, where it is undisputed that in some recent years he has performed 200 or more independent medical examinations.

Id. at 524-25 (citations omitted). Myriad conflicting standards can be gleaned from this passage.

At first the court states that supplemental discovery may be permitted where there are "reasonable grounds to believe that the witness may have entered the professional witness category." Such a standard would appear to be an appropriate threshold showing to permit supplemental discovery. The court, however, immediately and dramatically increases the threshold showing by stating that "the proponent of the discovery should demonstrate a significant pattern of compensation that would support a reasonable inference that the witness might color, shade, or slant his testimony in light of the substantial financial incentives." The court then ends the passage with the facts in *Cooper*, stating that the doctor at issue there performed 200 or more IMEs per year, which satisfied the threshold burden.

This passage provides little guidance to practitioners and the courts. Moreover, it seems as if the *Cooper* court was not cognizant of the fact that it was establishing a ***threshold*** burden that if satisfied would permit additional discovery. How is a party to show a "significant pattern of compensation that would support a reasonable inference that the witness might color, shade, or slant his testimony in light of the substantial financial incentive" before discovery regarding a doctor's

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[1] "*Cooper* Interrogatories" refers to the specific supplemental discovery by way of written deposition that the Supreme Court of Pennsylvania identified in *Cooper* as proper:

> the approximate amount of compensation received and expected in the pending case; the character of the witnesses' litigation-related activities, and, in particular, the approximate percentage devoted to specific types of litigation and/or work on behalf of a particular litigant, class of litigant, attorney, and/or attorney organization; the number of examinations, investigations, or inquiries performed in a given year, for up to the past three years; the number of instances in which the witness has provided testimony within the same period; the approximate portion of the witness's overall professional work devoted to litigation-related services; and the approximate amount of income each year, for up to the past three years, garnered from the performance of such services.

Id. at 525-26.

THE CONUNDRUM ...(Continued from Page 10)

medical-legal work is permitted?[2] This problematic standard requires a party to obtain information regarding an expert's legal work through means outside of discovery to then be able to engage in discovery regarding the expert's legal work. The court in *Cooper* was overly concerned about burdening experts and intruding on an expert's finances despite its recognition that the discovery sought could be relevant to bias. In balancing the interests of the parties and experts, *Cooper* erred in protecting the defense medical expert's interests more than the interests of the injured plaintiff.

The basis for the *Cooper* court requiring any threshold showing that an expert is a "professional witness" before permitting expert discovery is Rule 4003.5 of the Pennsylvania Rules of Civil Procedure.[3] Rule 4003.5 generally limits discovery of experts to the substance of the facts and opinions to which the expert is expected to testify at trial. Additional, discovery may be permitted "upon cause shown." *See* Pa. R.C.P. 4003.5(a)(2). The Supreme Court of Pennsylvania held that the "upon cause shown" required the threshold showing discussed above. Accordingly, it is unlikely that the Supreme Court of Pennsylvania will eliminate the need for some threshold showing before supplemental discovery of an expert's medical-legal work is permitted. It is more likely that through subsequent appellate decisions, the appellate courts may clarify the requirements for the threshold showing.

In conclusion, my recent experience in fighting to get defense medical doctors to answer "*Cooper* Interrogatories" has reinforced the importance of WPTLA and PAAJ to me. The ability to get information regarding defense medical doctors through the PAAJ listserves and from the WPTLA and PAAJ network of plaintiffs' lawyers is invaluable. The recent tactics of defense counsel to resist *Cooper* discovery on the basis of a defense doctor not being a "professional witness" highlights the importance of a strong plaintiffs' bar and the free exchange of information.

[2] *Compare Wrobleski v. de Lara*, 727 A.2d 930 (Md. 1999). In *Wrobleski*, the Court of Appeals of Maryland did not impose the need for a threshold showing. Instead the court held "that it is generally appropriate for a party to inquire whether a witness offered as an expert in a particular field earns a significant portion or amount of income from applying that expertise in a forensic setting and is thus in the nature of a 'professional witness,'" which would then trigger further inquire. *Id.* at 938.

[3] Notably, the Superior Court of Pennsylvania held the Rule 4003.5 did not apply to discovery into bias. *See Cooper v. Schoffstall*, 859 A.2d 839 (Pa. Super 2004).

PICTURES & PROFILES QUESTIONNAIRE

Name: Dave Landay

Firm: Sole Practitioner

Law School: Duquesne University School of Law

Year Graduated: 1981

Special area of practice/interest, if any: Complex products liability and medical malpractice cases

Most memorable court moment: Falling in the court house and tearing my rotator cuff right before jury selection in a malpractice case.

Most embarrassing (but printable) court moment: Showing up at a pretrial conference in a golf shirt because I forgot to wear a coat and tie that day

Most memorable WPTLA moment: My first Comeback Awards Dinner

Happiest/Proudest moment as a lawyer: Obtaining a verdict in my first plaintiff's jury trial for the family of two young children killed in an electrical fire.

Best Virtue: Organizational skills

Secret Vice: Ice cream

People might be surprised to know that: I graduated from college and law school in the same year as part of a 6-year Engineering and Law program conducted by Carnegie-Mellon and Duquesne.

Favorite movie (non-legal): Raiders of the Lost Ark

Favorite movie (legal): The Verdict

Last book read for pleasure, not as research for a brief or opening/closing: Zero Day by David Baldacci

My refrigerator always contains: Apples and flavored coffee creamer

My favorite beverage is: Sweet tea

My favorite restaurant is: Andora

If I wasn't a lawyer, I'd be: an architect

STACKING ON MULTI-VEHICLE POLICIES: WHERE DOES *SACKETT III* LEAVE US?

By: Erin K. Rudert, Esq.

On March 8, 2013, the Superior Court issued its opinion in *Bumbarger v. Peerless*, at Docket No. 354 WDA 2012, analyzing the entirety of the *Sackett* line of cases and addressing the specific language of the after-acquired vehicle clause in Peerless' policy of insurance. The majority's opinion underscores the need to carefully review the language of the after-acquired vehicle clause in effect in your client's policy on the date on which each new vehicle was purchased if your client had an existing multi-vehicle policy and added vehicles to that policy.

On May 17, 2007, Peerless issued a Personal Auto Policy to Helen Bumbarger. At the time of its original issuance, the policy provided motor vehicle insurance coverage for two (2) vehicles: a 1980 Ford F-150 pick-up truck and a 1998 Ford Taurus. At the time of its original issuance, the policy provided bodily injury liability coverage in the amount of $25,000 per person/$50,000 per occurrence and uninsured and underinsured motorists coverage in the amount of $25,000 per person/$50,000 per occurrence. The policy provided non-stacked UM and UIM coverage, for which Bumbarger executed stacking rejection forms, each of which was dated May 17, 2007. The stacking rejection forms executed by Bumbarger were valid and in compliance with the provisions of Pennsylvania Motor Vehicle Financial Responsibility Law. On July 24, 2007, Bumbarger purchased a third vehicle, a 1995 Ford F-150 pick-up truck. On July 24, 2007, Bumbarger notified her insurance agent of the purchase and requested that the new vehicle be added to and insured under the existing policy.

On July 24, 2007, the agent advised Peerless of Bumbarger's notice that she had purchased the 1995 Ford F-150 pickup truck and of her request that it be insured under the existing policy. Pursuant to Bumbarger's request to insure the 1995 Ford F-150 pickup truck under the policy, Peerless extended coverage under the policy to the 1995 Ford F-150 pickup truck, effective July 24, 2007. On July 24, 2007, Peerless issued an amended Declarations Page for the policy and an "Endorsement Summary." At no time after Bumbarger's purchase of the Ford F-150 pickup truck did Peerless or the insurance agent have Bumbarger execute a new stacking rejection form.

On October 2, 2009, Bumbarger notified her insurance agent that she had purchased a fourth vehicle, a 1985 Ford Bronco, and requested that it be added to and insured under the existing policy. Pursuant to Bumbarger's request to insure the 1985 Ford Bronco under the policy, Peerless extended coverage under the policy to the 1985 Ford Bronco, effective October 2, 2009; however, coverage was only extended after the agent conducted certain research regarding the Ford Bronco, as Peerless would not insure certain Broncos (for reasons undisclosed in this matter) and initially advised Bumbarger that she may have to insure the Bronco through a different carrier. After it was determined that the Bronco was insurable through Peerless, Peerless issued an amended Declarations Page. At no time after Bumbarger's purchase of the 1985 Ford Bronco did Peerless obtain a new stacking rejection form.

The only stacking rejection form associated with the policy was executed by Bumbarger at the time of the policy's initial issuance on May 17, 2007, when it provided coverage for two (2) motor vehicles. On December 3, 2009, Helen Bumbarger was involved in a motor vehicle accident with an uninsured motorist. On December 3, 2009, the policy insured four (4) motor vehicles. The Bumbargers filed a Complaint in a Civil Action against Peerless in the nature of a breach of contract action seeking payment of stacked Uninsured Motorist benefits under the policy of insurance in question. The Bumbargers filed a motion for summary judgment seeking a determination that the policy in question provided stacked UM benefits based on *Sackett*. Peerless filed a cross-motion for summary judgment seeking a determination that the policy in question provided non-stacked UM benefits.

The Honorable Frederic J. Ammerman of the Court of Common Pleas of Clearfield County granted the Bumbargers' motion for summary judgment in favor of stacked UM coverage and denying Peerless' motion for summary judgment. *Opinion and Order dated February 3, 2012*, No. 2010-1563-CD, Court of Common Pleas of Clearfield County. The court below held that that the Superior Court's rationale under *Sackett III* controlled the outcome of the instant dispute and that Peerless' failure to obtain a new stacking waiver following the addition of new vehicles to an existing multi-vehicle policy resulted in the policy provided stacked UM benefits. Judge Ammerman adopted Bumbarger's argument, based on *Sackett III*, that the existence of an endorsement for the third vehicle constituted the purchase of new insurance under 75 Pa.C.S. § 1738, which purchase required a new waiver of stacking. Peerless appealed to the Superior Court, arguing that the after-acquired vehicle clause in the policy was an "infinite" after-acquired vehicle clause,

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STACKING … *(Continued from Page 12)*

thereby obviating the need for new stacking waivers when the third and fourth vehicles were added to the policy, and that the endorsement was a legal nullity without contractual significance.

The Superior Court started its analysis by acknowledging that the *Sackett III* decision contained three separate and distinct bases for the Court's determination that the Sacketts were entitled to stacked coverage, with each basis arguably being independently sufficient to support the Court's determination. This "gray area" in *Sackett III* leaves open the question of whether the addition of a vehicle to a policy by endorsement constitutes the "new purchase of insurance," negating any application of the after-acquired vehicle clause and requiring new stacking waivers. Unfortunately, the majority declined to answer that question, which was also left open by *Sackett III*, but the Court did analyze the after-acquired vehicle clause and provide some guidance as to how stringently the Court will parse the language of the clause.

The clause in Peerless' policy states:

> For any coverage provided in this policy except Coverage for Damage To Your Auto, a "newly acquired auto" will have the broadest coverage we now provide for any vehicle shown in the Declarations. Coverage begins on the date you become the owner. *However, for this coverage to apply to a "newly acquired auto" which is in addition to any vehicle shown in the Declarations, you must ask us to insure it within 45 days after you become the owner.* (Emphasis added).

Peerless characterized this clause as creating "infinite coverage" without a notice requirement for the insured. On that basis, Peerless argued that the clause fit within the exception created by the Supreme Court in *Sackett II* and that new stacking waivers were not required. However, the Superior Court found that the clause in Peerless' policy was ambiguous as to whether it was finite or infinite. The Court noted that the limitation period of forty-five days to request coverage was questionable in that it limited the automatic coverage to a period of time of less than the remainder of the policy; however, the Court's analysis hinged on the word "ask."

The Superior Court held that by using the word "ask" in the clause, Peerless created a situation where coverage was not automatic and infinite for after-acquired vehicles. By requiring the insured to "ask" for coverage for a new vehicle, rather than requiring the insured to merely "notify" or "tell" the insurer of the existence of the new vehicle, Peerless' policy implied that Peerless could decline to extend coverage to an after-acquired vehicle. The Court held that the requirement that the insured "ask" for coverage within a certain period of time, after which time coverage would be terminated absent the request, created an ambiguity in the policy as to whether Peerless' requirement was merely a notice requirement *and* whether the policy was infinite or finite. The Court found that Peerless' after-acquired vehicle clause allowed Peerless the prerogative to decline to cover a newly-acquired vehicle following the insured "asking" for coverage, and/or to decline to cover a vehicle beyond the forty-five day grace period if such a request was not received. Because Peerless retained the ability to decline coverage, and because Peerless acceded to Bumbarger's request to insure her third vehicle by extending coverage (memorialized through an endorsement), Peerless was bound to seek a new stacking waiver from Bumbarger.

The most significant practice points to consider from the *Sackett* cases are: 1) you need to review the entire policy underwriting history to see if and when vehicles were added to an existing multi-vehicle policy; 2) you need to review the language of the after-acquired vehicle clause as it existed *at the time of the addition of the vehicle* (many carriers revised their after-acquired vehicle clauses after *Sackett*, so the current clause may appear to be an infinite/notice-only clause, but a vehicle added years ago could be subject to an older clause with favorable language); 3) you need to *carefully* review and consider the language of each after-acquired vehicle clause applicable to your case; and 4) you need to review the underwriting history, including the agent's file if necessary, to identify endorsements and/or any other activity that could demonstrate the ability of the insurer to decline to insure a new vehicle or that could constitute a "new purchase" of coverage.

COMP CORNER

By: Thomas C. Baumann, Esq.

1979 INCIDENT YIELD 2007 AVERAGE WEEKLY WAGE

The Supreme Court has determined in *Lancaster General Hospital v. WCAB (Weber-Brown),* 69 MAP 2010 that an exposure to the herpes simplex virus in 1979 will have benefits paid based on a 2007 average weekly wage. Claimant worked as a licensed practical nurse for Lancaster General Hospital. In 1979 or early 1980, the Claimant was treating a patient's tracheotomy when the patient coughed and sprayed sputum in the Claimant's eye. Claimant was treated at her employer's emergency room and sent to her eye doctor for follow-up. Later, Claimant's eye became infected as she apparently had acquired HSV. She did not miss any work at that time.

Claimant left for new employment in 1985. During her subsequent employment, the eye developed several other infections. However, she did not miss any work with her subsequent employers as a result of the infections.

As time went on, the eye infections continued and eventually did not respond to antibiotic treatment. By February 2007, she had lost vision in her eye and in May 2007, she had a cornea transplant. This cornea transplant did not work and she was ultimately left blind in the infected eye.

In 2007, Claimant pursued a Petition alleging loss of use of the eye as of March 8, 2007.

The Workers' Compensation Judge found a specific loss as of May 16, 2007, finding that the work-related injury was caused by the exposure to the sputum from the tracheotomy patient in 1979 or 1980. That incident caused the HSV which later caused the loss of use of the eye. The Judge further found that the average weekly wage was to be calculated as of the date of the injury, which was determined to be May 16, 2007.

The Defendant/employer appealed to the Workers' Compensation Appeal Board and then Commonwealth Court, which both sustained the WCJ. Lancaster General then appealed to the Supreme Court. It did not challenge the date of injury, but rather challenged the calculation of the average weekly wage, maintaining that the AWW should be based on the Claimant's wages as of 1985, her last period of work with Lancaster General.

The Court conducted an exhaustive analysis of Section 309 of the Act, the provisions setting out the various ways to calculate the average weekly wage. Lancaster General argued that Section 309(d.1) controlled the calculation in the case. It argued that the average weekly wage calculation could not use wages earned from an employer different than the employer found liable for compensation.

Claimant argued that Section 309(a) controlled the calculation of the AWW. Furthermore, the Claimant argued that the Supreme Court's Decision in *J.G. Furniture Div./Burlington v. WCAB (Kneller),* 595 Pa. 60, 938 A.2d 233 (2007) permitted the calculation of the average weekly wage to be determined as of the date of injury, in this case May 16, 2007.

The Court analyzed the term "employer" as used in Section 301(a) and Section 306(e). In those sections, the term "employer" was tantamount to payor. However, Section 309 speaks to calculating the average weekly wage "at the time of injury." Therefore, the Court stated, "...[W]e conclude the most logical interpretation of "employer" in Section 309 is that it means the employer at the time of the work-related injury. Since Lancaster General did not contest that the date of injury was May 16, 2007, the proper wages to be utilized in calculating the average weekly wage were those wages earned with her employer at that time. While these wages were substantially more than the wages the Claimant earned at the time of the initial exposure, as pointed out by Justice Eakin in a concurring opinion, the opposite could also be true. Claimants may change jobs or move to part-time status and have lesser income at the time the "injury" actually occurs. Practitioners need to be mindful of this case when dealing with specific loss injuries. Benefits are not based on the wages at the time of the initial incident.

Query: What is the effect of Lancaster General on Section 108(m) and 108(m.1) cases? These sections which involve the enumerated diseases tuberculosis and hepatitis are conceivably affected. The "injury" would seemingly occur substantially after the initial exposure. Under the Lancaster General rationale, would the AWW be calculated on subsequent earnings incurred at the time of injury?

BY THE RULES

By: Mark E. Milsop, Esq.

FEDERAL COURT OFFERS NEW EXPEDITED PRE-TRIAL PROCEDURE

Some litigants may benefit from an opportunity to have their case placed on the "Expedited Docket" in federal court in the Western District of Pennsylvania. The program provides for cases to be admitted to the program by a signed stipulation prior to the conclusion of the intial case management conference or with leave of court for cause shown at a later time.

By agreeing to the program, the parties agree to limited discovery, including 10 Interrogatories, 10 Requests for Production of Documents, and fifteen hours of deposition testimony per side. Discovery is to be completed within 90 days. In exchange, a firm trial date is to be set by order following the initial case management conference. The trial is to be no more than 6 months after the conference.

There are to be no motions for summary judgment or motions in limine. Other motions will require leave of Court. A response to any motion is due in 7 days and any reply in 3 days.

Although this program is a positive option, discovery may be too limited to induce many defense lawyers to agree. We will wait and see whether the Court reports many litigants taking advantage of the program.

Further Details can be found online at the Court's website with the following link: http://www.pawd.uscourts.gov/Documents/Forms/EXPEDITED_DOCKET.pdf.

PROPOSED CHANGES TO ARBITRATION LAW MAY NOT BE BENEFICIAL

One of the hot issues in litigation is whether or not tort claims should be subject to mandatory arbitration by agreements entered into prior to the claim. Such agreements result from contracts of adhesion and are seldom the product of equal bargaining. Unfortunately, pending legislation may all but eliminate an injury victim's ability to contest contractual arbitration provisions. The Legislation, currently designated as House Bill 23, would repeal the current provisions for Statutory Arbitration found in Title 42, Subchapter A, Sections 7301 to 7320 and replace them with new Subchapter A1, Sections 7321.1 through 7321.31.

With respect to agreements to arbitrate, §7303 currently provides:

> **§ 7303. Validity of agreement to arbitrate.** A written agreement to subject any existing controversy to arbitration or a provision in a written agreement to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity relating to the validity, enforceability or revocation of any contract.

Under the pending legislation, § 7321.5 allows for an agreement to arbitrate "before a controversy arises" subject only to a restriction on waiving certain rights.

An additional controversial provision contained in the new legislation is § 7321.26 which is a fee shifting provision. This section provides that a prevailing party to "a contested judicial proceeding" to confirm, vacate or correct an award may be awarded costs and "reasonable attorney fees and other reasonable expenses of litigation."

Although there may be some positive provisions in the proposed change, one must question whether the two provisions outlined above overshadow any benefit from the proposal.

As of this time, it appears that the Pennsylvania Association for Justice opposes this change while the Pennsylvania Bar Association supports the legislation. Members are encouraged to review HB 23 themselves and contact their legislators and representatives of the Pennsylvania Bar Association to share their thoughts.

House Bill 23 can be found at:

http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2013&sessInd=0&billBody=H&billTyp=B&billNbr=0023&pn=0743.

HOT OFF THE WIRE!

By: Chris Hildebrandt, Esq

SUPREME COURT OF PENNSYLVANIA

Pursuant to the MVFRL, a medical provider is not entitled to attorney's fees when challenging an insurer's refusal to pay for treatment where the insurer has submitted the questionable medical bills to a PRO.

Herd Chiropractic Clinic, P.C. v. State Farm, 2013 Pa. LEXIS 304 (Feb. 20, 2013)

In Herd, an individual obtained treatment from Herd Chiropractic for injuries sustained in a motor vehicle accident. State Farm submitted Herd's invoices to a peer review organization (PRO) pursuant to 75 Pa.C.S. § 1797(b). The PRO determined that certain chiropractic treatments were not necessary or reasonable, and the insurer refused to pay for such treatment. Herd then commenced a civil action against the insurer, seeking compensation for unpaid bills in the amount of $1380. The trial court awarded Herd the unpaid medical bills as well as $27,047.50 in attorney's fees. The Superior Court affirmed the trial court's decision.

On appeal, the Supreme Court, in a 4-2 decision, reversed the Superior Court. The Supreme Court concluded that § 1797(b)(4) only allows providers to appeal insurers' coverage refusals, "the reasonableness or necessity of which the insurer has not challenged a [peer review organization]." Section 1797(b)(6), meanwhile, only allows for courts to award attorney feeS "pursuant to paragraph (b)(4)." Invoking the general American rule that there could be no recovery of attorneys' fees from an adverse party, absent an express statutory authorization, a clear agreement by the parties, or some other established exception, the Supreme Court held that Herd was not entitled to attorneys' fees as there is no express statutory authorization for fee shifting on provider challenges to peer-review determinations.

SUPERIOR COURT OF PENNSYLVANIA

It is improper for a trial court to grant a defendant summary judgment where the trial court has usurped the duty of the trier of fact. It is for the jury to assess the witnesses' credibility and to reach conclusions regarding the defendant's rate of travel, visibility and the distance requisite for the defendant to have been able to stop short of or swerve and miss the decedent.

Wright v. Eastman, 2013 PA Super 11 (Jan. 22, 2013)

Decedent was struck by an automobile which was driving in the curb lane of Pittsburgh-McKeesport Boulevard. Decedent had a BAL of 0.42% at the time of the accident. The evidence established that the defendant did not see the decedent until he was within 11/2 car lengths of her. The defendant applied his brakes but could not stop in time. There was no evidence the defendant was speeding, and the police report reflected that the defendant was travelling below the speed limit. Likewise, there was no evidence that the defendant was being inattentive or that he could have done anything to prevent the collision.

Decedent sought to introduce expert testimony to establish that the defendant could have seen the decedent from 160'-170' away and, therefore, could have stopped prior to the collision. The trial court rejected this testimony, concluding that the defendant was entitled to summary judgment because the proffered expert testimony lacked any factual basis, i.e., there were no facts to establish that the decedent was on the road at that distance.

On appeal, the Superior Court reversed the trial court's decision. The Superior Court determined that it was improper for the trial court to base its ruling on the defendant's testimony that he did not see the decedent until he was 30' from her, ruling that it was not proper for the trial court to determine the defendant's credibility. Moreover, the Superior Court reasoned that " the critical inquiry in determining whether [the defendant] breached his duty to [the decedent was] not when he saw her in fact, but when it was his duty to see her, such that his failure to do so would amount to a breach of that duty." In addition, the Superior Court concluded that it was improper for the trial court to conclude that the defendant was not speeding based merely on the defendant's own testimony and the police report "which concluded only that [the defendant] **struck** [the decedent] at a speed below the posted limit." Likewise, the trial court improperly concluded that the was no evidence that the defendant was not being attentive when the defendant testified that he did not see the decedent *move into* the position she was located at when his vehicle struck her. In all, it was for the jury to assess the witnesses' credibility and to reach conclusions regarding the defendant's rate of travel, visibility and the distance requisite for the defendant to have been able to stop short of or swerve and miss the decedent.

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HOT OFF THE WIRE! (*Continued from Page 16)*

A person listed as a named driver on a policy of automobile insurance is not bound by the policy owner's tort selection.

McWeeney v. Strickler, 2013 PA Super 17 (Jan. 30, 2013)

This case involves the issue of whether a person who is named as a driver on an insurance policy is bound by the policy owner's selection of limited tort. Here, the fiancé of the owner of the policy was also a resident of the same household and named as a driver on the policy. The trial court concluded that she was a "named insured" or, as a permissive driver, an "insured" who was bound by the limited tort selection under the terms of § 1705 MVFRL.

On appeal, the Superior Court reversed the trial court and held that under the plain and unambiguous terms of the MVFRL the fiancé is neither a "named insured" nor an "insured" under § 1705. Accordingly, she was not bound by the limited tort selection. The Superior Court reasoned that pursuant to § 1705, "only one who is identified by name as an insured on the face of the policy is a 'named insured' for purposes of tort election." Additionally, the Superior Court concluded that to hold that a permissive driver is an "insured" bound by limited tort contravenes the intent of § 1705. Because § 1705(f) limits the people who are considered bound by the limited tort selection, and a permissive driver is not one of them, the named driver was not bound by the fiancé's tort selection.

The sudden medical emergency defense, which avoids negligence, is an affirmative defense which must be plead in new matter or it is waived. The sudden emergency doctrine, which merely modifies the standard of care applied to a defendant, is not an affirmative defense and, therefore, need not be plead in new matter.

Shiner v. Ralston, 2013 PA Super 33 (Feb. 22, 2013)

This case stems out of an automobile collision, which occurred when a pickup truck operated by the Decedent struck a vehicle being operated by the plaintiff. The decedent's vehicle was leased to his employer, General Parts Company. At the time of the collision the decedent was travelling in the southbound lane of Route 6026 when his vehicle left its lane of travel, crossed a grassy median and struck the plaintiff's northbound vehicle. An autopsy found that the decedent suffered a cardiac dysrhythmia secondary to severe coronary atherosclerosis which caused him to become unconscious while operating his vehicle. It was uncontroverted that the decedent suffered a cardiac event due to underlying coronary atherosclerosis, resulting in the decedent losing control of his vehicle.

The decedent and Genuine Parts Company moved for summary judgment, claiming that the collision was the result of a sudden and unforeseeable medical emergency, and, therefore, as a matter of law neither the decedent nor his employer could be held liable to the plaintiff. The trial court granted summary judgment in favor of the defendants pursuant to the sudden emergency doctrine.

The Superior Court reversed the trial court's decision, noting that the decedent and the trial court "improperly conflated 'the sudden emergency doctrine' and 'the sudden medical emergency defense'." The Superior Court noted that the *sudden emergency doctrine* in Pennsylvania is not an affirmative defense, but is a legal principle that provides that "an individual will not be held to the 'usual degree of care' or be required to exercise his or her 'best judgment' when confronted with a sudden and unexpected position of peril created in whole or in part by someone other than the person claiming protection under the doctrine." On the other hand, the *sudden medical emergency defense* is an affirmative defense "often pled as sudden loss of consciousness or incapacitation." Notably, because the defense avoids negligence, it must be pled as new matter and proven by the defendant.

For a detailed discussion of this case, please see the article on p. 6 authored by Troy M. Frederick, Plaintiff's counsel in this case.

QUALIFICATIONS OF MEDICAL EXPERTS UNDER § 512 OF MCARE

By: Lawrence M. Kelly, Esq.

Under the MCARE Act, which has been in place in Pennsylvania for several years, a question often times arises as to whether or not the physician offering opinion testimony on the issues of causation and damages is qualified under § 512 of the Act.

Most recently, a challenge was made in a medical malpractice case involving testimony given by a board certified anesthesiologist against a board certified anesthesiologist who was also board certified by the American Board of Pain Management. In that case, the Defendant/Physician was not certified in pain management by the American Board of Medical Specialties even though the American Board of Medical Specialties has the same certification available.

Under § 512, an expert is permitted to offer standard of care testimony if the expert:

1. [Is] substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care;

2. Practices in the same sub-specialty as the Defendant-Physician or in a sub-specialty which has a substantially similar standard of care for the specific care at issue;

3. In the event the Defendant-Physician is certified by an approved Board, be board certified by the same or similar Board except as provided in subsection (e).

(e) A court may waive the same specialty and board certification requirements for an expert testifying as to a standard of care if the Court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full time teaching of medicine in the applicable sub specialty or a related field of medicine within the previous five year time period.

In the case presented before the Court, the expert anesthesiologist was board certified in anesthesiology by the American Board of Medical Specialties and:

1. Since 2008, he had been the Chairman of the Anesthesiology Department at the hospital where he worked

2. As Chairman of the Anesthesiology Department at the hospital where he worked, he supervised the pain management program.

3. He also was part of a committee that develops patient safeguards which included the use of morphine.

4. He did patient safety work outside of the hospital which also addressed the use and side effects of morphine.

5. In his role as Chairman of the Pain Management Committee at the hospital where he worked, he discussed the use of and side effects of morphine.

6. In his role on the Pharmacy and Therapeutic Committee at the hospital where he worked, he discussed the use and side effects of morphine.

7. He used intrathecal morphine during his practice.

8. He was familiar with the standard of care involving the use of intrathecal morphine.

In the case of *Hyrcza vs. West Penn Allegheny Health System*, 978 A.2d 961 (Pa. Super. 2009), the Court held that a board certified psychiatrist and neurologist was competent to testify as an expert witness in the wrongful death action as to the standard of care applicable to a board certified physiatrist in connection with post-operative care when prescribing aspirin and steroids at the same time for the patient. The expert witness testifying on behalf of the plaintiff testified that he often used aspirin and steroids together and was familiar with the risks involved when using aspirin and steroids together. 978 A.2d at 973-74.

In the case of *Campbell vs. Attanasio*, 862 A.2d 1282 (Pa.Super. 2004), a psychiatrist was permitted to testify as to the negligent use of an oral sedative by a third year resident in internal medicine upon a patient where the expert witness had prescribed the particular sedative on multiple occasions to individuals who suffered from anxiety.

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So, too, in *Smith vs. Paoli Memorial Hospital*, 885 A.2d 1012 (Pa.Super. 2005), the Court held that an oncologist and general surgeon was permitted to testify on the issue of GI bleeding against a gastroenterologist when the standard of care for **the specific care at issue** was substantially similar. 885 A.2d at 1020.

Smith relied on the case of *Herbert vs. Parkview Hospital*, 854 A.2d 1285 (Pa.Super.2004). In that case, the Court recognized that a physician board certified in internal medicine could testify against a board certified nephrologist on the issue of respiratory blockage because nephrology is a sub specialty of internal medicine and the standard of care are the same. 854 A.2d at 1294.

In the case before the Court, the expert physician used morphine as a regular part of his practice. He was familiar with the standard of care and the use of morphine. He was familiar with the risks inherent with the use of morphine. As such, the expert physician was qualified to offer expert opinion both as to standard of care and causation in the case before the Court. It was argued in the case before the Court that pain management was:

1. A sub specialty of anesthesiology.
2. The standard of care when using morphine is substantially similar for an anesthesiologist and pain management physician.
3. The expert physician used intrathecal morphine in his practice as an anesthesiologist.
4. The expert physician was the chair of the Department of Anesthesiology which supervises the pain management program.
5. The expert physician does patient safety work which includes the use and side effects of morphine.
6. The expert physician is on a committee that develops patient safeguards involving the use of morphine as Chairman of the Department of Anesthesiology.
7. The expert physician is on the Pharmacy and Therapeutics Committee which discusses use and side effects of intrathecal morphine.

Based on the foregoing argument, the Court agreed that the expert physician was qualified under § 512 of the MCARE Act to offer opinion testimony. The key to the Court's opinion was even though the expert offering testimony was not board certified as a pain management physician, he was board certified as an anesthesiologist. The Court found that pain management was a subspecialty of anesthesiology. The Court further found that the expert was familiar with the standard of care in the use of intrathecal morphine and that the standard of care was the same for both pain management and anesthesia.

CALENDAR OF EVENTS

for the remainder of the fiscal year

Friday, May 3, 2013	Annual Judiciary Dinner	Heinz Field East Club Lounge Pittsburgh, PA
Saturday, May 11, 2013	Community Service Program Pittsburgh Cares' Beautification Saturday	Pittsburgh, PA
Thursday, May 23, 2013	Ethics Seminar & Golf Outing	Shannopin Country Club Pittsburgh, PA

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...Through the Grapevine

Member James R. Moyles was a recent presenter/lecturer at a CLE seminar on Personal Injury on January 24 at the Omni William Penn Hotel in Pittsburgh. The seminar was hosted by LAWRE-VIEW.

And on a sad note, our condolences to Jim on the recent passing of his father.

Member Arthur L. Schwarzwaelder has a new address. Art is now at 429 Forbes Ave, Ste 901, Pittsburgh, PA 15219. His phone, fax, and email remain the same.

Board of Governors Member Matthew T. Logue has opened his own firm. Matt can be reached at the Logue Law Firm LLC, 304 Ross St, 5th Fl, Pittsburgh, PA 15219. P: 412-307-5160 F: 412-906-9932 Email: matt@loguefirm.com. Website: www.loguefirm.com

Member Virginia Shenkan has a new address. She can be found at 2712 Carlisle St, New Castle, PA 16105. Her phone and fax remain the same.

Past President Henry H. Wallace has been certified as a member of the Million Dollar Advocates Forum, one of the most prestigious groups of trial lawyers in the United States. Congratulations, Hank!

Member Lawrence Gurrera II got engaged on Valentine's Day. Congratulations to Guido and his fiancée, Susie.