THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

Volume 25, No. 4
Summer 2013

JUDICIARY DINNER RECAP

By: Kelly M. Tocci, Esq.

WPTLA held its Annual Judiciary Dinner on May 3, 2013 at Heinz Field's East Club Lounge in Pittsburgh. As always the venue provided a scenic view of the city and a delightful evening for 143 judges, members and guests in attendance.

Eight (8) members of the judiciary who retired or reached Senior Status in 2012 were honored including:

The Honorable Janet Moschetta Bell
The Honorable Hiram A. Carpenter III
The Honorable John J. Driscoll
The Honorable Michael E. Dunlavey
The Honorable Judith L.A. Friedman
The Honorable John C. Reed
The Honorable Gerald R. Solomon
The Honorable Ralph C. Warman

Pictured above from L to R: Past President Carl Schiffman, Honoree Judge Hiram Carpenter, President Paul Lagnese.

All of the judges honored were presented a plaque commemorating their years on the bench and were thanked for serving our legal community with distinction. In attendance was Judge Hiram A. Carpenter III of Blair County who was introduced by Past President Carl R. Schiffman.

Winners of the President's Scholarship Essay Contest were introduced. This year's contest asked participants to tackle applicability of the Rule of Capture in the context of a fictional Pennsylvania farm town where the oil and gas industry hopes to develop. Three winners were chosen and each received a $1,000 scholarship. The winners were Garrett Jones, of Slippery Rock Area High School, Teresa Morin, of Mercer Area Junior-Senior High School, and Emily Pirt, of Shaler Area High School

The event marked the end of Chris Miller's highly successful run as chair of the President's Challenge 5K Race to benefit the Pittsburgh Steelwheelers. A check in the amount of $30,500.00 was presented to Lee Tempest and Kate Smith of the Steelwheelers organization who spoke of how meaningful the program is to its members and thanked WPTLA for its continued support. Since the race was first organized 11 1/2 years ago, WPTLA has donated a total of $286,335.00 to the Steelwheelers, helping wheelchair athletes compete at the local, state and national level.

Our first annual Daniel M. Berger Community Service Award was presented honoring WPTLA member Jon Perry for his outstanding work through Pennies from Heaven, a charity that provides financial assistance to families of children during long hospital stays. Jon and his wife Joni were inspired to create Pennies from Heaven while their own son Trevor was hospitalized with Leukemia and they learned how financially devastating it is for parents to take time off from work to be with their ill children. WPTLA made a $500 donation to Pennies from Heaven which was matched by Berger & Lagnese, and business partners NFP and Findlaw for a total donation of $2,000 to this worthy cause.

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UPCOMING EVENTS FOR WPTLA

A **Legislative Meet 'n Greet** is scheduled for **Tuesday, Sept. 17** at 6:00 p.m. at **Storms Restaurant in Pittsburgh.**

The **13th annual 5K Run/Walk/Wheel** event takes place on **Saturday, Sept. 21, 2013** on the **Riverwalk on Pittsburgh's NorthShore**. Help us help the Pittsburgh Steelwheelers.

A **dinner meeting** at the **Wooden Angel Restaurant in Beaver** is scheduled for **Monday, Oct. 21, 2013.**

Our annual **Comeback Award Dinner** will make a return to the **Duquesne Club in Pittsburgh** on **Wednesday, Nov. 20, 2013**. Who will you nominate to be our Comeback Award winner?

President
Paul A. Lagnese

The Advocate
Vol. 25, No. 4, Summer 2013
Published quarterly by:
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A Message from the President …

By: Paul A. Lagnese, Esq.

As I end my tenure as President of WPTLA, I am glad to report that the state of our organization is strong. Thanks to all the hard work of the Officers, the Board of Governors and, of course, our staff Laurie Lacher and Maria Fischer, membership is up, our financial house is in order, and the benefits we are providing to our membership continue to grow.

One exciting new development this past year was entering into formal relationships with our exclusive business partners. The following companies are WPTLA exclusive business partners: Allied Medical Legal Consulting, Covered Bridge Capital, The Duckworth Group at Merrill Lynch, FindLaw, Finley Consulting & Investigations, Forensic Human Resources, NFP Structured Settlements, Robson Forensics, Scanlon ADR Services and Stratos Legal. These new relationships provided WPTLA with some additional revenue and a newly designed website. They also provided WPTLA members with a group of committed and quality service providers. I think you will find, as I have, that these business partners provide great benefits to our practices and most importantly our clients. I ask that each of you take the opportunity, when the need arises, to use the services of our business partners.

Not only does WPTLA provide benefits for our members, we also do things to benefit the communities in which we live. Our annual 5K race was again a rousing success, raising over $30,000 for the Pittsburgh Steelwheelers. Our Comeback Award was presented to a wonderful little girl by the name of Davanna Feyrer. The Comeback Award Dinner was covered by KDKA TV. Members also participated in a community service day with Pittsburgh Cares. Additionally, this year WPTLA awarded the first Daniel M. Berger Community Service award to member Jon Perry and his wife, Joni, for their work with Pennies from Heaven. WPTLA, with sponsorship from some members and business partners, provided Pennies from Heaven a check for $2,000.

Looking forward, I think you will see more improvements to the website. We are looking into adding a legal database that will contain sample pleadings, discovery, and motions that members can access. I am sure incoming President Chad Bowers will have other great ideas for improving the services WPTLA provides to our members as well as the things WPTLA does in the community.

In closing know that it has been my honor to serve as President of an organization of men and women who are committed to obtaining justice for those who are not able to do so for themselves. I was honored to lead the wonderful group of Trial Lawyers that is the WPTLA.

JUDICIARY DINNER … *(Continued from Page 1)*

Also honored was WPTLA president Paul A. Lagnese for his dedication and commitment to the organization for the past 13+ years. Under Paul's leadership, WPTLA achieved another successful and rewarding year advancing the cause of trial advocacy and the rights of injured victims.

Pictured above, from L to R: Business Partner Varsha Desai, of Alliance Legal Medical Consulting; Vice President Chris Miller; Amy Finley; Rhoda Carmody; Business Partner Chris Finley, of Finley Consulting & Investigations; Business Partner Don Kirwan, of Forensic Human Resources';President Paul Lagnese; Sydne Unatin; and Board of Governors Member Greg Unatin.

Pictured above from R to L: Past President Veronica Richards; Past President Carl Schiffman; Daniel M. Berger Community Service Award winner Jon Perry; President Paul Lagnese; Steve Moschetta with his Dad, Past President Steve Moschetta.

Pictured above, from L to R: Justin Joseph; Past President Hank Wallace; Ken Nolan; Board of Governors Member and Advocate Editor Erin Rudert; Larry Gurerra; Pittsburgh Steelwheeler Matt Ramsey; Board of Governors Member and 5K Co-Chair Sean Carmody; Pittsburgh Steelwheeler Lee Tempest, Pittsburgh Steelwheeler Shawn Polach, Vice President and 5K Co-Chair Chris Miller; Pittsburgh Steelwheeler Kate Smith.

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20TH ANNUAL ETHICS SEMINAR AND GOLF OUTING

On Thursday, May 23, 2013, 40 assorted golfers - from duffers to aces - came together at Shannopin Country Club in a north Pittsburgh suburb and spent the day together. Starting off the day was a 1 credit CLE ethics course, taught by none other than seasoned speaker Rich Schubert. Rich updated the crowd on Miscellaneous Ethical Issues in PA.

After the CLE, lunch was available. Folks dined on sandwiches, salads and cookies, all while making the necessary preparations for their rounds of golf.

At 1:00, the horn was blown and the golf round was on. Carts went every which way, scrambling to their starting hole. WPTLA staff Laurie Lacher and Maria Fischer drove a cart around the course, stopping to take photos of all the foursomes. Hopefully they didn't bother anyone too much!

During the afternoon, a massive thunderstorm came through, and play was suspended. Most everyone made it back to the clubhouse, in varying degrees of wetness, though a few unlucky souls had to find shelter elsewhere. After a while, play resumed, with sunny skies and humid air - the typical Pittsburgh summer day.

It was great to see some of our Business Partners in attendance, such as Jack Berman of Alliance Legal Medical Consulting, Chris Finley of Finley Consulting & Investigations, Don Kirwan of Forensic Human Resources, and Abe Mulvihill, Ron Natoli and Tim Wilhelm of Forensic Human Resources. Thanks also to Don Ivol of Integrity First and Stuart Setcavage of Setcavage Consulting for attending.

Pictured above, from R to L: Past President and Golf Chair Jack Goodrich; Stuart Setcavage of Setcavage Consulting; Howard Schulberg; Anthony Judice; Alex Shenderovich; Robson Forensic's Abe Mulvihill; Board of Governors member Craig Fishman; Ed Shenderovich; Past President Bill Goodrich; John Zagari; Immediate Past President Josh Geist; Robson Forensic's Tim Wilhelm.

Pictured above, from L to R: Board of Governors member Sean Carmody; Past President Rich Catalano; Alliance Legal Medical Consulting's Jack Berman; Terry Ging; President Paul Lagnese; Past President John Quinn; Finley Consulting's Chris Finley; John Becker; Past President John Becker; Dottie Kirwan; and Forensic Human Resources' Don Kirwan.

WPTLA MEMBERSHIP

Have you renewed your membership dues for the 2013-2014 year yet? If not, here are some reasons to do it now:

- ***The Advocate*** - published quarterly, this newsletter keeps you current on Association news, significant case law updates, pending legislation and practice tips. This is only sent to current WPTLA members.
- **Website** - www.wptla.org includes a wealth of information, research links and news tailored to the busy trial lawyer. Coming this year, a member's only section.
- **WPTLA Directory** - a directory for you to easily access other WPTLA members in Western Pennsylvania. This directory also provides useful court information. The next issue of the directory will be published in the first half of 2014, and is only available to current members.
- **Legislative Interaction** – opportunities to meet and network with legislative leaders from western Pennsylvania. A Meet 'n Greet is scheduled for Tuesday, Sept. 17, 2013.
- **CLE** – programs on hot trial topics, problem areas, and case evaluations. These courses are published for WPTLA members.

Are you a President's Club member? You can still increase to that level, if you've already paid at the General member rate. Some benefits of President's Club membership include;

- **special recognition** in The Advocate, our members-only Directory, and the Judiciary Dinner program;
- **premier exposure** on our website;
- **3 CLE credit hours for the year**, at no additional cost;
- **a plaque** acknowledging your increased support of WPTLA, updated annually.

Renew now at www.wptla.org. Click on the "Join WPTLA" tab, then "Click to Join/Renew." What are you waiting for?

Comeback Award Dinner
Wednesday, Nov. 20, 2013
Duquesne Club, Pittsburgh, PA

Which client will you nominate to be our Comeback Award winner?

Contact Comeback Award Chair
Sandy Neuman at ssn@r-rlawfirm.com.

SPONSOR SPOTLIGHT

NAME: Bert Farris

BUSINESS/OCCUPATION: Stratos Legal Nationwide Court Reporting and Records Retrieval Services

FAMILY: Wife Rachel and Daughter Deja

INTERESTS: Hunting, boating, travel, cooking BBQ and spending time with family and friends

PROUDEST ACCOMPLISHMENT: Growing Stratos from 3 employees to over 75!

FUNNIEST/WEIRDEST THING TO HAPPEN TO YOU ON THE JOB: Getting a call from a concerned citizen who informed me that someone was using their Stratos work email address on their Craigslist posting about dating.

FAVORITE RESTAURANT: Vespio in Austin, Texas

FAVORITE MOVIE: Cool Hand Luke or Shawshank Redemption

FAVORITE SPORTS TEAM: The only team that matters….Notre Dame Football

WHAT'S ON MY CAR RADIO: Sports Talk

PEOPLE MAY BE SURPRISED TO KNOW THAT: I performed at the Grand Ole Opry

SECRET VICE: Late night cereal

382
4,262

You and your clients are certainly more than mere numbers to us but this is an ad and we can't expect to hold your attention for long. So, for now anyway, what you need to know about us can be summed up with a couple numbers and a few words: Covered Bridge Capital has helped 382 WPTLA/PAJ member attorneys secure 4,262 plaintiff advances for their respective clients.

Please also know that we are proud and privileged to be the exclusive plaintiff funding partner of the WPTLA.

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Keepin' It Simple

COMMON ENEMY RULE

By; Charles F. Bowers III, Esq.

As Plaintiff's attorneys, we all have been contacted by potential clients who have slipped and fallen due to an accumulation of ice or water, or been injured in an automobile accident as the result of accumulation of ice or water runoff on a highway. In those situations, a visit to the location of the fall/auto accident site will often reveal that the water that caused the accident came from an adjoining landowner's property. In pursuing a claim against the landowner, you must be aware of the "Common Enemy Rule." The "Common Enemy Rule" provides that an owner of higher land cannot be held liable for damages to an owner of lower land for water which flows from his property to a lower level. *Chamberlain v. Ciaffoni*, 96 A.2d 140, 142 (Pa. 1953). The law regards surface water as a common enemy that every proprietor must fight to get rid of as best he may. *Fasio v. Fegley Oil Co.*, 714 A.2d 510, 512, (Pa. Cmwlth. 1997). In an urban setting, a landowner may improve his property by erecting buildings on the property or changing the grade without liability to adjacent property owners. The rationale behind the rule is that a landowner should be permitted to improve his property to properly enjoy its use. *Id*.

Only where the owner of land is negligent in diverting the water, increasing its flow, or collecting and discharging it onto another property can he be held liable for damages. *Laform v. Bethlehem Township*, 499 A.2d 1373, 1378 (Pa. Super. 1985). Where water flows from one property across a highway, The Restatement (Second) of Torts § 368 may apply.

Under Pennsylvania Law, a possessor of land can be held liable for physical harm to persons traveling on a highway if the possessor permits an artificial condition to remain on his property so near to the highway that it involves an unreasonable risk to others brought into contact with such condition. This duty is set forth in Restatement (Second) of Torts § 368:

> A possessor of land who creates or permits to remain thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to persons who:
>
> (a) are traveling on the highway, or
> (b) foreseeably deviate from it in the ordinary course of travel.

Rest. (2d) Torts § 368; *Rasmus v. Pennsylvania Railroad*, 67 A.2d 660, 662 (Pa. Super. 1949). However, § 368 will only apply if you can show that the property owner increased the rate of flow or was negligent in diverting the flow of water. Without this type of evidence, you will then be faced with the Common Enemy Rule and its effect. One defense that may be available to thwart the Common Enemy Rule is the setting of the land. If you have a rural setting, the Common Enemy Rule should not apply. *Rasmus;Chamberlain*. You must examine the facts of your case to determine if the rule may provide a defense to your claim.

When dealing with water runoff cases, it is always wise and prudent to keep the obscure Common Enemy Rule in mind.

Are you, or your firm, utilizing our Business Partners? Would you like to let other western PA attorneys know how they've helped you?

Please share your experiences with us at admin@wptla.org.

Your quotes may be used in a future edition of this publication, or on our website at www.wptla.org.

OIL AND GAS LEASING AND RELATED ISSUES IN WESTERN PENNSYLVANIA

By: David C. Zimmaro, Esq.

Over the past five (5) years, a significant part of my practice has been representing landowners throughout Western Pennsylvania regarding oil and gas leasing issues. I would imagine many of our members, particularly those practicing outside of Allegheny County, have received calls from property owners with questions related to gas leasing and drilling. Hopefully, you find the following helpful should you have a client in need of counsel in this area.

First of all, no landowner, large or small, residential, farm, or commercial should sign any lease or other document presented to them by a gas company or affiliated entity without advice of knowledgeable counsel. Examples of other documents are: extensions or amendments to existing leases, consent to perform seismic or other tests on the property, or right of way/easements related to oil and gas development or transportation, etc. Please know that many landowners regret signing leases or related documents because they did not know what they were signing and the real value of what they were giving up.

There is much more to a gas lease than how much a landowner is paid, which often becomes the primary focus of the landowner, causing other issues to be overlooked. Even lease language related to money paid by royalties is sometimes not carefully analyzed. Royalties paid from production to a Western Pennsylvania landowner will generally vary from 12½% (the state statutory minimum) to 18% in some of the more desirable areas. This percentage is typically negotiable. While the percentage is certainly important, the amount of deductions allowed by the lease before the royalty is calculated can be just as important. While production costs (costs of drilling) are not typically shared by the landowner, costs related to post production such as treating, marketing, processing and transporting the gas can be an issue. Today, many leases contain proposed language providing the landowner a net royalty, which is the amount calculated after deduction for the above costs. Counsel for the landowner may be able to eliminate some or all of these deductions. This allows for more of a gross royalty. The consequences, depending on the number of acres, can be very significant over the span of 20-30 years.

Under Pennsylvania law, unless restricted by the lease, the lessee of subsurface rights has equal to or, in some cases even superior rights to the surface owner to use the surface of the property to develop the oil and gas.

Another very important issue is what surface operations are allowed. Often, landowners do not realize the extent of surface rights they have given up under the terms of the lease. Many standard leases allow for gas storage, fracking/retention ponds, compressor stations, roads, easements for transmission lines and other very significant surface operations. These activities may not only have a significant impact on the use and enjoyment of the property, but also affect its value and marketability. Under Pennsylvania law, unless restricted by the lease, the lessee of subsurface rights has equal to or, in some cases even superior rights to the surface owner to use the surface of the property to develop the oil and gas. Therefore, language limiting or restricting certain surface operations is crucial. I would not recommend a small or even midsize landowner, particularly if they live on the property, give up surface rights. Because landowners are pooled together into what is called a "Unit" consisting of between 600 to 1,000 acres, they often can lease their oil and gas and receive royalties from production without giving up surface rights. If surface operations are granted, the lease should contain language providing additional compensation to the landowner if ongoing operations are conducted, such as a road or a well site.

Another important issue relates to the ownership of the oil and gas rights. The landowner should never "warranty title" of their gas rights and the lease should clearly state, "No Warranty of Title." It is the lessee that does the title search for the gas rights and makes the decision to pay the landowner for these rights. Therefore, in no circumstance should a landowner warranty good title. To do so can subject them to liability in the future if an issue arises related to ownership.

There has, and will continue to be, accidents and environmental problems stemming from drilling and resulting lawsuits. Therefore, there needs to be strong indemnification language in the lease protecting the landowner. I have seen leases that actually contain language whereby the landowner is indemnifying the lessee related to drilling operations. Obviously, this is absurd and needs to be amended. There needs to be clear, unambiguous and strong language completely indemnifying the landowner for any and all claims related to drilling and related operations, including paying any and all costs of defense should they be named in an action.

Language concerning "commencement of operations," related to when the lease expires also needs to be closely analyzed. The initial term of a lease is typically five (5) years for which the landowner receives a bonus payment (sort of like an option to drill). A lease will typically state it ex-

Continued on Page 9

OIL AND GAS LEASING … *(Continued from Page 8)*

pires in five (5) years "the initial term" unless there is "commencement of operations." Gas companies attempt to put very loose language in a lease allowing them to "hold the property by production" past the initial agreed upon term without actually drilling a well or paying royalties. They do this with proposed language in the lease defining "commencement of operations" as things such as merely obtaining a permit to drill or conducting very limited activity in the pursuit of oil and gas production. In other words, walking onto property in the Unit and putting a stake in the ground may be deemed "commencing operations." This language needs to be amended so that if there is not deep well horizontal drilling within the Unit within the initial term, the lease expires and the gas rights revert back to the landowner. This will allow a landowner to potentially negotiate a new lease if desired and obtain additional bonus money.

Depending on the landowner's situation, some of the other issues that may need to be addressed include: depth severance provisions (limitations on what depths of oil and gas is being leased); language related to removal of timber or similar issues related to crops; use of water; pugh and related clauses; limitation on unit size; extended setbacks of surface operations from particular structures on the property; right to audit; and shut-in provisions.

The above are some of the many issues that should be considered and addressed in an oil and gas lease. Every lease needs to be closely reviewed and amended based on the particulars of the property.

Representing landowners does not end with reviewing and negotiating leases. I have been involved with many of the numerous issues being litigated throughout Pennsylvania regarding the validity of existing leases. For example, there are a number of Pennsylvania cases in which landowners have attempted to void leases based on fraud in the inducement during the leasing process. The Parole Evidence Rule will generally protect the lessee from being bound by any oral representations made outside of the language in the lease. However, if there is fraud during the lease signing process, the entire lease can be declared void. Like any fraud case, in Pennsylvania, to void the gas lease, the burden is on the landowner to prove intentional misrepresentation or reckless indifference of a material fact on which a landowner justifiably relied in making the decision to sign a lease. The most common allegations in these cases are that the land agent told the landowner the bonus amount offered per acre was the "most they would ever receive" and if they did not sign the lease, the gas company would drill near their property and "get their gas anyway." These can be tough cases and for different reasons many of these cases have been dismissed at the Preliminary Objection or Summary Judgment stage. See, Standefer v. T.S. Dudley Land Co., 433 Fed. Appx. 85 (3rd Cir. 2011); Harrison v. Cabot Oil & Gas Corp., 887 F.Supp. 2d 588 (M.D.Pa. 2012); Julia v. Elexco Land Serv., U.S. Dist. WL10904245 (M.D.Pa. 2010). A few have survived, see, Kropa v. Cabot Oil & Gas Corp., 716 F. Supp. 2d 375 (M.D.Pa. 2010); Price v. Elexco Land Serv., U.S. Dist. WL2045135 (M.D.Pa. 2009); and Stone v. Elexco Land Serv., U.S. Dist. WL1515251 (M.D.Pa. 2009).

> ***T**here needs to be clear, unambiguous and strong language completely indemnifying the landowner for any and all claims related to drilling and related operations, including paying any and all costs of defense should they be named in an action.*

There are other scenarios in which an existing lease may be deemed invalid. For example, I have been able to compel the release of leases by filing actions regarding leases that were not signed by all property owners, not properly filed, and other similar circumstances. If such a lease is one where the landowner only received $25.00 an acre and a 12.5% royalty and upon its release, is now able to obtain $2,500.00 per acre and a 17% royalty, it is a big win. Also, the issue of whether a lease has expired related to whether there was "commencement of operations" (discussed above) has been and will likely continue to be the subject of ongoing litigation. See, Burke v. Gapco Energy, LLC, 2012 WL 1038849 and Goodwill Hunting Club v. Range Resources 2012 WL 722614.

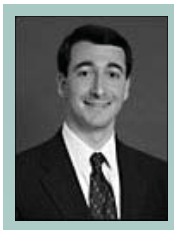
Another issue is, when does a lease became a binding contract? Today, the standard gas lease is drafted in such a way by the lessee, that when it is signed by the lessor (landowner), it can be construed as an offer back to the lessee that they can accept or reject. Leasing entities do this for various reasons, all advantageous to them. Because the lease is presented like an offer, landowners often assume that when they sign it, a contract is formed and they are entitled to the bonus money and other benefits. In many circumstances, this is not the case. This issue has been the crux of several recent lawsuits, such as Snyder v. Rex Energy, et al., a recent class-action filed in Westmoreland County. In Snyder, hundreds of landowners signed identical leases presented to them by agents for Rex Energy. Rex Energy, even though they presented the lease to the landowners, subsequently decided to "not accept" the leases and pay the bonus money. All landowners similarly situated sued to enforce the lease and compel payment. There were some unique circumstances and language in the lease and related documents advantageous to the plaintiffs' position that *Continued on Page 10*

OIL AND GAS LEASING … *(Continued from Page 9)*

a contract was formed when they signed and returned the documents. Defendant's preliminary objections claiming that the lease signed by the landowners was merely an offer that had not been accepted were denied by Judge Caruso. Following preliminary objections, a Fourteen Million Dollar ($14,000,000.00) settlement was reached on behalf of all landowners. Other cases dealing with this issue have not been so favorable to the landowners. In Hollingsworth v. Range Resources, WL3601586 (M.D. Pa. 2009) and Lyco Better Homes, Inc. v. Range Resources, U.S. Dist. (M.D. Pa. 2009), defendant's preliminary objections, were granted finding that a lease presented to and signed by the landowners was merely an offer to the lessee which could be accepted or rejected. The language in those leases is much more similar to what you see today in a standard lease.

The above are just some of the issues prompting litigation related to oil and gas leasing. Other matters in which I have been involved and you may see include environmental tort claims, issues regarding bonus and royalty payments, disputes between landowners over gas rights, and damage to property caused by drilling operations.

Hopefully, this gives you a broad oversight of some of the issues related to oil and gas leasing in Western Pennsylvania. Just like with our personal injury clients, it is often the little guy versus the big guy and these landowners who are dealing with billion dollar energy companies need experienced and aggressive representation. Feel free to contact me with any questions related to any such matter.



COMMUNITY SERVICE

By: Gregory R. Unatin, Esq.

On Saturday, May 11, 2013, Chad Bowers, James Tallman, Greg Unatin, Sydne Unatin, Laurie Lacher, Luke Lacher, and Nick Hutchison took WPTLA to the streets of Pittsburgh for a few hours of rugged volunteer work. The crew joined with several other young volunteers to keep Pittsburgh looking beautiful. The task: clean beneath, between, and behind city trash cans and newspaper boxes. First, we donned free yellow T-Shirts and followed our leader, Barrie, of the Pittsburgh Downtown Partnership, to an alley where out of the public's eye we gathered rags, brooms, and other tools to complete the transformation into super cleaners. After mission briefing, we moved up and down the cross roads between Penn Avenue and Ft. Duquesne Boulevard. The yellow-shirted volunteers swarmed every trash bin and set of newspaper boxes in sight. Some of us relocated rotten apple cores to their proper home, while others dislodged gum stuck to trash bins since the days of the original doublemint twins. Chad Bowers held the great power of an Xacto knife with the great responsibility of removing stickers from lampposts and street signs. Like all winning teams, everybody contributed to the task at hand.

Our group was so efficient, we stopped for (*I didn't treat – it was on WPTLA)* a coffee break at Starbucks. But as Barrie made clear, it didn't matter what we did or when we decided to call it quits. Pittsburgh Downtown Partnership was genuinely grateful to each of us for simply showing up. Of course, we moved our way back up Liberty Avenue to finish what we started. At the end of the day, the city sparkled with a series of trash containers not even a litter bug could resist.

Pictured above, from L to R: Board of Governors member Greg Unatin and his wife Sydne; Board of Governors member James Tallman; Luke Lacher; Nick Hutchison; President Chad Bowers; James Tallman, and Sydne and Greg Unatin cleaning a trash receptacle; Chad Bowers removing stickers from a street sign pole.

BY THE RULES

By: Mark E. Milsop, Esq

APPELLATE RULES CHANGES

The Rules of Appellate Procedure have recently been amended. These amendments must be noted by anyone filing a brief. The most significant change is that briefs must now be prepared using no smaller than a 14 point font in the text and a 12 point font in the footnotes. (Rule 124(a)(4).) The second significant change involves the length of the briefs. By amendment to Rule 2135 the maximum length of a principal brief has been changed from 70 pages to 14,000 words. Moreover, where the Brief exceeds 30 pages in length, a certification of compliance is required by Rule 2135(d). Slightly greater length is permitted in cases involving cross appeals. A reply brief is limited to 7,000 words. Similar changes have been made for briefs on remand and Applications for Reargument.

Page limitations for the Statement of the Questions Involved and the Summary of Argument have been eliminated. The changes have already become effective. The full text of the Amendments can be found at Pa Bulletin 2007 (April 13, 2013).

YOU ARE WHAT YOU PLEAD

As trial lawyers, we work hard to maintain a good image despite public perception fed by interests that want to destroy the civil justice under the guise of tort reform. As an organization we care for the common person, the poor and the vulnerable. In addition to representing the interests of these constituencies in the courthouse, we offer an essay/ scholarship contest, volunteer with Habitiat for Humanity, hold a 5K, etc. As individuals we volunteer in our communities, with non-profits, and our churches. Unfortunately, it is also tempting from time to time to do something which will fuel negative perceptions of trial lawyers. One of these is the way we handle our pleadings.

A recent example of how a pleading can undermine our image with the public comes from a high profile case in which the complaint recently circulated on the internet. The gist of the case is that a public figure died from injuries caused by a fall while attending an engagement party in a private residence. The party was catered. Apparently, an employee of the caterer muscled past the decedent who was standing near an open stair case. As a result, the decedent fell down the steps. The decedent was transported to a hospital where he died of injuries including head trauma. The complaint clearly sets forth valid claims of negligence based upon the way the party was planned and based upon the actions of the employee who caused the decedent to fall. Certainly, filing the Complaint was appropriate. However, the Complaint also contained a series of allegations that were not needed to set forth a cause of action. In my opinion, these allegations were petty and vindictive. These allegations include:

- While the decedent was being urgently evaluated, the party continued throughout the evening and into the middle of the night and party goers were told that the injury was not serious (repeated three times)
- At no time did the host go to the hospital to check on the decedent (repeated twice)
- That some partygoers were not informed that a fellow guest had fallen.
- That the EMS team was led into a side entrance
- That the hostesses' mother made several phone calls to the widow after the fact.

Even with an emotional distress claim, these issues are not elements of a cause of action. The only thing that these allegations do is interject into the action an element of personal ill will. This plays right into the image that lawyers are mean people while doing nothing to advance the adjudication on its merits.

Of course, there are also other ways that our filings reflect on our profession. A Complaint that rambles, does not clearly plead the elements of the cause of action or which is otherwise poorly thought out can also harm the image of the profession.

The Editor and staff of The Advocate would like to acknowledge and thank **Past President Bernard C. Caputo**, for his efforts over the past 3 years in preparing and editing this publication. His tireless efforts and tenacity have been greatly appreciated.

And while you're thinking about our publication, please continue to send in items of news for our "… through the Grapevine" section. We need to hear from you to keep it full of current tidbits. Share your items via email to admin@wptla.org.

HOT OFF THE WIRE!

By: Chris Hildebrandt, Esq.

UNITED STATES SUPREME COURT

Where an ERISA plan's language is specific and clear, the plan may recover the full amount of its lien, even if it puts the plan beneficiary in a worse position for having pursued a third party. If the plan's language is not clear, however, regarding the allocation of attorney fees, then the common fund doctrine is appropriate for determining the fees to be paid by the plan.

U.S. Airways v. McCutchen, 133 S. Ct. 1537 (2013)

In a 5-4 decision, the United States Supreme Court held that in a §502(a)(3) action based on an equitable lien by agreement, the ERISA plan's terms govern the plan's recovery from the plan beneficiary. The Court held that equitable doctrines, such as unjust enrichment, double-recovery or common-fund cannot override the plan terms, even if the result of the terms will leave the plan beneficiary worse off for having pursed a third party.

The underlying facts of this case are well known: McCutchen was in a motor vehicle accident. U.S. Airways' health plan paid over $66,000 in medical expenses. McCutchen recovered $110,000, which was the limit of insurance coverage available to him ($10,000 from the third party tortfeasor and a $100,000 UIM policy), even though the value of his injuries and damages was likely in excess of $1 million. The health plan demanded that McCutchen pay back the entire lien amount. McCutchen's attorneys attempted to reduce the lien by deducting attorneys' fees and a proportionate share of costs. U.S. Airways rejected this settlement offer and filed suit.

The District Court held that U.S. Airways was entitled to recover the full amount paid by the plan. On appeal, the Third Circuit vacated the District Court's ruling, holding that full reimbursement would unjustly enrich U.S. Airways and that ERISA is subject to equitable limitations, i.e., equitable defenses trump the express terms of the plan.

The Supreme Court rejected both the District Court and the Third Circuit opinions. The Supreme Court premised its decision on simple contractual theories, stating that "[t]he agreement itself becomes the measure of the parties' equities; so if a contract abrogates the common-fund doctrine, the insurer is not unjustly enriched by claiming the benefit of its bargain." The Supreme Court went so far as to note that as long as the plan language is specific and clear, an ERISA insurer "can free ride on the beneficiary's efforts, and the beneficiary . . . may be made worse off for having pursued a third party."

The Supreme Court, however, recognized that the plan language may leave "gaps," which can be "filled in" via the common-fund doctrine. In this case, "[t]he plan is silent on the allocation of attorney's fees, and in those circumstances, the common-fund doctrine provides the appropriate default. In other words, if US Airways wished to depart from the well-established common-fund rule, it had to draft its contract to say so – and here it did not." The Court then analyzed both parties' apportionment formula. US Airways argued it had first claim on the entire recovery. McCutchen argued that US Airways' claim only attaches to the share of recovery for medical expenses. "The plan's terms fail to select between these two alternatives: whether the recovery to which US Airways has first claim is every cent the third party paid or, instead, the money the beneficiary took away." The Court reasoned that "the plan provision here leaves space for the common-fund rule to operate. That equitable doctrine . . . addresses not how to allocate a third-party recovery, but instead how to pay for the costs of obtaining it." The Court notes that the common-fund rule "provides the best indication of the parties' intent." Thus, in the absence of specific plan language, the common-fund rule holds that the beneficiary is entitled to a "reasonable attorney's fee from the fund as a whole."

SUPREME COURT OF PENNSYLVANIA

An employee who signs a "third-party release" contained in a "Workers' Compensation Disclaimer" in consideration for employment and receipt of compensation benefits is barred from suing a customer of the employer who may be liable for the employee's injuries and damages.

Bowman v. Sunoco, 27 EAP 2011 (Pa. April 25, 2013).

Plaintiff was an employee of Allied Barton. She was injured when she slipped and fell on ice while providing security at a refinery. She filed a workers' compensation claim and received benefits. She then filed a negligence claim against Sunoco. Discovery revealed that when she was hired by Allied Barton she signed the following disclaimer:

I understand that state Workers'

Continued on Page 13

HOT OFF THE WIRE … *(Continued from Page 12)*

Compensation statutes cover work related injuries that may be sustained by me. If I am injured on the job, I understand that I am required to notify my manager immediately. The manager will inform me of my state's Workers' Compensation law as it pertains to seeking medical treatment. This is to assure that reasonable medical treatment for an injury will be paid for by Allied Workers' Compensation insurance.

As a result, and in consideration of Allied Security offering me employment, I hereby waive and forever release any and all rights I may have to:

-make a claim, or
-commence a lawsuit, or
-recover damages or losses

from or against any customer (and the employees of any customer) of Allied Security to which I may be assigned, arising from or related to injuries which are covered under the Workers' Compensation statutes.

Sunoco moved for and was granted judgment on the pleadings. Judgment was affirmed by the Pennsylvania Supreme Court in a 5-1 opinion (Eakin, Castille, Saylor, Todd & McCaffery for majority; Saylor and McCaffery concurring; Baer dissenting). The Supreme Court reasoned that "Appellant was not forced to sign the release, and the release did not in any way prevent her from receiving compensation for her work-related injuries as provided by the Act." Moreover, "[t]he Act ensures employers will compensate employees for work-related injuries and that employers cannot contract away liability. The disclaimer was a guarantee to Allied's customers that they would not be responsible for injuries sustained by Allied's employees; it served as a benefit to Allied's customers and in no way affected appellant's right to recover from her employer for work-related injuries as provided by § 204(a) of the Act. While appellant may suffer additional injuries for which others may be liable, this release relates only to recovery for injuries covered by the Act, to which appellant bargained away her rights."

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SUPERIOR COURT OF PENNSYLVANIA

The four-year statute of limitations on an underinsured motorist claim begins to run when the insured settles with or secures a judgment against the underinsured owner or operator.

Hopkins v. Erie Insurance Company, 2013 PA Super 90 (April 19, 2013)

In a 3-0 decision the Superior Court held that "the four-year statute of limitations on underinsured motorist claims begins to run when the insured settles with, or secures a judgment against, the underinsured owner or operator." In so holding, the Superior Court explicitly followed State Farm v. Rosenthal, 484 F.3d 251 (3rd Cir. 2007). Expanding upon Boyle v. State Farm, 456 A.2d 156 (Pa. Super. Ct. 1983), the Superior Court reasoned that "the third event vesting the right to payment under an underinsured motorist claim would be when the insured knows of the underinsured status of the other owner or operator. Such knowledge would be gleaned when the claim against that owner or operator results in a settlement or judgment which is less than the insured's loss from the accident."

Bumbarger v. Peerless Indemnity Insurance Company, 2013 PA Super 47 (March 8, 2013)

Plaintiff was a passenger in her own vehicle which was struck by a vehicle owned and operated by Michael Jury. Mr. Jury was uninsured. At the time Plaintiff had purchased her vehicle she owned two vehicles but elected to waive stacked UM coverage. Between that time and the time of the collision with Mr. Jury, Plaintiff added two more vehicles to her insurance policy (one by endorsement). Plaintiff' position is that stacking across the four vehicles was appropriate because the insurer failed to obtain new stacking waivers pursuant to Sackett I, Sackett II and Sackett III. Cross-motions for summary judgment were filed and granted in favor of Plaintiff and against Peerless.

The Superior Court affirmed the trial court's decision. Looking to the policy language, the Superior Court noted that the Plaintiff was required to "ask" the insurer to insure the newly acquired vehicle, as opposed to the circumstance where a newly acquired vehicle simply replaces another; under the later scenario, "coverage is provided . . . without having to ask to insure it." According to the Superior Court, because the plaintiff had to "ask" Peerless to insure the newly acquired vehicles, given the contingent nature of Peerless' review of the plaintiff's request, the factual scenario was "reflective of a purchase of new insurance for purposes of section 1738," thus Peerless was required to seek a new waiver of stacking.

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President's Club and Governor's Club Members

The following list reflects WPTLA members who have joined the President's Club and Governor's Club. President's Club members pay dues of $250.00 and Governor's Club members pay dues of $185.00. These additional monies help the Association in serving their membership and their clients. Thank you!

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THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 26
2013-2014

NUMBER	ARTICLE DEADLINE	PUBLICATION DATE
Volume 26, No. 1	September 13, 2013	October 14, 2013
Volume 26, No. 2	December 6, 2012	December 30, 2013
Volume 26, No. 3	February 28, 2014	March 31, 2014
Volume 26, No. 4	June 6, 2014	June 27, 2014

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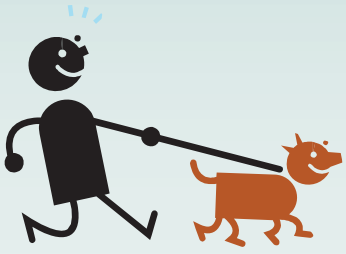
PITTSBURGH STEELWHEELERS

The 13th Annual President's Challenge 5K Run/Walk/Wheel is scheduled for Saturday, September 21, 2013 along the North Shore's scenic Riverwalk. Registration begins at 8:00 a.m. with the race starting at 9:00 a.m. Please plan on attending this event and get in some exercise for the entire family.

Sponsorship donations are due by September 11, 2013 in order for your name to appear on the race t-shirt*. Sponsorship levels are:$1,000.00, $500.00, $250.00, and $100.00.

Thank you for your support and generosity!



**Sponsorship at $1,000 and $500 levels only are printed on the official race t-shirts*

COMP CORNER

By: Thomas C. Baumann, Esq.

Draft legislation is circulating around the capital which would make significant changes to the Worker's Compensation act. The proposed changes are decidedly unfriendly to injured workers.

Highlights of the changes are as follows:

1. Elimination of the mail-order pharmacies that have done so much to make the lives of our clients easier. The proposed changes would allow an employer to require the injured worker to obtain prescriptions from a source designated by the employer. This would include medications, durable medical equipment and supplies for the duration of treatment for the work injury.

2. Limitation of prescription of opiate medications to comprehensive pain management programs selected by the Department of Labor and Industry.

3. The interjection of so-called" evidence-based medical treatment guidelines" into the determination of what is a reasonable and necessary treatment.

4. The promulgation of medical treatment guidelines to be developed by the Department of Labor and industry.

5. The gutting of utilization review through the use of the medical treatment guidelines and elimination of review by a workers compensation judge. The proposed legislation provides for an initial review by department employed nurses. An appeal from the nurses review goes to a medical review panel consisting of the department's medical director, a workers compensation judge and a provider of the same specialty as the treater under review. Medical review panel determinations may only be appealed to the WCAB, with a very limited scope of review.

6. Significantly increased expenses for a claimant to pursue utilization review. Claimants would have to pay a filing fee both for initial review by nursing staff employed by the department and any appeal to the medical review panel. Claimants would also have to file all medical records that were requested by the department within the time requested.

As all the readers can see, these would be changes designed to eliminate any real opportunity for a fair utilization review. The changes would create a nightmare for injured workers and treating doctors. All readers should discuss these changes with treating doctors whenever you have a chance. You should all raise these issues with physicians when you take their depositions in your cases. If you have a group of physicians whom you know well you should write to them about these changes and alert them. These efforts should be expanded to include physical therapists, chiropractors, primary care physicians and anyone else involved in the system.

If you are not a member of Lawpac, please consider joining. You are the last line of defense for working people in this state. Whether you are trying cases or attempting to affect legislation in Harrisburg, your clients are relying on you. We are stronger together and the more money Lawpac has the more strength we have.

THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

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Has The Advocate ever helped you answer a practice problem, or provided you with new information regarding a particular issue? Please consider helping WPTLA make The Advocate the best resource it can be for our members. If you encounter a unique legal issue, or one that could affect the practice of our members, please consider sharing your experience and knowledge with other WPTLA members by contributing an article to The Advocate.

Article submission deadlines and publication dates for Volume 26 can be found on page 16.

Any questions regarding article topics, criteria, and length can be directed to the Editor, Erin K. Rudert, Esq., erudert@edgarsnyder.com.

Children's Hospital of Pittsburgh
FOUNDATION

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May 20, 2013

Western Pennsylvania Trial Lawyers Association
909 Mount Royal Boulevard
Suite 102
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Dear Friends at the Western Pennsylvania Trial Lawyers Association:

Thank you for your contribution of $500.00 to Children's Hospital of Pittsburgh Foundation given in honor of Jon R. Perry. We have notified Mr. and Mrs. Jon R. Perry of your gift. As requested, we have directed your contribution to the Pennies From Heaven Fund.

Your generous gift is a heartfelt way to honor a loved one and a meaningful tribute to the children and families we serve.

Through continual support from our donors, we are able to buy specialized equipment, provide new life-saving therapies, meet the psychosocial needs of patients and their families, fund research to help prevent, treat, and cure childhood illness and disease, and provide free medical care to every child who needs it.

We are grateful to donors like you, who champion our mission of transforming young lives through unparalleled care and deep compassion. If you would like to learn more about how you can get involved with Children's Hospital of Pittsburgh Foundation, please visit www.givetochildrens.org.

Sincerely,

Laura Bea Swisher

Laura B. Swisher
Director, Annual Giving

Have you visited our newly re-designed website at *www.wptla.org* ?

Save the date of upcoming events on your calendar by checking out WPTLA's Calendar of Events . And while you're at it, register and pay your registration online. It's easy! … Look for links to medical and legal research, as well as the state legislature … Click on the county map for court information for the western district of PA. Have an idea for the website? Contact our Executive Director at **admin@wptla.org** or Website Chair Larry Kelly at **lkelly@lgkg.com**.

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...Through the Grapevine

Our condolences to the friends and co-workers of **The Honorable Gary L. Lancaster, of the U.S. District Court**, who passed away in April.

Congratulations to our **2007/2008 Comeback Award Winner Karrie Lee Coyer**, and her husband Len. Karrie and Len welcomed their daughter, Carolynn Elaine, on April 3. Mom and daughter are doing well.

Congratulations to **Past President Henry H. Wallace**, on being named to the Multi-Million Dollar Advocates Forum. Well done, Hank! Hank missed the recent Past President's Dinner because of hip surgery, but is "alive and well and actively engaged in the practice of law."

Past President and President's Club Member Bernard C. Caputo has moved his office to 801 Vinial St, 3rd Fl, Pittsburgh, PA 15212. Phone calls can be placed to 412-231-7529.

President's Club Member Ellen M. Doyle's law firm has changed its name to Feinstein Doyle Payne & Kravec, LLC. While the address and phone remain the same, her email has changed to edoyle@fdpklaw.com.

Congratulations to **President's Club Member Tim Conboy**, on being elected to the ACBA Board of Governors for a three year term.

Member Herbert B. Cohen has moved his firm, Colarusso and Cohen, LLC, to 429 Blvd of the Allies, Ste 300, Pittsburgh, PA 15219. His phone, fax, and email will remain the same.

Kudos to **Past President and President's Club Member John P. Gismondi**, on receiving a "Lifetime Achievement Award" from the *Legal Intelligencer*. John was selected among 27 people who had the most influence on the legal profession in Pennsylvania over the past 20 years, and is the only attorney from the Pittsburgh area among the awardees. Great job, John!

Members **George R. Farneth II** and **Joseph W. Selep**, of Zimmer Kunz, have moved their office to 310 Grant, Ste 3000, Pittsburgh, PA 15219 P: 412-281-8000

Member **Sheila M. Burke** has joined Burke Cromer Cremonese, LLC. She can be reached at 517 Court Pl, Pittsburgh, PA 15219 P: 412-904-3360 F: 412-904-3799 Email: sburke@bccattorneys.com Website: www.bccattorneys.com