THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

Volume 24, No. 1
Fall 2011

5K WRAP-UP

By: Christopher M. Miller, Esq.

The 11th Annual President's Challenge 5K Run/Walk/Wheel race was held on Saturday, September 17, 2011. Finally, we had excellent weather for a run! Approximately 175 participants took part in the race, enjoying a morning of exercise and giving back to the community.

Although exact numbers are still being tallied, I expect our donation to the Pittsburgh Steelwheelers to be in excess of $30,000.00 again this year. After this year's event, the total amount raised and donated over the past 11 years should exceed $250,000.00, which is something that we should all be proud to have accomplished.

Thank you to all of our members who have donated so generously and given their time to this wonderful cause. I would also like to thank all of our members who actually participated in this year's event and who worked so hard to make it another success. And last but not least, thanks to all of our vendors who donated so generously once again this year. As I have stated before, I encourage our members to try to use the services of vendors who support our causes and to look to other vendors for the services which they offer who decline to contribute and support our causes. There is no reason to contribute to the financial gain of those companies and vendors who willingly choose not to support our efforts. Please feel free to contact me should you wish to see a list of vendors who supported this year's event.

And finally, through the efforts of former President Steve Moschetta, it appears that our PR campaign is well underway! This year's event was covered by the Pittsburgh Post Gazette and the Tribune Review. A photo and a small paragraph detailing the event were featured in both newspapers. Additionally, WPXI and WTAE both had cameramen present, and it is my understanding that the race was mentioned on the news for both channels. Many thanks to Jampole for their efforts in getting WPTLA recognized by local media.

Continued on Page 3

UPCOMING EVENTS FOR WPTLA

A **1-credit CLE program** is being planned in **Beaver County** on **December 20, 2011**. The topic will be Koken. More details will be available soon.

Saturday, December 10, 2011 is the day we will be assisting the **Beaver County Habitat for Humanity**. Call our Executive Director to be added to the list of volunteers.

A **Pittsburgh dinner meeting** is scheduled for **Wednesday, January 18, 2012** at the LeMont Restaurant on Mt. Washington.

A **3-credit CLE program** will be held in **Pittsburgh** on **February 13, 2012,** focusing on electronic medical records. Past President Jerry Meyers will be the speaker.

The **Membership Dinner Meeting** is being held on **Thursday, March 22, 2012** at **Willow Restaurant** in Pittsburgh.

President
Joshua P. Geist

The Advocate
Vol. 24, No. 1, Fall 2011
Published quarterly by:
WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

President
Joshua P. Geist

Immed. Past President
Stephen P. Moschetta

President-Elect
Paul A. Lagnese

Vice President
Charles F. Bowers III

Secretary
Christopher M. Miller

Treasurer
Lawrence M. Kelly

Editor
Bernard C. Caputo

Advocate Committee Chair
Christopher M. Miller

Executive Director
Laurie J. Lacher

Association Office:
909 Mount Royal Boulevard, Suite 102
Pittsburgh, PA 15223-1030
Tel: 412-487-7644
Fax: 412-487-7645
email: admin@wptla.org

A Message from the President …

By: Joshua P. Geist, Esq.

Help Those Who Help Us

As we begin another year of exciting events, I am reminded of the many supporters of our organization. Throughout the next year, we should all remember those who help us help our clients.

We just finished the 11th President's Challenge Run/Walk/Wheel to benefit the Pittsburgh Steelwheelers, a group of incredible athletes. When I proudly put on my 5K T-shirt, I am reminded of the overwhelming support of our members and their firms. I am also reminded of the many businesses that annually contribute to the President's Challenge.

I am fortunate to serve during a membership directory year. Apparently, whenever we publish our membership directory, our membership grows! The cost of the directory is usually offset by advertisements from businesses that are useful to our members.

We have another full slate of dinner meetings this year. The past few years many of our dinner meetings have been sponsored by companies that help us help our clients. I anticipate another great year of dinner sponsors.

The Comeback Award Dinner is scheduled for Tuesday, November 15, 2011. We will again honor an individual who has faced adversity and made the most of his life. My goal is to have more sponsors than ever before!

Our Judiciary Dinner will be held at Heinz Field on May 4, 2012. This is yet another opportunity where our sponsors shine.

Finally, the Ethics Seminar and Golf Outing will be held on May 25, 2012 at Highland Country Club. Each year, we are overwhelmed by the support from companies that are committed to our organization.

If you have a choice between a company that supports our organization and one that does not, your choice should be simple. So, throughout the next year, please remember to help those who help us.

Pictured above, from L to R: Cindy Miklos, of FindLaw; Past President Veronica Richards; member John Bacharach; Board of Governors Member Chris Hildebrandt.

5K WRAP-UP … *(Continued from Page 1)*

On behalf of WPTLA and the 5K committee members, thanks again to all of you who donated so generously and participated in this year's race. I can tell you firsthand that our efforts are truly appreciated by the members of the Pittsburgh Steelwheelers. I look forward to seeing all of you again at the 12th Annual President's Challenge next year.

Board of Governors Member Dave Zimmaro posts a winning time, above, while Past President Bill Goodrich and Josh Geist talk shop, below. Board Governors Member Drew Leger is fast approaching.

President Josh Geist speaks to the press, above right. Immediate Past President Steve Moschetta brought the whole family, above, including the dog. Below, President-Elect Paul Lagnese enjoys the time with Board of Governors Member Steve Barth.

Below, Past President Mark Homyak seems to be having a great time alongside race participant Juan Sotolongo.

In This Issue

Features

News

Columns

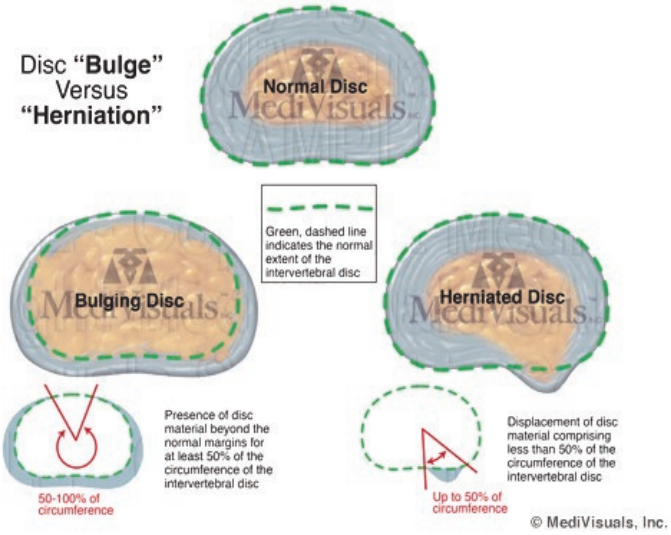
HOW A DISC "BULGE" IS DIFFERENT FROM A “HERNIATION" (Intervertebral Disc Pathology, Part 1 of 3)

By: Robert L. Shepherd M.S.

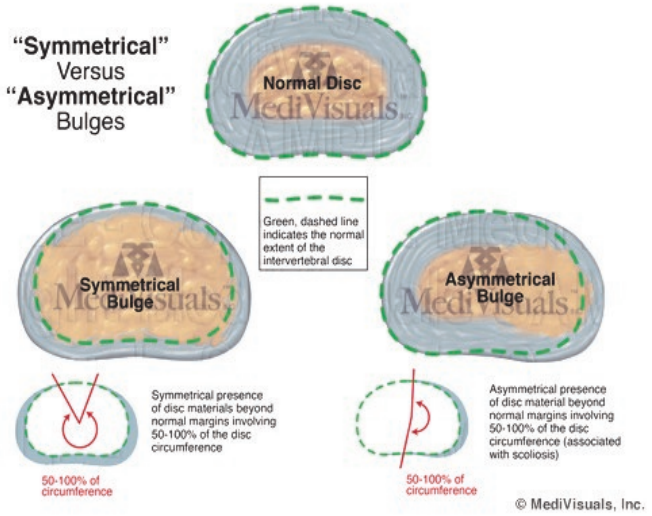
It is difficult to appreciate the subtle differences between the various types or severities of intervertebral disc injuries that result in them being defined as bulges, herniations, protrusions, extrusions, etc. The way disc pathology is defined may even vary from physician to physician—perhaps primarily due to the fact that, prior to 1995, many physicians' professional societies used different criteria to define the various classifications of disc injuries. In 1995, a joint undertaking by representatives from the North American Spine Society, the American Society of Spine Radiology, and the American Society of Neuroradiology worked together to develop a more widely accepted and used system to define disc pathology as published in "Nomenclature and Classification of Lumbar Disc Pathology".

This will be the first of three blogs dedicated to helping explain the definitions of disc pathology as recommended by the 1995 combined task force. This blog will focus on the difference between "bulges" and "herniations". Topics to be discussed in future articles are differences between a "Herniated Disc" and an "Annular Tear" and the difference between "Protrusions" and "Extrusions".

In the image below, a normal disc is shown in comparison to the two types of intervertebral disc injuries covered in this article: "Bulges" and "Herniations". Disc "Bulges", in general, are defined by the presence of disc material beyond the normal margins around at least 50% of the disc's circumference. A "Herniation" is defined as displacement of disc material beyond the limits of the intervertebral disc space that extends less than 50% around the circumfrance of the disc. The displacement material can consist of the nucleus, the annulus, or parts of both. This is significant in personal injury litigation because the defense often places a great deal of emphasis on whether disc pathology is defined as a "bulge" or "herniation" when determining the severity of an injury. However, a "bulge" can actually impinge nerve roots or the spinal cord to a more severe degree than a "herniation".



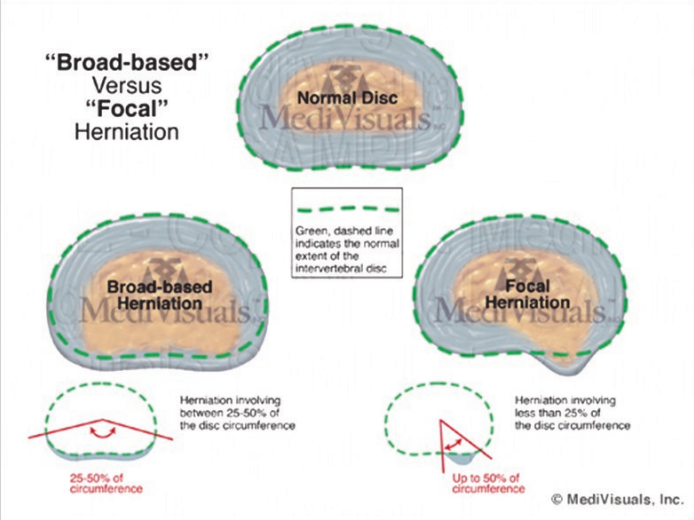
The next image compares the normal disc to two different types of disc "Bulges". A "Bulge" is defined as "Symmetrical" when the right and left sides of the herniation more or less mirror each other. A bulge is "Asymmetrical" when the bulge is more severe on one side when compared to the other.



Finally, the image on the next page shows a normal disc as compared to two types of "Herniations". A "Broad-Based" herniation is defined as disc material extending beyond its normal limits in an area between 25 and 50% of the disc's circumference. A "Focal" herniation is one involving extension of disc material beyond its normal limits in less than 25% of its circumference.

Continued on Page 5

HOW A DISC "BULGE" … *(Continued from Page 4)*



(Shepherd, Robert. "How a Disc 'Bulge' is Different from a 'Herniation.'" *MediVisuals Incorporated.* MediVisuals Incorporated. 24 Aug. 2011. Web. 26 Sept. 2011.)

THE ADVOCATE

Article Deadlines and Publication Dates

VOLUME 24
2011-2012

Number	Article Deadline	Publication Date
Vol. 24, No. 2	December 9, 2011	January 2012
Vol. 24, No. 3	March 2, 2012	April 2012
Vol. 24, No. 4	May 25, 2012	Mid-June 2012

PICTURES & PROFILES QUESTIONNAIRE

Name: Mark Milsop

Firm: Berger and Green

Law School: Duquesne

Year Graduated: 1992

Special area of practice/interest, if any: Plaintiff's trial lawyer

Most memorable court moment: During the trial of a medical malpractice case (resulting from an emergency room doctor releasing a young girl too early), the defense expert testified that there was no infection in the girl's lung when she left. I realized that he did not say that there was not an infection. I asked about the distinction, and he admitted that she had an infection, just not yet in the lung.

Most embarrassing (but printable) court moment: A juror stated during voir dire that he knew me. On further questioning the juror thought that I was my brother.

Most memorable WPTLA moment: Having my first submission to *The Advocate* published.

Happiest/Proudest moment as a lawyer: I once handled a juvenile court case in which a young girl was taken away from her mother. Seeing the girl returned to her mother was a happy moment.

Best Virtue: Hard work

Secret Vice: Following Penn State Football

People might be surprised to know that: I make up strange names when I sign a release for Atomic Wings at Quaker Steak and Lube.

Favorite movie (non-legal): Any Bogart movie

Favorite movie (legal): Tie: *To Kill a Mockingbird* and *A Man for All Seasons*

Last book read for pleasure, not as research for a brief or opening/closing: *Jesus of Nazareth: Holy Week* by Benedict XVI

My refrigerator/freezer always contains: ice cream

My favorite beverage is: Root Beer

My favorite restaurant is: The Common Plea

If I wasn't a lawyer, I'd be: Maybe a teacher – I never gave this much thought.

COMP CORNER

By: Thomas C. Baumann, Esq.

FUN AND FOLLIES WITH THE UEGF

Recently, this writer had the opportunity to once again engage in the joy of practicing against the UEGF. The claimant in this case was actually employed by an employer with significant assets. The employer had placed Workers' Compensation coverage through the state of West Virginia but failed to obtain a Pennsylvania rider, despite the fact that it employed people in Pennsylvania and maintained at least one base of operations therein. Claimant was actually placed on benefits in West Virginia but sought Pennsylvania benefits, mostly for medical reasons. The process to obtain treatment through the West Virginia system is something of a bureaucratic nightmare.

The claimant filed claims against the employer and the UEGF, following the requisite waiting period. Defendant employer hired counsel and litigation commenced against both entities. The case was bifurcated on the issue of Pennsylvania jurisdiction which was resolved in favor of the claimant via Interlocutory Order. At this point, the claimant had grown weary of the ongoing litigation and instructed counsel to see if the case could be resolved. Mediation proceeded and an agreement was reached. The UEGF contributed a minimal sum as part of the resolution. At that point, the drafts of the Compromise and Release Agreement were exchanged, and the new problems began.

UEGF, throughout the case, was in the driver's seat regarding the litigation. While the defendant employer's counsel provided excellent representation, the employer was constantly being squeezed by the UEGF to resolve the case in a manner such that the UEGF would have little or no exposure. As many readers know, the UEGF is woefully under-funded. Presumably, many more cases have come into the system than the Bureau of Workers' Compensation anticipated when crafting the assessment under the law utilized to fund the UEGF's operations. Counsel for the UEGF assiduously minimized the Fund's exposure. The UEGF continued to drive the language contained in the Compromise and Release Agreement as settlement continued apace.

The UEGF demanded language in the Compromise and Release Agreement that all claims against the Funds would be "extinguished, released, discharged with prejudice, irrespective of whether or not the payments to be made in the Compromise and Release Agreement by parties other than the Uninsured Employer's Guaranty Fund are satisfied or paid". Claimant's counsel was rather dismayed at this language and pointed out to UEGF counsel that this would prevent the claimant from pursuing the UEGF in the event defendant employer failed to pay. Claimant's counsel intimated to UEGF counsel perhaps he should place his malpractice carrier on notice if he agreed to said language. Ultimately, the parties delayed the Compromise and Release hearing several times as they worked through these issues. The UEGF ultimately removed the language once a certified check for the total amount of settlement was obtained by the defendant employer and transferred to its counsel. Upon receiving proof of the check's existence, the UEGF agreed to the removal of the offending language.

The UEGF has been a resource for many people who otherwise would not have received any Workers' Compensation benefits. However, litigating against it is often a major pain in the neck.

TROUBLING DECISION FROM COMMONWEALTH COURT

A full panel of the Commonwealth Court recently reached a decision in *Westmoreland Regional Hospital v. WCAB* (Pickford), 1188 C.D. 2009. This case involved litigation over an independent rating examination conducted by Milton Klein, D.O. At the time of the IRE, claimant's recognized work injury included cervical disc injuries, brachial plexus stretch, lumbar strain and reflex sympathetic dystrophy. Dr. Klein, after examination, rated the Claimant on chronic discogenic cervical pain, chronic discogenic lower back pain, and bilateral shoulder pain with impingement. He provided an overall impairment rating of 22%. The employer lost before the Workers' Compensation Judge and the Workers' Compensation Appeal Board but prevailed in a 4 -3 decision before Commonwealth Court, with the majority opinion written by Judge Leavitt. The Commonwealth Court ruled in favor of the employer, even though Dr. Klein testified to a different diagnosis than the recognized work-related injury.

Dr. Klein had testified that he found no objective evidence of reflex sympathetic dystrophy at the time of his evaluation. Therefore, under the mandates of the Guides to the Evaluation of Permanent Impairment, he could not consider the problem. Employee's treating physician testified that the employee had objective evidence of the diagnosis in evaluations both before and after the client examination. The majority opinion specifically found that this was appropriate. It therefore ordered a change in status in the employee's disability from total to par tial.

Continued on Page 7

COMP CORNER … (*Continued from Page 6)*

The dissenting opinion by President Judge Leadbetter and joined by Judges McGinley and Cohn Jubelirer gets to the essential problem with the majority's opinion. Judge Leadbetter points out that the majority disregards the credibility determinations made by the Workers' Compensation Judge. The Workers' Compensation Judge specifically found Dr. Klein not credible. The majority opinion of the Commonwealth Court has essentially substituted its own credibility finding for those of the Workers' Compensation Judge. The dissent correctly points out that "credibility determinations and the evaluation of evidentiary weight are within the provenance of the Workers' Compensation Judge as a fact-finder." The Court went on to say that it was within the Judges' province to assign more weight to the employee's treating physician than the rating examination physician. This writer respectfully suggests that the role of the Workers' Compensation Judge as the ultimate fact-finder is such black-letter law that to ignore it, as done here, is a position without intellectual support, foundation, or reason. This case represents a continuation of what appears to be a willingness by the Commonwealth Court to disregard credibility determinations made by the Workers' Compensation Judge that extends back at least to *Rag (Cyprus) Emerald Resources, L.P. v. WCAB* (Hopton), 912 A.2d 1278 (Pa. 2007). Many readers will recall the *Hopton* case involved an employee who was threatened with, among other things, rape on the job by a supervisor. That employee suffered emotional breakdown and disability as a result. Hopton had prevailed before the Workers' Compensation Judge and the Appeal Board, only to lose in the Commonwealth Court. The dissent in the Commonwealth Court in that case, actually joined by Judge Leavitt, the author of the majority opinion in *Pickford*, chastised the majority for ignoring the credibility determinations and Findings of Fact made by the Judge. In *Hopton*, the Supreme Court righted the wrong that was performed by the Commonwealth Court by finding that the Commonwealth Court abused its discretion by not limiting its review in the proper manner.

The Amicus Committee is presently investigating whether employee counsel will be seeking allocatur. The author hopes to have an update in the future.

QUERY: If an appellate court substitutes its Findings of Fact for those of the fact-finder, does this constitute judicial activism?

SPONSOR SPOTLIGHT

NAME: William Goodman

BUSINESS/OCCUPATION: Structured Settlement Consultant

FAMILY: Wife, Erica, and 3 children, Emily 17, Jessica 15, Isaac 12

INTERESTS: Vacationing with my family, coaching hockey, golf and skiing with my kids

PROUDEST ACCOMPLISHMENT: My 3 amazing kids

FUNNIEST/WEIRDEST THING TO HAPPEN TO YOU ON THE JOB: 20 years of traveling the country and helping families has resulted in numerous transportation mishaps and stories that will someday become a bestseller.

FAVORITE RESTAURANT: Milos in Montreal

FAVORITE MOVIE: *Caddyshack*

FAVORITE SPORTS TEAM: Penguins, Steelers, Pirates and the Hamilton Continentals

FAVORITE PLACE(S) TO VISIT: Aspen

WHAT'S ON MY CAR RADIO: WDVE, ESPN and the Bruce Springsteen channel

PEOPLE MAY BE SURPRISED TO KNOW THAT: I proposed to my best friend/wife of 20 years after only dating for 2 months.

SECRET VICE: Playing the guitar and hitting golf balls on the driving range. They are both frustrating and therapeutic.

On The Lighter Side ...

Do you have a funny or amusing story that happened to you, or someone else, during the course of your day as a trial lawyer? Is there a light-hearted anecdote from your career that we could all find enjoyable? If you'd like to share your story, please send it via email to *admin@wptla.org* for submission in a future issue of The Advocate.

HOT OFF THE WIRE!

By: Chris Hildebrandt, Esq.

SUPERIOR COURT OF PENNSYLVANIA

An insured that sustained injuries as a result of his employer striking him with a vehicle in the course of business is precluded from seeking UIM coverage because the insured is not entitled to recover damages from his employer.

Erie Ins. Exchange v. Conley, 2011 PA Super 155 (July 27, 2011)

Conley was injured while he was working for Olander Tree and Landscaping when he was stuck by a truck being operated by his employer. The plaintiff, while receiving workers' compensation benefits, made a claim for underinsured motorist ("UIM") benefits under an automobile insurance policy issued to him by Erie. Erie filed a Declaratory Judgment action seeking an order declaring that it had no duty to tender UIM benefits to Conley.

The court concluded that Erie was entitled to judgment on the pleadings. The court reasoned that in order for Conley to be eligible to receive UIM coverage under the Erie policy, the law must entitle him to recover damages for bodily injuries from the owner or operator of an underinsured motor vehicle. The court determined that because Conley was precluded from recovering damages against his employer pursuant to the Workers' Compensation Act, Erie was not required to provide him with UIM coverage.

COMMONWEALTH COURT OF PENNSYLVANIA

A bus passenger who is struck by a vehicle while crossing a road during a transfer from a bus to a trolley is not an occupant of a motor vehicle, but merely a pedestrian.

N. Morning Cloud Jones-Molina v. SEPTA, No. 1363 C.D. 2009 (Pa. Cmwlth. Ct., July 22, 2011)

This was an appeal from the Court of Common Pleas of Philadelphia County, which had ordered SEPTA to pay to the plaintiff first party medical and uninsured motorist ("UM") benefits.

The plaintiff was taking a trip which required use of both a SEPTA bus and trolley. While on the bus, she purchased a transfer ticket. She then disembarked the bus, intending to transfer to a trolley. As she was crossing the street to embark on the trolley, she was struck by an unidentified vehicle. The issue on appeal was whether the plaintiff was an "occupant" of a SEPTA vehicle and, therefore, entitled to first party medical and UM benefits.

The plaintiff relied on Adeyward-I v. Pa. Fin. Responsibility Assigned Claims Plan, 648 A.2d 589 (Pa. Cmwlth. 1994), which held that a passenger transferring buses remains an occupant of the bus during the transfer. The court, en banc, overruled Adeyward-I, concluding at the time the plaintiff was struck by the unidentified vehicle, she was not an "occupant" of the bus. The court reasoned that "the term 'occupant of a motor vehicle,' in its common and ordinary sense, would not include a pedestrian crossing the street." According to the court, the vehicle-oriented status of a transferring bus passenger struck while in the act of crossing the street was no different than any other pedestrian.

Neither PennDOT nor a local municipality is liable for the existence of black ice which forms on a highway after the highway has been plowed and salted.

Page v. City of Philadelphia et al., 1542 C.D. 2010 (Pa. Cmwlth. Ct., July 18, 2011)

The plaintiff alleged that he lost control of the vehicle he was operating when he struck black ice caused by the "melt and refreeze" of improperly removed snow and ice from the highway. Both the City of Philadelphia and PennDOT filed motions for summary judgment, which were granted by the trial court. Two issues were raised on appeal: (1) whether PennDOT has an obligation to effectively remove snow and ice from its highways in a manner that does not create a dangerous condition; and (2) whether the City of Philadelphia could be found liable for removing snow and ice in an improper manner.

The Court affirmed summary judgment in PennDOT's favor. Following Miller v. Kistler, 582 A.2d 416 (Pa. Cmwlth. Ct. 1990), the Court held that the natural formation of ice or accumulation of snow following PennDOT's treatment of the roadway with chemicals does not expose PennDOT to liability pursuant to 42 Pa. C.S. § 8542(b)(4). The Court distinguished Commonwealth v. Weller, 574 A.2d 728 (Pa. Cmwlth. Ct. 1990), reasoning that the formation of black ice on a treated roadway was a natural condition, akin to the accumulation of ice and snow.

The Court also affirmed summary judgment in favor of the City of Philadelphia, determining that the plaintiff's claim did not fall within any exception to the Tort Claims Act. The Court noted that the plaintiff failed to *Continued on Page 9*

HOT OFF THE WIRE … *(Continued from Page 8)*

establish that the black ice was caused by the improper design, construction, deterioration or inherent defect of the street itself. The plaintiff also failed to establish that the black ice originated or has its source from the roadway itself.

UNITED STATES DISTRICT COURT, MD PA

The Pennsylvania Skier's Responsibility Act does not act as an absolute bar to all skier-collision cases; a skier or snowboarder may be found liable where it is alleged and established that the tortfeasor's conduct was "abnormal."

Smith v. Demetria, 3:11-CV-773, Decided: June 14, 2011

This action stemmed from a collision between a snowboarder and a skier. The plaintiff alleged that he was either skiing slowly or stopped on a ski trail when he was struck by the defendant, who was allegedly "bomb[ing] the hill," i.e., snowboarding at approximately 30-35 mph. The defendant filed a Motion to Dismiss pursuant to F.R.C.P. 12(b)(6), claiming that the plaintiff's action was barred by the Pennsylvania Skier's Responsibility Act, 42 Pa. C.S. § 7102(c).

The court predicted that the Pennsylvania Supreme Court would not find the Act to be an absolute bar to liability given the facts alleged and therefore denied the defendant's motion. In its analysis, the court looked to two decisions of the Pennsylvania Superior Court: Crews v. Seven Springs Mountain Resort, 874 A.2d 100 (Pa. Super. Ct. 2005), and Bell v. Dean, 5 A.3d 266 (Pa. Super. Ct. 2010). In Crews, the Superior Court determined that a ski resort was not entitled to summary judgment where the plaintiff was struck by another skier who was "an underage drinker on a snowboard," concluding that such an action was not an inherent risk of downhill skiing. In Bell, on the other hand, the Superior Court determined that a collision between a snowboarder and a skier was barred by the Act because the plaintiff skier failed to establish that the defendant snowboarder was snowboarding "abnormally," i.e., "out of control," "beyond his abilities," or without keeping a proper lookout.

The District Court predicted that "the Pennsylvania Supreme Court would acknowledge that at least some collisions may give rise to skier liability." The District Court determined that the Act was not an absolute bar to liability, particularly because the record was not developed well enough to establish that the case was one involving a "mere collision." The District Court noted that pursuant to the holding in Crews and dicta in Bell, a skier or snowboarder behaving "abnormally" could be found liable regardless of the Act.

COURT OF COMMON PLEAS

An award for future medical expenses is purely compensatory and is not precluded under § 1722 of the MVFRL.

Ferraro v. Knies, Court of Common Pleas of Luzerne Co., No. 9543 of 2008

Plaintiff was injured in a motor vehicle accident. A jury returned a verdict in favor of the plaintiff totaling $200,000.00, of which $140,000.00 was apportioned as the cost of future medical expenses. The defendant raised post-trial motions challenging, inter alia, the award for future medical expenses.

Trial testimony established that the plaintiff had and was using health care coverage provided by her current employer. The defendant challenged the award for future medical expenses pursuant to § 1722 of the MVFRL, which states, in pertinent part, that "a person who is eligible to receive benefits under the coverages set forth in this subchapter . . . shall be precluded from recovering the amount of benefits paid or payable under this subchapter, or workers compensation or any program, group contract or other arrangement for payment of benefits as defined in Section 1719."

Testimony also established that the pursuant to the terms of the health care coverage, the plaintiff incurs out-of-pocket expenses of $40.00 per treatment, and that there is an annual $7,500 deductible before payment of any services will be covered. The jury was instructed that the plaintiff had a 40-year life expectancy; thus, the court reasoned that the award of $140,000.00 for future medical expenses reflected an award of expenses totaling $3,500 per year for 40 years. The court rejected the defendant's post-trial motion and concluded that the award for future medical expenses was "purely compensatory, not providing a windfall or dual recovery and specifically not 'payable' as to be precluded" by § 1722 of the MVFRL.

2011-2012 EVENTS

Sat., Dec. 10, 2011	Habitat for Humanity - Beaver Co.
Tues., Dec. 20, 2011	CLE Program - Beaver Co.
Wed., Jan. 18, 2012	Board Mtg / Dinner Mtg LeMont Restaurant, Pittsburgh
Mon., Feb.13, 2012	3-Credit CLE Program Westin William Penn Hotel, Pittsburgh
Thurs., Mar. 22, 2012	Board Mtg / Member Dinner Mtg Willow Restaurant, Pittsburgh
Thurs., Mar. 29, 2012	3-Credit CLE Program Lawrence County
Thurs., Apr. 19, 2012	Board Mtg / Dinner Mtg Hilton Garden Inn - Southpointe
Fri., May 4, 2012	Annual Judiciary Dinner Heinz Field, Pittsburgh

A VIEW FROM THE BENCH

By: The Hon. Beth A. Lazzara

So, we've covered most of the basics of a trial….with the glaring exception of closing arguments. I'm going to make you wait in suspense for my comments on closings. Between being very late with this article and having a raging head cold, I'm not sure that my thoughts will be coherent. Instead, I'm going to give you the lazy writer's fall back….bullet points. Some of these I may have covered before, but they bear repeating, given that I see them constantly!

- No case or client or fee is worth sacrificing your reputation. It has utterly shocked me to see the behavior of some of the attorneys in the family and criminal divisions. I'm not saying that all of the attorneys in either division are sleazy or lie or that this kind of conduct does not occur in the civil division. That's absolutely not the case. There are some wonderful people in both the criminal and family divisions for whom I have great respect, and I realize that there are some less reputable folks in the civil division.

  However, believe it or not, there are attorneys who lie every time that they open their mouths. They lie in pleadings and briefs; they lie in oral arguments to the judge; they misrepresent the holdings of cases; they lie during non-jury trials; they lie to jurors. Your reputation is really all that you have as an attorney. It does not take much to besmirch it. And we all know how quickly bad news flies around the courthouses. Everyone will hear about what happened, and the judges do talk. It takes forever to restore a reputation once tarnished.

  I appreciate that most of the readers of this column would never trade their reputations for an advantage in a case or for a client. Make sure that you discuss this with your young associates and law students clerking in your offices. The repercussions of momentary lapses can last an entire career.

- What should you do when you are dealing with a less than honest opponent? I think that you should point out the issue. No, I'm not saying to tattle on everything that opposing counsel does, nor am I saying that you should call the attorney a rotten liar in open court. There are ways, however, to let the court know that someone is playing dirty pool. (You should also be aware that most judges know who the dishonest folks are.)

  Here are some ideas that you can use. If you have an attorney clearly misrepresenting facts in a closing, ask for a sidebar. If the judge has been doing his or her job, she knows that there have been misrepresentations and can instruct the jury to recall the facts from their own memories, not counsel's, before you begin your closing. Point out the facts that were misrepresented to the jury in your closing. Don't just skip over the misrepresentations and hope that the jurors were paying enough attention to know that counsel took liberties with the testimony. Even if they do recognize the problems, they want confirmation of their belief that someone was playing fast and loose with the facts. Before you do any of this, however, make sure that the facts were truly misrepresented. If someone hedges on it ("If I remember correctly…"), you don't want to look foolish making too big of an issue.

  If counsel hands over a case to the judge, and you are unfamiliar with it and your opponent is not reputable, ask for time to comment on the case or provide your own case law. Most judges will give you that opportunity. Do not assume that the judge's law clerk will catch the mistake. The law clerk may not have an opportunity to look at the case if it occurs in open court, and most law clerks are not in every day. If cases are mis-cited in a brief, make sure that you point that out in your brief or do it in a responsive brief. You do not need to bash counsel while doing so, but you can provide the real language of the case in the brief or highlight the actual language of the case that you attach for the judge. Make sure you look at the cases cited in an opponent's brief, and have your law clerk shepardize the cases. I was surprised at how often people cite overturned law.

- Do not assume that a judge will automatically intervene if an attorney pulls something shady. We do not want to interfere in your cases. We figure that you do not bring things to our attention because of some strategy. I do not want to screw up some great strategic use of your opponent's bad behavior that you have planned. On the other hand, not bringing it to our attention because you think that we will not do something is not the correct way to handle the issue. This is especially true if there will be an appeal. It is hard to argue that something happened when it is not in the record.

- I know that you probably do not want to be preached at by

Continued on Page 11

A VIEW FROM THE BENCH ... (*Continued from Page 10)*

me or anyone, but I think that it is important to be reminded of the things I have written about above. There are attorneys who I will now require to be sworn in before they speak in my room again. Bad behavior is out there. I certainly do not expect to see it from any of my friends reading this, but sometimes people take shortcuts out of good intentions or busyness or inattention that turn out to be bad behavior. Do not let it happen to you.

- On another note, please remember that we all are making a record of the proceedings. Too many people do not wait after an objection for a ruling, or talk on top of a witness, or simply say "this" or "that." If I was reviewing your appeal, having seen your trial, I might be able to make sense of the lack of ruling on the objection or the interspersed dialogue in the transcript or what "this" refers to. Unfortunately, The Superior Court is reviewing a cold transcript with no ability to recall what occurred at the time of trial. Then again, I might not remember anything and have to rely on that cold transcript to write my opinion to uphold your verdict.

  You have several people to whom you are speaking in a trial….the jury, the defense attorney and representatives of the insurance company, the judge so that you get the right rulings and closing charge, your client and the record, meaning the cold transcript that will be reviewed on appeal. It may seem hard to speak to these diverse people all at the same time, but you must in order to be effective as a trial lawyer and in order to help the judge write a supportive opinion on appeal.

  Judges will often help you to make your record. A good record makes it much easier to write a good opinion upholding your verdict. However, sometimes we miss the ball as well. If we have help from you in preserving the record, it keeps us even more vigilant in doing so.

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

If you have thoughts or differing opinions on articles in this issue of The Advocate, please let us know.

Your response may be published in the next edition.

Send your articles to
admin@wptla.org, Attn: Bernie

Come Monday.

Chip Bell. Tarentum, PA: Word Associations Publishers, 2009. 154 pages.

Reviewed by: Brittany Huey

Crime, mystery, a serial killer, a corrupt politician all on a beautiful island in the Florida Keys, Chip Bell brings it all together in 154 pages for his thrilling novel *Come Monday*. Jake Sullivan is Miami's criminal attorney and lands a major case prosecuting serial killer Carlos Ortiz, better known as the "South Beach Sadist." However, Jake's life begins to spiral out of control when the original evidence to this momentous case is stolen from his car. Jake loses the case, turns to alcohol, and drifts away from his family. Needing a fresh start, Jake moves to Key West and sets up his own firm. Just when he begins to turn his life around, he is the unfortunate witness of a 4:30 a.m. meeting on a remote stretch of the Florida Keys between Benjamin Matthews, the Attorney General of the United States, and the "South Beach Sadist." What ensues is a whirlwind adventure filled with double-crossing, bloodshed, and quick thinking. Readers familiar with western Pennsylvania will enjoy finding Bell's subtle – and not so subtle – allusions to the area. Entertaining and suspenseful, *Come Monday* is dark, clever, and heart-pounding, making the reader anticipate what scrape Jake will find himself in next.

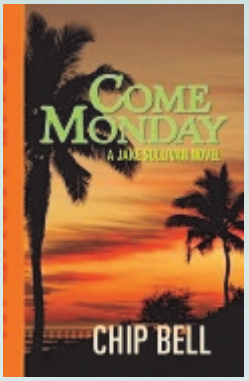
WPTLA Member Charles L. (Chip) Bell, Jr. is a practicing attorney specializing in personal injury litigation, with his main office in Arnold, Pennsylvania. He attended Duquesne University School of Law and graduated Cum Laude. He attended Allegheny College in Meadville, Pennsylvania and graduated Phi Beta Kappa and Magna Cum Laude. He served in the United States Army from 1972 to 1974.

Chip Bell lives in New Kensington, Pennsylvania with his wife, Linda. He is the father of two daughters, Jennifer and Jessica.

Come Monday *is his first novel.*

You may contact Chip at 724-339-2355, or clb.bcymlaw@verizon.net

ISBN:978-1-59571-685-9



BY THE RULES

By: Mark E. Milsop, Esq.

Some Defense counsel are becoming bold. You may ask: "How bold are they?" They are bold enough to ask for personal information that no one would have dreamed of obtaining several years ago. They argue that by using modern technology, people forfeit their privacy. More specifically, they are requesting access to our clients' personal information included on social websites. There are three variations on this request. Listed in increasing boldness, they include:

1. Printouts from social media (Facebook, Twitter, etc.);
2. The right to view social media;
3. Passwords to social media sites.

I would suggest that none of this discovery is completely proper, and certainly, the latter forms are out of line. Twenty years ago, no one would ever dream of requesting permission to enter a Plaintiff's home to review all photos, personal correspondences, and diaries or the right to listen in on phone calls. Many members of the judiciary have lost perspective on the problem and are willing to assume that information included on social media is somewhat different. However, analytically it is not, at least where your client's use of the media is restricted by the use of a "friend request". The information on a Facebook page is no different than traditional personal material. Years ago, when you visited friends of a family member, they may have displayed and invited you to look at photographs or cards received over the holidays or for special events. However, these people would be highly offended if someone came in off the street and looked at these things.

So how can all of this be analyzed from a legal standpoint?

I would suggest the starting point should be that discovery does not entitle a party to go on a "fishing expedition." Case law has repeatedly approved the familiar rule that "a court can prohibit the discovery of matters that have been stated too broadly or without proper specification, and would amount to a 'fishing expedition'" Koken v. One Beacon Insurance Company, 911 A.2d 1021 (Pa. Commw. 2006). Similarly, it has long been acknowledged that Rule 4003.1(b) recognizes discovery must be "reasonably calculated to lead to the discovery of admissible evidence." Hence, it holds that "Pursuant to this rule, the court must ensure Appellee's discovery requests are tailored to her specific negligence cause of action. The Court should not permit Appellee's requests if they represent a mere 'fishing expedition' or an obvious intent to force A-Plus into a settlement." Berkeyheiser v.e A-Plus Investigations, 936 A.2d 1117, 1127 (Pa. Super. 2007).

Most likely, Defense counsel are making a request without knowing whether or not your client has posted anything to the social media. The mere fact the Plaintiff may have a social media page or that people are known to post personal information on such sites should not be found to make a request for such information to lead to the discovery of admissible evidence. This becomes especially compelling if the request is very broad and is not narrowed or tailored to request only discoverable material.

Second, unfettered access to such sites is an intrusion into a litigant's privacy. As I discussed in a prior column related to medical record requests (See volume 23, No. 3), an individual's privacy interest is recognized as protected under the United States Constitution, and the Courts have a duty to limit such intrusions. See e.g. Greynolds v. McAllister, 130 P.L.J. 414 (Allegheny County 1982). In the broader discovery context, it has been recognized the Courts must balance the right to privacy against the interest in discovery. Specifically, the right of privacy the Courts must protect includes "the individual interest in avoiding the disclosure of personal matters." Berkeyheiser, 936 A.2d at 1126.

Finally, it must be kept in mind that Rule 4011 prohibits discovery which "(b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party." Much of the information on a social media site will readily fall into these categories.

Despite the foregoing discussion, the Courts have so far taken varying approaches. There is a lead case in favor of broad discovery, McMillen v. Hummingbird Speedway 2010 Pa. Dist. & Cnty. Dec. Lexis 270 (Jefferson County 2010). In McMillen, the Court placed considerable emphasis that "Evidentiary privileges are not favored …". In doing so, the Court also looked to the privacy policies of the websites. It should also be noted that in this case, the public portion of the Plaintiff's website contained tipoffs it would contain relevant information. Nonetheless, the decision is deficient in that it did not realize the constitutional nature of the privacy right, nor did it consider clearly non-discoverable information also would be available. The McMillen decision was followed in the Northumberland County case of Zimmerman v. Weis Markets.

Continued on Page 13

BY THE RULES *...(Continued from Page 12)*

A contrary approach was taken in Piccolo v. Patterson No. 2009-04979, 2011 Pa. Dist. & Cnty. Dec. LEXIS 45 (2011Bucks County). However, this citation only offers an Order and not a decision. There, the issue arose in a motion to compel photos contained on a Facebook page, which were sought via a "neutral friend request." Further details of this decision are reported in The Pennsylvania Law Weekly of May 17, 2011 at p.1.

A third approach was taken in Offenback V. Bowman, 2011 WL 2491371 (M.D. Pa. 2011). In that case, the Court undertook an in camera review of the Plaintiff's Facebook page. Ultimately, the Court determined reports of Plaintiff's certain activities were discoverable, but the balance of the information was not.

In the final analysis, it may be difficult to convince a Court a request based upon a reasonable basis that requests "snapshots" or printouts of narrowly defined portions of social media sites should be denied. However, the rules of discovery, long established case law on "fishing expeditions," and constitutional considerations should prevent the boldest requests by Defense counsel, including printouts of entire sites, friend requests, and password and username requests.

KOKEN SEMINAR

By: Sean J. Carmody, Esq.

The Western Pennsylvania Trial Lawyers sponsored a seminar in June of 2011, discussing the developments of Koken issues throughout the state. Panel members included the Honorable Gary P. Caruso of the Court of Common Pleas of Westmoreland County; Keith McMillen from McMillen, Urick, Tocci, Fouse, and Jones; Thomas McDonnell of Summers, McDonnell, Hudock, Guthrie and Skeel; and myself.

The seminar was well attended, and it was clear from the outset that the Plaintiff and Defense bars have two distinct approaches to successfully litigating a Koken matter. The Defense, for obvious reasons, strives to keep out any reference to the insurance carrier even though they are a named party. The Defense believes the Court should "pay no attention to the man behind the curtain" and preclude the jury from hearing any evidence of the insurer's involvement in the case. This perpetuates the legal fiction that the uninsured driver or tortfeasor is the only Defendant and misleads the jury as to the true nature of the dispute. The Western Pennsylvania Trial Lawyers on the panel were unified in their approach, stressing the importance of carefully explaining to the jury the role of the insurance carrier in an uninsured or underinsured motorist case. The contractual duties and responsibilities of the insurer need to be emphasized so the jury understands the insurer undertook these promises in exchange for the insured's premium.

Judge Caruso would not speculate on how he would rule on these issues, but he did provide valuable insight as to what would be needed from a pleading and evidentiary stand point to make a compelling argument for the disclosure of the insurance carrier's role. Judge Caruso indicated the Court should start by examining the pleadings and identify how the Plaintiff framed his cause of action. If a breach of contract action is alleged, the Court would likely permit introduction of the insurance contract and allow it to be referenced during trial. Evidence regarding the payment of first party benefits for income loss and medical expenses may also be relevant depending on the circumstances.

The right to recover delay damages was also discussed. Last year the Superior Court held that delay damages are recoverable in a Koken action and that Court must use the jury's verdict in calculating the damage award. The insurers believe the contractual nature of the Koken claims do not permit the recovery of delay of damages under Pa.R.C.P. 238; however, if they are recoverable, damages should be calculated on the policy limits and not the jury's award. State Farm filed a Petition for Allowance of Appeal to the Supreme Court on the delay damage issues in January of 2011; however, there has been no indication as to whether the Court will grant the Petition.

The Koken trials will continue to provide interesting issues for consideration for years to come as the cases work their way through the Common Pleas and Appellate Courts. Stay tuned!

THE IMPACT OF *CIGNA V. AMARA* ON ERISA REIMBURSEMENT CLAIMS

By: Professor Roger M. Baron and Marilyn F. Trefz[1]

The Supreme Court stated on May 16, 2011, "We cannot agree that the terms of statutorily required plan summaries may be enforced as the terms of the plan itself." This holding has a significant impact upon the enforceability of ERISA Reimbursement claims which have traditionally been based upon the terms set forth in Summary Plan Descriptions.

The U.S. Supreme Court handed down its decision in *Cigna Corp. v. Amara*[2] on May 16, 2011. Although the dispute in *Cigna* involves retirement accounts in a pension plan, the Court made a significant holding involving the documents required by ERISA in regard to plan administration. This holding may have a significant impact concerning health benefit plans, which are also fostered under ERISA. In particular, the *Cigna* decision holds that the terms of a "Summary Plan Description" are not in and of themselves, the terms of the Plan and do not qualify for enforcement under ERISA.

The *Cigna* decision discusses two types of documents, which are addressed under ERISA's statutory scheme – the "plan" and the "Summary Plan Description" or "SPD." A brief review of the nature of these documents is helpful.

The "Plan"

The term "plan" as utilized in the *Cigna* opinion is the "written instrument" authorized by ERISA, 29 U.S.C. § 1102(a)(1) which provides that "Every employee benefit plan shall be established and maintained pursuant to a written instrument."[3] The required features of this written instrument are set forth in 29 U.S.C. § 1102(b). Optional features are permitted under 29 U.S.C. § 1102(c). *Cigna* recognizes that the plan's "sponsor" (or employer) is responsible for creating and executing this written instrument.[4]

For more information regarding the required content of the "plan," one may wish to consult the publications provided by the Employee Benefits and Security Administration (EBSA) of the United States Department of Labor.[5] In practice, one finds that the nature and format of "plan" documents vary greatly, especially considering that both retirement plans and health benefit plans operate under the auspices of the same statutory provisions.[6]

The "Summary Plan Description" or "SPD"

The "Summary Plan Description" or "SPD" is authorized and required by ERISA, 29 U.S.C. § 1022. These documents, as described in *Cigna*, "provide communications with beneficiaries *about* the plan, but do not themselves constitute the *terms* of the plan."[7] The *Cigna* opinion recognizes that the plan administrator, as opposed to the plan sponsor, is responsible for "provid [ing] the participants with the summary documents that describe the plan in readily understandable form."[8]

The required content of the SPD is addressed by regulations promulgated by the Department of Labor.[9] These regulations require, *inter alia*, that the SPD contain information in regard to a participant's eligibility for benefits, the scope of benefits covered under the Plan, and a participant's rights and responsibilities under the Plan. Consistent with the Court's recognition in *Cigna*, these regulations refer to benefits and responsibilities under "the plan" itself. [10]

---

[1] Roger M. Baron, Professor of Law at the University of South Dakota, is an expert on the area of ERISA reimbursement claims. He has published and lectured extensively on the topic. Prof. Baron may be contacted at Roger.Baron@usd.edu. Marilyn F. Trefz, currently a 3rd year law student at the University of South Dakota School of Law, has worked in the field of Human Resources in excess of 20 years. She is a certified Senior Professional in Human Resources (SPHR). Marilyn may be reached at marilyntrefz19@gmail.com.

[2] 2011 WL 1832824

[3] The majority opinion in *Cigna* refers to the "written instrument containing the terms and conditions" and "'a procedure' for making amendments" under 29 U.S.C. § 1102 on page 14 of the slip opinion. Justice Scalia states that ERISA "requires that a `plan' `be established and maintained pursuant to a written instrument,' § 1102(a)(1)." Page 1, J. Scalia's Concurring Slip Opinion.

[4] "The plan's sponsor (e.g., the employer), like a trust's settlor, creates the basic terms and conditions of the plan, executes a written instrument containing those terms and conditions, and provides in that instrument "a procedure" for making amendments. § 402, 29 U.S.C. § 1102." Slip opinion at 14.

[5] In connection with retirement plans, the EBSA advises that the plan instrument should include:

- A written plan that describes the benefit structure and guides day-to-day operations;
- A trust fund to hold the plan's assets (unless the plan is set up through an insurance contract),
- A recordkeeping system to track the flow of monies going to and from the retirement plan; and
- Documents to provide plan information to employees participating in the plan and to the government.

United States Department of Labor, EBSA, Meeting Your Fiduciary Responsibilities: What Are the Essential Elements of a Plan, http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html (last visited May 20, 2011).

[6] In regard to health benefit plans, it should be noted the EBSA instructs that the primary responsibility of ERISA fiduciaries "is to run the plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses." United States Department of Labor, EBSA, Health Plans & Benefits: Fiduciary Responsibilities, http://www.dol.gov/dol/topic/health-plans/fiduciaryresp.htm (last visited May 19, 2011).

[7] Slip opinion at 15. (emphasis on "about" and "terms" is original with the Court).

[8] Slip opinion at 14. Justice Scalia also recognizes, "ERISA's assignment to different entities of responsibility for drafting and amending SPDs on the one hand and plans on the other." J. Scalia's Concurring Slip Opinion at 2.

[9] 29 CFR §§ 2520.102-2 and 2520.102-3.

[10] "The summary plan description shall be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their *rights and obligations under the plan*. "29 CFR §§ 2520.102-2(a) (emphasis added); "The advantages and disadvantages *of the plan* shall be presented without either exaggerating the benefits or minimizing the limitations." 29 CFR §§ 2520.102-2 (b) (emphasis added); "The summary plan description must accurately reflect the *contents of the plan*" 29 CFR § 2520.102-3 (emphasis added).

Continued on Page 15

THE IMPACT OF CIGNA … *(Continued from Page 14)*

Enforceability of Summary Descriptions

The interests sought to be protected by the plaintiffs in the *Cigna* litigation were traceable to the terms of a Summary Plan Description or SPD. The dispute arose as a result of the decision by Cigna to restructure its pension plan in 1998. Prior to implementing the actual change, Cigna gave its employees a description as to how the changes would affect the retirement benefits and accrued accounts for existing employees. This description was more favorable to the participants than the actual terms of the new plan. The trial court "found that CIGNA's initial description of its new plan were significantly incomplete and misled its employees."[11] Additionally, the initial description failed to explain certain features calculated to save Cigna $10 million annually.[12] The trial court determined that Cigna's descriptions were "incomplete and inaccurate" and that Cigna "intentionally misled its employees."[13] One of the key issues for decision in this case was the enforceability of the written descriptions as to "how" the new plan would function – as opposed to enforcing the plan as it was actually written.

In the Supreme Court litigation, the Solicitor General had urged that the more favorable descriptions could be enforced as terms of the plan.[14] This argument failed, with the Court stating,

> We cannot agree that the terms of statutorily required plan summaries (or summaries of plan modifications) necessarily may be enforced (under § 502(a)(1)(B)) as the terms of the plan itself.[15]

The rationale for this holding lies in the fact that SPDs are, in fact, descriptive of the terms of the plan but not the terms themselves.[16] The Court's holding on this issue is as follows:

> We conclude that the summary documents, important as they are, provide communication with beneficiaries *about* the plan, but that their statements do not themselves constitute the *terms* of the plan.[17]

As to this holding, there is full agreement by the members of the Court.[18] Justice Scalia's concurrence is in full accord.[19] In fact, Justice Scalia would have the entire case rest solely on this issue. [20]

ERISA Reimbursement Claims

Virtually every ERISA Reimbursement claim presented today is predicated upon the terms of the SPD. As a result, the impact of the *Cigna* opinion is significant. According to *Cigna*, the terms of the SPD are not, in and of themselves, enforceable under ERISA. This applies to efforts under § 502(a)(1)(B) (direct enforcement of the terms of the plan) and would also apply to relief sought under § 502(a)(3)'s "appropriate equitable relief."[21]

Under the federal common law which has developed under *Sereboff* ,[22] it is necessary that the terms of the plan create a lien.[23] Language which merely purports to create a right of subrogation is insufficient.[24] Additionally, plan language may be deficient because it is overreaching in nature, extending the plan's rights into the general assets of the ERISA participant/beneficiary.[25]

As a result of *Cigna*, it is now important that terms of the plan itself satisfy these common law requirements. It may be true, as recognized by Justice Scalia in his concurring opinion in *Cigna*, that an SPD can serve to amend a plan, but the plan itself must expressly so permit.[26] Nonetheless, the clear holding of *Cigna* tells us that the terms of an SPD are not the terms of the plan and, as such, do not qualify for enforcement under ERISA's remedy scheme. An attorney dealing with an ERISA reimbursement claim should insist that the terms of the "plan" itself are fully compliant with all aspects of the common law requirements for enforcement. It should also be kept in mind that the analysis should be made in connection with the plan provisions in effect at the *time of the injury*. It is inappropriate for a plan to

[11] Slip Opinion at 5.
[12] Slip Opinion at 6.
[13] "The District Court found that CIGNA told its employees nothing about any of these features of the new plan—which individually and together made clear that CIGNA's descriptions of the plan were incomplete and inaccurate. The District Court also found that CIGNA intentionally misled its employees." Slip Opinion at 8.
[14] "The Solicitor General says that the District Court did enforce the plan's terms as written, adding that the "plan" includes the disclosures that constituted the summary plan descriptions. In other words, in the view of the Solicitor General, the terms of the summaries are terms of the plan." Slip Opinion at 13-14.
[15] Slip Opinion at 14.
[16] "information about the plan provided by those disclosures is not itself part of the plan. See 29 U.S.C. § 1022(a). Nothing in § 502(a)(1)(B) (*or, as far as we can tell, anywhere else*) suggests the contrary." Slip Opinion at 14. (emphasis added to language which extends holding beyond simple application of § 502(a)(1)(B).)
[17] Slip Opinion at 15. (emphasis on "about" and "terms" is original with the Court.)
[18] Note: Justice Sotomayor did not participate in this case.
[19] "The District Court based the relief it awarded upon ERISA § 502(a)(1)(B), and that provision alone. It thought that the `benefits' due `under the terms of the plan,' 29 U.S.C. § 1132(a)(1)(B), could derive from an SPD, either because the SPD is part of the plan or because it is capable of somehow modifying the plan. Under either justification, that conclusion is wrong. An SPD is separate from a plan, and cannot amend a plan unless the plan so provides. See *Curtiss–Wright Corp. v. Schoonejongen*, 514 U.S. 73, 79, 85, 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995). J. Scalia's Slip Concurring Opinion at 2.
[20] "Nothing else needs to be said to dispose of this case... I would go no further." Id.
[21] "information about the plan provided by those disclosures is not itself part of the plan. See 29 U.S.C. § 1022(a). Nothing in § 502(a)(1)(B) (***or, as far as we can tell, anywhere else***) suggests the contrary." Slip Opinion at 14. (emphasis added to language which extends holding beyond simple application of § 502(a)(1)(B).)
[22] *Sereboff v. Mid Atlantic Medical Services, Inc*, 547 U.S. 356, 126 S. Ct. 1869, 164 L. Ed.2d 612 (2006).
[23] *Sereboff v. Mid Atlantic Medical Services, Inc*, 547 U.S. 356, 126 S. Ct. 1869, 164 L. Ed.2d 612 (2006); *Popowski v. Parrott*, 461 F.3d. 1367 (11th Cir. 2006); *In re Vioxx Products Liability Litigation*, 45 Employee Benefits Cas. 1192, 2008 WL 3285912 (E.D. La) (Aug. 7, 2008) aff'd in *Avmed Inc., et al. v. Browngreer PLC, et. al*., 300 Fed. Appx. 261, 2008 WL 4909535 (November 17, 2008).
[24] Id.
[25] *Fleetwood Enterprises, Inc. v. Taylor*, 2007 WL 2826180 (W. D. Ky.) (2007); *James River Coal Company Medical and Dental Plans v. Bentley*, 2009 WL 2211906 (July 23, 2009).
[26] "An SPD is separate from a plan, and cannot amend a plan unless the plan so provides." J. Scalia's Slip Concurring Opinion at 2.

Continued on Page 16

THE IMPACT OF CIGNA … *(Continued from Page 15)*

retroactively apply the terms of a subsequent plan document.[27]

One final observation on this matter should be made. In addition to adhering to *Cigna*'s requirement that an enforceable right of reimbursement must be contained in the "plan" itself, the plan is still required to comply with 29 CFR § 2520.102-3(l) which mandates that the SPD contain notification of any right of subrogation or reimbursement that the plan may assert.[28]

To sum it up, the plan's right of reimbursement must be found in the "plan" itself under *Cigna* and must further be set forth in the SPD by virtue of the DOL regulation. If the right of reimbursement is found only in the SPD, then it is not enforceable under *Cigna.* If the right of reimbursement is found only in the plan itself, and not in the SPD, then the plan is in violation of 29 CFR § 2520.102-3(l).

Ascertaining Terms of the Plan

Because there is much inconsistency in the manner in which plan administrators or employers refer to ERISA benefit plan documents, the retrieval of such documents may be somewhat challenging. Additionally, important documents which govern the relationship between the entities providing services may not be found in either the plan or the SPD.[29]

As noted above, the "plan" -- often referred to as the "plan document" -- describes the plan's terms and conditions related to the operation and administration of a plan, while the "SPD" is the main vehicle for communicating plan rights and obligations to participants/beneficiaries. In health benefit plans, as opposed to retirement plans, some employers (plan sponsors) use a "wrap plan," or "wrap document" which incorporates by reference the various insurance certificates, policies, contracts, booklets and other benefit descriptions provided by insurance carriers. Thus, a "wrap" document is a device designed to incorporate into the "plan" all of the terms of the various benefit documents. [30]

The "wrap plan" or "wrap document" device is sui generis, born outside of ERISA's nomenclature, and utilized by only a limited number of plans. Because of the wide variety of plan documents in use today, an employee encountering a potential reimbursement claim would be wise to first investigate the situation in house. The employee may consult with a member of the employer's Human Resources or Benefits Department to determine the company's benefit plan structure and appropriate terminology. [31]

An ERISA participant/beneficiary's ability to obtain access to the SPD is statutorily recognized.[32] This right has been meticulously guarded and enhanced by Department of Labor (DOL) regulations.[33] Participants are to receive SPDs within 90 days of becoming covered by the plan, and updated SPDs must be furnished every 5 years, if changes have been made to SPD information or if the plan is amended. Otherwise, an ERISA plan's SPD must be furnished to plan participants every 10 years.[34] One's right to access the SPD, the document upon which reimbursement claims have been traditionally based, has never been an issue.

With the Court's holding in *Cigna,* however, there is now a vital need for participants/beneficiaries to have access to the "plan" itself. Indeed, the need to examine the plan terms themselves (which were in effect at the time of the injury) is of critical importance to examine they are sufficient to create a lien.

Though both are required documents under the ERISA design, neither the "plan" nor the SPD are required to be filed with the Department of Labor. Still, both of these documents must be available to both plan participants, as well as the DOL upon request. This right is granted to participants by 29 U.S.C. 1024 (b)(4) which provides as follows:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated *summary plan description*, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or *other instruments under which the plan is established or operated.* (emphasis added).

The statute specifically provides that "the participant or beneficiary"[35]

[27] *Gorman v. Carpenters' & Millwrights' Health Benefit Trust Fund*, 410 F.3d 1194 (10th Cir. 2005); *ACS/PRIMAX v. Polan*, 2008 WL 5213093 (W.D. Pa.); *Sheet Metal Workers Local 27 Health & Welfare Fund v. Beenick*, 2008 WL 5156663 (D.N.J.); *Burgett v. MEBA Medical And Benefits Plan*, 2007 WL 2815745 (E.D.Tex.).

[28] The SPD must provide "a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery (e.g., by exercise of subrogation or reimbursement rights) of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section." 29 CFR § 2520.102-3(l).

[29] Consider, eg., the situation where a commercial insurer is providing coverage to participants/beneficiaries through an ERISA plan. Important aspects of the relationship between the plan and the insurer may lie in the insurer's Master Contract, Certificate of Coverage, Administrative Services Contract or Summary of Benefits. Yet, none of these documents are considered to be either the "plan" or "SPD" under ERISA.

[30] See eg., *Administrative Committee of Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Gamboa*, 479 F.3d 538 C.A.8 (Ark.), 2007; *Keogan v. Towers, Perrin, Forster & Crosby, Inc*. 2003 WL 21058167 (D.Minn.).

[31] *Service of a 'Proper Request' upon the Plan Administrator: a Key Step in Defending against ERISA Reimbursement Claims* (2010), published in Trial Lawyer Journals in Massachusetts, Pennsylvania (Western Pa. Trial Lawyers "The Advocate" and Pa. Association for Justice "PA Justice New"), Ohio, South Dakota, Nebraska, Louisiana, Kansas, Colorado, Washington, Texas, Michigan, Utah and Vermont.

[32] 29 U.S.C. §1022(a); 29 U.S.C. §1024(b)

[33] 29 CFR §.104b-1(b) requires plan administrators to "use measures reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries," when distributing SPDs to employees.

[34] 29 CFR § 2520.104b-2. Additionally, 29 CFR § 2520.104b-3 requires that changes to the SPD must be reflected in a Summary of Material Modifications and that these Summaries of Material Modification must be must also be given to all plan participants and beneficiaries.

[35] The term "participant" is defined in 29 U.S.C. 1002 (7) and generally encompasses employees and former employees. The term "beneficiary" is defined in 29 U.S.C. 1002(8) as "a person designated by a participant or by the terms of an employee benefit plan, who is or may become entitled to benefit thereunder."

Continued on Page 17

THE IMPACT OF CIGNA … *(Continued from Page 16)*

may make such a request.[36] A plan administrator's failure to provide this information within 30 days, results in a cause of action in favor of the beneficiary/participant against the administrator for the recovery of a penalty of up to $110 per day for each day of noncompliance.[37] The statute sets the amount at $100 per day, but a federal regulation, 29 CFR § 2575.502c-1, effective August 1999, authorizes up to $110 per day.

Conclusion

The *Cigna* decision, although rendered in the context of a pension plan dispute, appears to significantly impact the body of law concerning the enforceability of ERISA reimbursement claims. In particular, as a result of *Cigna*, it is now required that the ERISA plan's effort to seek reimbursement be traceable to the plan itself and not just to the SPD. The terms of the SPD, in and of themselves, are not enforceable as a judicial remedy afforded by ERISA. The plan's right of reimbursement must be traceable to terms of the plan itself and those provisions must be fully compliant with the federal common law which has evolved under *Sereboff* and its progeny.

---

[36] Further, 29 CFR § 2520.104a-8 also grants the Department of Labor the authority to request and review "*any documents relating to the employee benefit plan*" upon service of a written request, on behalf of a plan participant or beneficiary.
[37] 29 U.S.C. 1132(c)(1)(B).

PaAJ's President's Message

Compassion and service as a way of life

By: Kenneth M. Rothweiler, Esq.

On Oct 21, at our President's Club Reception in Philadelphia, PAJ presented its Community Service Award to trial attorney Joel Feldman for his efforts in promoting safe driving. For Joel and his wife Dianne Anderson, the mission is personal--their daughter Casey was killed at a crosswalk in 2009--a victim of distracted driving.

Through the charitable foundation they established in Casey's name, Joel and his family hold educational programs and activities to raise awareness about distracted driving, give grants to organizations to promote teen driving safety, and support legislation and enforcement of laws banning cells phone use behind the wheel and texting while driving, and protecting pedestrians.

More than 100 guests turned out for the Reception including trial lawyers and invited members of the judiciary and state legislature. We all watched a video of Casey's story told by her friends and mom. The video was produced by Feldman and featured in the "Faces of Distracted Driving" series of the U.S. Department of Transportation. It is the only video submitted by a member of the public to be included in the series. Near the end of the video, Casey's mom asks: "What will it take for us to change the way we drive?" I urge every member to see this powerful video and share it with their friends and family: http://www.distraction.gov/faces/casey-feldman.html

It was an emotional evening, and as I watched my friend Joel talk about dealing with loss, I was struck by two things: First, Joel and Dianne are courageous examples of parents who turned their tragedy into a force for saving lives. Second, at a time when the rights of our clients are being threatened, and our profession is being vilified, we can learn a lesson from Joel about compassion and service.

In his book, "Ball on Damages", trial consultant David Ball says lawyers need to start doing and stop talking. He means focus on our good works outside of court and show Pennsylvanians that we work for the good. Words alone will not persuade people; words must be backed up with deeds.

All over trial lawyers like Joel are making a difference.

The firm of Hourigan Kluger & Quinn in the Northeast established the HKQKids Foundation. After seeing children injured – or worse – from preventable hazards, our colleagues at that firm have used the foundation not to promote the firm, but to promote safety so kids and their parents don't end up as clients. Find out more about what they do at www.HKQkids.org

Our colleagues in the Western Pennsylvania Trial Lawyers Association have a long tradition of giving back to our community too. Most people know about the annual race Western Pennsylvania Trial Lawyers hosts to benefit the Pittsburgh Steelwheelers, a group of wheelchair athletes. They also sponsor a Comeback Award that honors a client who has shown rare courage in overcoming adversity, as well as other fundraisers, and their members volunteer for their local chapter of Habitat for Humanity. More information is at www.wptla.org/calendar

These are only two examples. I know many of you have similar projects or may be considering beginning one.

If you do, I encourage you to give as much thought to promoting your good deeds as you do to promoting your advocacy skills and your practice.

We're not going to change the public's mind with just words. But we can show the public what we're really about by promoting the good works we do.

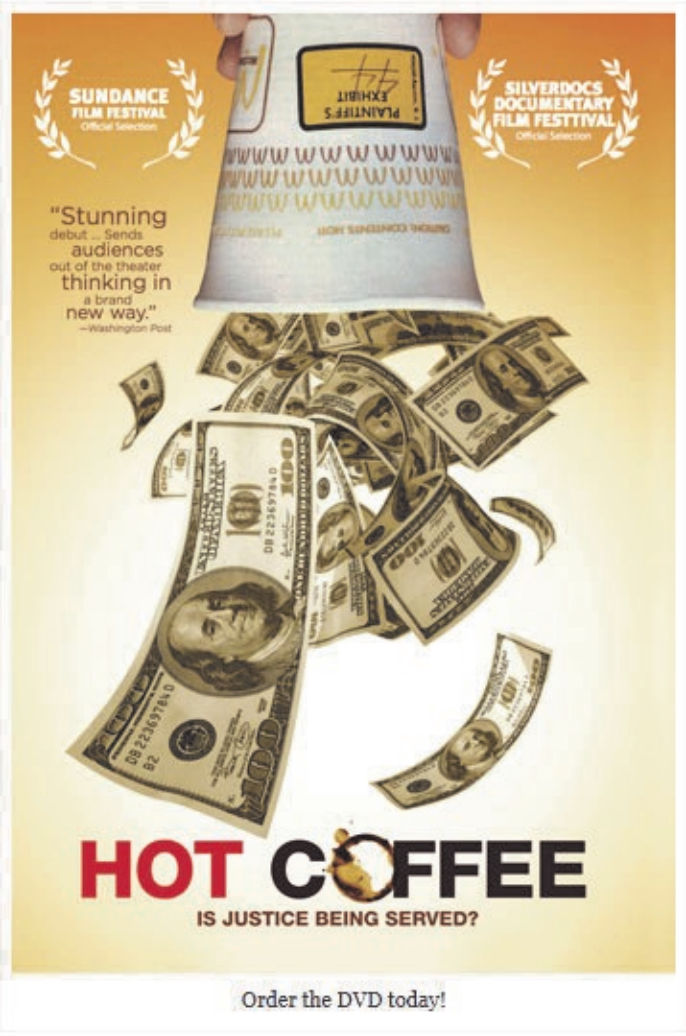
Kenneth M. Rothweiler serves as President of the Pennsylvania Association for Justice. He is happy to receive your comments, criticisms or thoughts by email krothweiler@pajustice.org or by phone 215.546.6636.

HOT COFFEE

By: Brittany Huey

Everyone has heard the jokes: "Be careful, that coffee is hot." Everyone knows the story: an elderly woman sues McDonald's because her coffee was too hot. Stella Liebeck's incident is an existing part of popular culture and the face for "frivolous lawsuits." So much so, it has spawned the annual Stella Awards which, true or not, convey to the public tort cases that result in a recovery with allegedly absurd facts. But that is bound to change. There is much more to Liebeck's story, which is where director Susan Saladoff's documentary *Hot Coffee* begins. Liebeck's story serves as the perfect starting point because it is a story everyone is familiar with, and therefore, the truth is most shocking when the details of the case are revealed. When Stella Liebeck bought her cup of coffee from McDonald's on February 27, 1992, she did not expect her accidental spill to result in third-degree burns. McDonald's kept its coffee at a scalding temperature of 180-190 degrees Fahrenheit, hot enough to cause third-degree burns in seconds.[1] The documentary showed photographs of her extensive burns, which required extended stays at the hospital, extensive treatments, and skin grafts. In the end, she was not awarded the millions as claimed. Though the jury wanted to give her close to $3 million in punitive damages, the judge reduced it to a six figure sum, and the final settlement was never revealed.[2] From there, the tort reform advocates used the media to spin the tale of a "jackpot" lawsuit. Saladoff accomplishes the momentous task of completely changing her viewers' minds about the hot coffee incident, catching not only their attention but their interest and trust as well. It would serve well for Plaintiff trial attorneys to watch this documentary and learn the real story, so that the next time someone half-handedly jokes about frivolous lawsuits, the protectors of the injured can respond forcefully with the real facts.

Three additional stories, showcasing the people whose lives are greatly affected by tort reform laws and powerful corporations, follow Stella's real story. Colin and Connor Gourley are identical twins, but due to a case of medical malpractice, Colin was born with cerebral palsy. The Gourleys were awarded $5.65 million in their trial for the heavy medical expenses Colin would require; however, due to the state-mandated cap, they could only collect $1.25 million. This is the argument against caps on recoveries. Then there is Oliver Diaz, a former Mississippi Supreme Court Justice. Diaz's fight against Karl Rove and the U.S. Chamber of Commerce eventually led to him being wrongfully prosecuted on criminal charges with his life story serving as inspiration for John Grisham's novel *The Appeal*, a novel about buying a Judgeship in the election process. Finally,



Saladoff introduces Jamie Leigh Jones, who while working in Iraq for KBR/Halliburton was raped by her co-workers. In a small clause in KBR/Halliburton's employment agreement, her right to a jury trial against her employers was taken away once the agreement was signed. Her claims were forced into a non-neutral arbitration. She filed a lawsuit in state court anyway. At the time of the documentary's filming, her case was currently underway; however, recently it ended with Jones being required to pay over $145,000 in the Defense's litigation costs. [3]

The documentary has received enthusiastic reviews. It has caused people to take a different look on a subject about which they thought they already knew everything. The *Washington Post* called it "refreshingly unadorned or manipulated for artistic tear-jerking effect."[4] Rachel Gordon of Filmcritic.com states, "*Hot Coffee* is simply a film that everyone should see."[5]

[1] "'Hot Coffee' Documentary Exposes Corporate Attacks in Consumer Rights, Features Expert Insights from Public Citizen." www.citizen.org/hot-coffee
[2] Vaughan, Dawn Baumgartner. "'Hot Coffee' Makes Splash at Film Festival." The Herald Sun. www.heraldsun.com/view/full_story/12812382/article--Hot-Coffee--makes-splash-at-film-festival
[3] Hot Coffee, a documentary feature film by Susan Saladoff. www.hotcoffeethemovie.com
[4] Stuever, Hank. "TV Review: On HBO's 'Hot Coffee,' a Persuasive Finding for the Plaintiffs." The Washington Post. ww.washingtonpost.com/lifestyle/style/tv-review-on-hbos-hot-coffee-a-persuausive-finding-for-the-plaintiffs.
[5] Gordon, Rachel. "Hot Coffee." Filmcritic.com Movie Review. www.filmcritic.com/reviews/2010/hot-coffee/

Continued on Page 19

HOT COFFEE *(Continued from Page 18)*

It is one of those films that changes the way viewers think. [6]

Information about this film, the film's trailer, reviews, interviews, event updates, purchasing information, and ways to become involved can all be found by visiting the film's website, www.hotcoffeethemovie.com.

Jamie Jones v. KBR-Halliburton

As a follow-up, Todd Kelly[7] from Texas, who represented Jamie Leigh Jones, issued the following press release:

"The American Courtroom is the last bastion of hope for our civilization. It is why Corporate America is trying so very hard to block the entrance to the average American. It is why they have pushed the agenda called 'tort reform' for so long - to destroy the right to a trial by jury.

They claim to be "strict constructionists," true American believers who are trying to stop a runaway system. Not so, they are corporations who only care about the bottom line, and need to stop access to the justice system so that they can wield their power without restraint. If they were as they claim, they might actually want to look at our Constitution:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." - U.S. Constitution 7th Amendment.

A jury of our peers, who reviews ALL of the facts is the only body that can make a determination about who wins - or loses - in a civil trial. It should be left there. The fact that Jamie was unsuccessful saddens me, but I respect the decision of the jury. The "armchair quarterbacks" who opine from their living rooms, however, are merely casting stones from a place without the proper context. Know her, know the environment at KBR, know anything about what is happening there, know about the intrusion on the rights of all Americans to bring suit. Then, and only then, can one offer an opinion that is worthy of consideration.

It takes a lot of courage to bring a lawsuit against a well-financed corporation like KBR. Jamie Jones displayed that courage, and in the face of the risks and with the full knowledge that she may have to pay KBR's costs if she lost, she faced them - head on - in the only place where an individual can still try to stand against a corporation like that, a United States Courtroom.

As a Marine Corps officer for nearly eleven years, I am mindful of the fact that countless men and women have died defending the rights of people like Jamie to fight for justice in our courts, and that countless more have sacrificed.

Thomas Jefferson said that 'no man is above the law and no man is below it. Nor do we ask any man's permission when we require him to obey it.'

We are glad that Judge Ellison agreed that this suit was not frivolous. After all, the jury deliberated for over ten hours, federal law was changed - twice, and countless other victims came forward because of the courage of this young woman.

I read the blogs about "get rich quick" schemes and such, and my blood boils. Jamie was a victim. The evidence was in the hands of KBR for years. Much of it was still unknown to us even at the time of trial. Evidence of Bortz' two subsequent batteries of women in other states (which would have shown his propensity for violence against women) was kept from the jury. Many have contacted Jamie and I 'anonymously' to tell of Bortz bragging about getting away with it - of course such anonymity is useless in a court of law. KBR knows it has a problem with its sexually charged environment. They know I know it. They wanted fees from only me - not my co-counsel. I happen to be the only one of the three of us with other cases pending against them. Coincidence?

Jamie has been ridiculed. I have been insulted. Why? Because we took on the world's largest military contractor for hiding its ill treatment of women.

Frivolous - the judge ruled that this case was NOT frivolous. That ruling was correct. The jury was not convinced that Jamie was telling the truth. That, by the way, does not mean that they decided she was lying. They just didn't credit her MORE than Bortz.

I, for one, will go to my grave believing that Jamie Leigh Jones was drugged and raped by (at least) Charles Bortz on the evening of July 27, 2005. For those who would call me a "greedy" trial lawyer, see my accountant about what this - and all civil trials cost. Get hurt in the State of Texas by someone else's neglect and see what it costs to get justice now that corporate America and Rick Perry control our courts.

Jamie, you remain a hero in my eyes. I am humbled that you chose me to stand for you. I am sorry that we did not walk out of that courtroom with justice, but I am proud to have stood by your side fighting for it for five long years. I am sorry that you have to pay the costs of the defense in this litigation. I am sorry that we will not recover the costs of your prosecution, either.

This is a loss that will forever haunt me, my friend. I am truly sorry." Thanks, Todd - TLC '09

[6] The DVD cover image and specific details of the film were taken from the film's website, www.hotcoffeethemovie.com

[7] Todd Kelly graduated from Pennsylvania State University – Dickinson School of Law and is a former member of PaTLA, practicing in Easton before moving back to Texas. He is an Alum of Trial Lawyers College. He is a board member of the Jamie Leigh Foundation, a nonprofit organization to assist people who have experienced crimes while working abroad for governmental entities.

…Through the Grapevine

Congratulations to **President's Club Member Alan J. Perer** on receiving the 2011-2012 Distinguished Alumni Award from the University of Pittsburgh School of Law Alumni Association.

More congratulations to the following attorneys of the Caroselli Beachler McTiernan and Conboy firm, who have been recognized for excellence in their specialties by Best Lawyers; **President's Club Member Edwin Beachler**, **President's Club Member and Past President William R. Caroselli**, **President's Club Member Timothy Conboy**, **President's Club Member David A. McGowan**, **President's Club Member John W. McTiernan**, **President's Club Member Thomas G. Smith**, and **Governor's Club Member Fred Soilis**.

Member **Arthur L. Schwarzwaelder** has moved to the Schwarzwaelder Law Offices, P.C., Times Bldg., 336 4th Ave., 8th Fl., Pittsburgh, 15222-2101. P: 412-394-6842 F: 412-394-6853

A speedy recovery to **Board of Governors Member Thomas A. Will**, from his recent surgery and ankle fracture.

Our deepest sympathies to the friends, family and coworkers of member **James P. Ross**, who passed away last year. James was employed with John T. Haller, Jr. & Associates in Cranberry Twp.

President's Club Member and Past President Jerry I. Meyers, **President's Club Member and Past President Charles E. Evans**, member **Todd R. Brown**, and member **Gregory R. Unatin**, all of Meyers Evans & Associates, can now be reached at U.S. Steel Tower, Ste. 4800, 600 Grant St., Pittsburgh, 15219. P: 412-281-4100 F: 412-281-4111

President's Club Member and Past President John E. Quinn and member **Brendan Lupetin**, of Portnoy & Quinn, have moved to 3 Gateway Center, Ste. 2325, 401 Liberty Ave., Pittsburgh, 15222. P: 412-765-3800 F: 412-765-3747

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

Presorted Standard
U.S. Postage
PAID
Pittsburgh, PA
Permit No. 1195