THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

Volume 24, No. 2
Winter 2012

JOEY AND HIS SMILE

By: Bernard C. Caputo, Esq.

At left, Joey and his attorney, member Larry Kelly; at right, Joey and his mom, Paula Hasson, celebrate his award.

Photography generously provided by Martin Murphy.

His infectious smile and view on life can wipe away a bad day. That is what the family and friends of Joseph Sarandrea say about him. Joey was awarded the 12th Annual Comeback Award on November 15, 2011 at the dinner in the River's Club in Pittsburgh. Larry Kelly presented his client on this night in Larry's usual flare, but he let photographs and stories of Joey and his family do the talking. Joey and his mother, Paula, gave thanks and left many with a tear in their eye.

Joey is confined to a wheelchair and has significant speech problems resulting from birth trauma some fourteen years ago. He was emergently delivered at thirty-four weeks. We, as attorneys, are all too well familiar with those types of injuries and the difficult lives that they result in. But, Joey makes the difference. Shortly after being diagnosed with developmental delays and cerebral palsy, Joey underwent a significant amount of therapy, which continues to this day. He had the support of his parents and grandparents in New Castle. He still has their support and love while he lives and attends school in Maine, except for his grandmother, who succumbed to cancer a few months ago. Joey chose to donate the check for $1,000 to the American Cancer Society in honor of his beloved grandmother. He was not at a loss for words until he talked of his grandmother.

Joey's mother, Paula, told us of the excitement Joey had on his first day of school. He charged in like he owned the place and has had that excitement every day since. One of his teachers remarked that she can be having a bad morning when she gets to school, but as soon as she sees Joey and his smile, she thinks how can she be down when he, with all he has gone through, has a smile on his face? Joey is a straight A student in the eighth grade with aspirations to be a basketball coach like his father, John Sarandrea, and his idol is Bo Ryan, head coach of the Wisconsin Badgers. This author was able to obtain an autographed basketball for Joey which was sent to him in Maine.

His mother told the story of Joey overhearing her telephone conversation with Larry Kelly upon his nomination for the Comeback Award. He asked what the Comeback Award was for, and she explained that it was for someone who has overcome adversity in his life. Joey looked puzzled at her and asked what adversity he overcame. Joey stands as an example of how we should take on life.

Continued on Page 3

UPCOMING EVENTS FOR WPTLA

Thursday, March 22 is our **Member's Only Dinner Meeting**, where we'll elect the Officers and Board of Governors for the 2012-2013 year. The dinner will be held at **Willow Restaurant** in Pittsburgh off I-79, and is being sponsored by **Scanlon ADR**.

A Koken **3-credit CLE** is set for **Friday, March 30** at the **New Castle Country Club**.

Come and meet the Pittsburgh Steelwheelers at the **Hilton Garden Inn—Southpointe/ Pittsburgh**, the location of the **Thursday, April 19** dinner meeting. Our sponsor will be Don Kirwan, of Forensic Human Resources.

A **Happy Hour with PAJ** is being planned for **Monday, April 23** at the **Westin Convention Center** in Pittsburgh.

The **Annual Judiciary Dinner** will be on **Friday, May 4** at **Heinz Field** in Pittsburgh, PA.

The Advocate
Vol. 24, No. 2, Winter 2012
Published quarterly by:
WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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A Message from the President …

By: Joshua P. Geist, Esq.

It's Time to Unleash the Reptile

In 2006, attorneys Don Keenan (Atlanta), Jim Fitzgerald (Wyoming), and Gary Johnson (Kentucky), along with jury research specialist and trial consultant David Ball (North Carolina), began a series of unique jury-research sessions. Their work led them to research performed by physician and neuro-scientist, Dr. Paul D. MacLean of Yale Medical School and the National Institute of Mental Health. Dr. MacLean's work first posited the three-part ("triune") brain. Keenan and Ball's focus was on the part of the brain Dr. MacLean called the "R-Complex."

The R-Complex is the oldest part of the brain. Over millions of years of evolution, the R-Complex gave rise to the rest of the brain: the parts that think and feel. Dr. MacLean called the R-Complex the "Reptilian" brain because it is identical in function to the brain of reptiles. Perhaps ironically, human beings are most similar to each other – all but identical – at the Reptilian-brain level.

Keenan and Ball found through their research that the Reptilian brain drives human decision-making, including jury decision-making. In their book Reptile – the 2009 Manual of the Plaintiff's Revolution, Keenan and Ball provide their research and methods to invoke the Reptile in your cases.

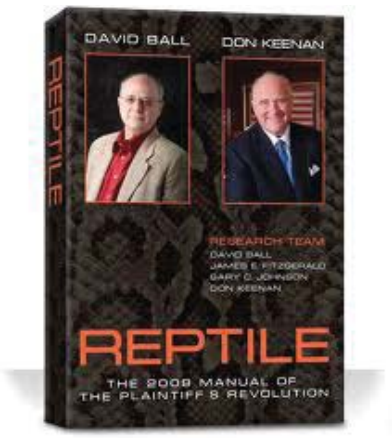
The "major axiom" of Reptile is "when the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community." The greater the perceived danger to you or your offspring, the more firmly the Reptile controls you. In trial, "justice" helps mainly when you show that justice equates with safety for the juror's Reptile.

Keenan and Ball's research revealed that a third or more of every jury pool believes a plaintiff's victory endangers the community in some way. Thus, the Reptile has long been tort-"reform's" tool. However, the Reptile prefers plaintiffs for two reasons: First, the Reptile is about community (and thus her own) safety – which, in trial, is the plaintiff's exclusive domain. The defense almost never has a way to help community safety. The defense mantra is virtually always, "Give danger a pass."

Second, the courtroom is a safety arena. Trials were invented for the purpose of making the public safer. So when we pursue safety, we are doing what the courtroom was invented and maintained for. That puts the honestly informed Reptile on our side.

Thus, the primary goal at trial becomes: "to show the immediate danger of the kind of thing the defendant did – and how fair compensation can diminish that danger within the community."

In Keenan and Ball's words, "To adopt the Reptile, you need not throw out all you have been doing. The new methods, though fundamental in concept, are used as an overlay to your current armament. It's like adding a telescopic sight to a rifle."



On December 16, 2011, WPTLA held its first book club meeting and the book was Reptile. We discussed the first 10 chapters of the book. Our recent book club meeting was January 27, 2012 and we discussed chapters 11 through 22. We plan on meeting every month. After we complete Reptile, we will offer round table discussions where you can bring your case, and we will discuss how to invoke the Reptile. After we finish with Reptile, we will be reading David Ball's Damages 3, which is the companion book to Reptile.

Please join us for our next meeting and learn how to unleash the Reptile!

JOEY'S SMILE … *Continued from Page 1*

He is the first Comeback winner that is under the age of eighteen and may be the most inspirational winner we have ever had. Joey has a lot more life to live and a lot more life to give. But, he inspires us at the ripe age of fourteen and that makes him a winner.

Above left from L to R; President Josh Geist, Comeback Award Chairperson Sandy Newman, Nominating Attorney Larry Kelly, and our 2011 Comeback Award Winner Joey Sarandrea. Above right; 2011 Winner Joey Sarandrea, 2007/2008 Comeback Award Winner Karrie Lee Coyer; 2006 Comeback Award Winner Joseph David Fleming II, and 2001 Comeback Award Winner Beckie Herzig.

At left, from L to R; Sean Carmody, Vice President Chad Bowers, Past President Bernie Caputo, Secretary Chris Miller, Precise Inc.'s Jody Wolk, Board Member Laura Phillips, Past President Carl Schiffman, and Board Member Jason Schiffman. Below, Dona Finamore, Past President Veronica Richards, Board Member Steve Barth, Past President Rich Schubert, and Board Members Chuck Alpern and Craig Fishman.

Below, from L to R; Kevin Peck, Todd Berkey, Past President Cindy Danel, Justin Joseph, Christina Westall, Board Members Erin Rudert, Christine Zaremski-Young and Chris Hildebrandt, all from Edgar Snyder & Associates, and sponsor George Audi of The James Street Group

Photography generously provided by Martin Murphy.

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WINNING YOUR CASE WITH THE *RULES OF THE ROAD*™ TECHNIQUE[1]

Defining the Problem: Complexity, Confusion and Ambiguity

The defense wields three weapons to defeat plaintiffs' cases: complexity, confusion and ambiguity. These are a plaintiff attorney's worst enemies. They creep up when you are not looking, and they are particularly pernicious in complex cases like insurance bad-faith or medical malpractice, where the facts and the jury instructions are complex, confusing, and ambiguous. But these enemies appear in simple cases too.

Sometimes, complexity, confusion, and ambiguity are inherent in the case; other times, they proliferate through the defense's intentional confounding of the jury and judge with endless, immaterial detail. In either event, you must defeat complexity, confusion, and ambiguity, or they will defeat you.

Consider one syntactic example: the use of the word *reasonable*—as in "reasonably prudent", "unreasonably dangerous", "reasonable and necessary treatment"… the list goes on and on. "Reasonable" turns up so frequently in our line of work that it can become invisible to the plaintiff's lawyer. Your jurors probably have a clear sense of what this means in layman's terms, but they probably don't understand what this word means in a legal context—and this is where the problem begins.

Because you have the burden of proof, it is incumbent upon you to make your case as clearly as possible. What the jurors don't know will hurt you.

Consider, again, the contexts in which the word "reasonable" appears before a jury. In medical malpractice cases, the key instruction asks the jury to measure the defendant's conduct in comparison to what a "reasonably prudent" or "reasonably competent practitioner" in the same field would have done. In product-liability cases, the jury is asked to determine if the product was "unreasonably dangerous" or if the manufacturer failed to act in a "reasonably prudent" way. And, in most states, the firstparty insurance bad faith jury instruction will include some variation on the plaintiff's duty to prove that the defendant intentionally [denied the claim] [failed to pay the claim] [delayed payment of the claim] without a "reasonable basis" for such action.

So what does it mean, "reasonable"? Look it up in the dictionary, and you will find a wide range of meanings: "showing sound judgment"; "rational"; "moderate" (as in a "reasonably priced house"); and "conforming with established standards or rules". That last one is the one we want.

So we have two imperatives that require us to focus carefully on this ubiquitous word, "reasonable." First, we need to show the jury that, in the legal context, *reasonable* refers to "established standards or rules." Second, we need to pour content into those rules. If we fail to meet both imperatives, the complexity, confusion, and ambiguity of the case threaten to overwhelm us.

Even the slowest defense lawyer can recognize that the ambiguity inherent in the word "reasonable" provides safe harbor for the the defendant's egregious conduct. Why? *Because the term, without clarification, creates ambiguous standards.* When the jury is asked to apply an ambiguous standard, they may be confused—and, faced with a confusing situation, most of us prefer not to act, but to wait. Jurors are no different. To render a verdict for the plaintiff, the jury needs to be confident, willing to act. A confused jury is rarely a plaintiff's jury.

For the jury, we need to define every term or phrase that could be misinterpreted: *reasonable*, *prudent*, *necessary*, *standard of care*, *preponderance of the evidence*… focus groups reveal that jurors are often confused by terms we use every day, and could define in our sleep. The bottom line is this: we cannot let jurors make up their own definitions, and we certainly cannot allow the defense to define these terms. We may get some help from the judge, in the form of jury instructions, but for the most part we need to provide the definitions ourselves.

Our Solution: The *Rules of the Road* Technique

The *Rules of the Road* technique, first published in 2007, is a proven method of distilling a case down to its most basic moral issues. When used effectively, this virtually eliminates juror confusion, and dramatically increasing the frequency of substantial plaintiffs' verdicts. At its most basic level, the *Rules* technique defines the basic principles of your case in such a way that a legal conflict is logically resolved in the plaintiff's favor. This approach cannot guarantee victory, but properly articulated *Rules*—with a capital R—will make you more successful at every stage of litigation.

The *Rules of the Road* approach posits—explicitly or implicitly—a simple paradigm to the jury:

1. *We live in a dangerous world. Anyone can get hurt.*
2. *Rules are set up to protect against danger and reduce*

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[1] This article is adapted from Rick Friedman and Patrick Malone, *Rules of the Road*. 2nd Ed. Portland: Trial Guides, 2011.

WINNING YOUR CASE … *(Continued from Page 4)*

the risk of injury.
3. People who engage in dangerous conduct need to follow the safety rules to protect the public.
4. A defendant who
(a) knows the danger in what she does,
(b) knows the rules to protect against that danger,
(c) but breaks those rules,
(d) is a person who can hurt anybody.
5. Enforcing the rules against a rule breaker protects the entire community.

The *Rules* system is designed to make it easy to set up the paradigm outlined above, even if it is not spelled out exactly this way to the jury; it gives your jurors unassailable tenets to anchor the case upon.

Continuing with our syntactic example of "reasonable", above: one would first explain the idea of the word, in a legal context, and then show the jury an enlargement of eight to twelve principles or standards that any rational juror would consider reasonable guidelines for the defendant to follow.

Once these *Rules* have been set—and ingrained with the jury over the course of the trial—it becomes vastly easier to use the term "reasonable" to your advantage. If everyone agrees with these standards, and if we can prove these standards were violated, it will be very hard for the defense to convince the jury there was a credible basis for its actions. Stated another way, these principles define "reasonableness" for the jury. We no longer have a single ambiguous, amorphous standard; we have a number of specific concrete standards—ones we know we can prove were violated.

Where to Find Your *Rules*

Rules can be found in many places. Consider culling *Rules* from: statutes and regulations; case law; contracts between relevant parties or entities; court rulings in your case; jury instructions; testimony of your experts, their experts, or their lay witnesses; policy and procedure manuals; training manuals, quality-control procedures, or operations manuals of the defendant, admissions in pleadings; textbooks and articles from the professional literature; industry guidelines or mission statements; ethical codes or guidelines; and common sense or moral imperatives.

When to Create Your *Rules*

Begin thinking about and constructing your *Rules* from the moment you meet your client, and refine each Rule throughout your case until every word is in keeping with an inviolable standard. You should add, change and or remove *Rules* in accordance with new information.

Discovery can be a wellspring of good *Rules* material. Pay attention to incoming material in terms of the following four things:

1. New *Rules* to add to your annotated list
2. Support for *Rules* you have already drafted
3. Clear agreement or disagreement from defense witnesses regarding your *Rules*
4. Violations of any *Rules*

Phrase your Requests for Admission in such a way as to be directly applicable to a *Rule*. For instance, if you have a Rule that pertains to unfair claims practices, proffer an RFA like the following:

> Please admit that when it adjusts claims originating from the State of Alaska, Acme Insurance Company is required to comply with all applicable provisions of A.S. 21.36.125 [Alaska's Unfair Claims Practices Act].

The *Rules* you formulate at the beginning of your case will become a constant theme throughout your trial, from voir dire and opening statement through direct and cross-examinations and summation. Our point here is simple, but important: start using the *Rules* technique now. It is not appropriate for every case, but it will be of tremendous help in most.

> ***Because you have the burden of proof, it is incumbent upon you to make your case as clearly as possible. What the jurors don't know will hurt you.***

Integrating *Rules* into the Jury Instructions

Jury instructions determine what evidence is relevant. They determine what you have to prove to win. They reveal what affirmative defenses can hurt you. They are the ultimate, strongest *Rules*.

If there is one takeaway lesson from our research, it would be this: *draft proposed jury instructions at the beginning of every case.* Jury instructions anchor your jury—as well as the judge and witnesses—to a common message. Nothing focuses the mind of a trial lawyer like a set of jury instructions. When you have finished drafting your jury instructions, you may be surprised to discover principles embodied in those instructions that you can incorporate into *Rules of the Road*. How you ultimately phrase the Rule for the jury will depend on exactly what facts you have to present and how defense witnesses have testified regarding your various formulations.[2]

[2] The full-length book upon which this article is based delves into the use of the *Rules* technique in every part of trial. Again, using the *Rules* technique is not a guarantee for winning every case; we strongly advise you to read the book to learn about the five traits required for a Rule, the difference between Rules and principles, as well as common pitfalls to avoid when using this method.

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WINNING YOUR CASE … *(Continued from Page 5)*

Rules *in Action: Example #1*

The following is an example of the *Rules of the Road* used in an actual commercial-property insurance bad-faith trial.

1. Company must treat its policyholders' interests with equal regard as it does its own interests. This is not an adversarial process.
2. Company should assist the policyholder with the claim.
3. Company must disclose to its insured all benefits, coverages, and time limits that may apply to the claim.
4. Company must conduct a full, fair, and prompt investigation of the claim at its own expense.
5. Company must fully, fairly, and promptly evaluate and adjust the claim.
6. Company must pay all amounts not in dispute within thirty days.
7. Company may not deny a claim or any part of a claim based upon insufficient information, speculation, or biased information.
8. If full or partial denial, Company must give written explanation, pointing to facts and policy provisions.
9. Company must not misrepresent facts or policy provisions.
10. Company may not make unreasonably low settlement offers.
11. Company must give claimant written update on status of claim every thirty days, including a description of what is needed to finalize the claim.

Rules *in Action: Example #2*

Now consider these *Rules* used in a products-liability case involving defective packaging of the drug Propofol:

1. If more than one way to provide drug to customer exists, a drug company should choose the safest one.
2. Even if the FDA allows an unsafe practice, a reasonable drug company should not engage in that unsafe practice.
3. Unsafe practice is not justified because another company is doing it.
4. If company learns product is being misused, it should take steps to prevent misuse.
5. A warning is not an answer to all safety problems.
6. Drug company must not entice or tempt health care workers into misusing drug.
7. When possible, a manufacturer should design and market a drug to reduce the risk of human error.
8. Drug Company should weigh the benefits of its product as designed against the risks, within practical limits.
9. If a drug product can be made safer, without loss of utility, company should make it safer, within practical limitations.
10. Drug company should never encourage a health care worker to use a vial of Propofol on more than one patient.

Remember the other enemies of a plaintiff's case: complexity and confusion? The *Rules of the Road* give the jury (and you) an effective tool for cutting through complexity and confusion. By methodically hinging your case upon a set of sacrosanct standards—and weaving these standards through every part of your case—your case becomes as unassailable as the *Rules* themselves.

While you do need to use strategic wording with every Rule, you should not to use technical or esoteric language. Suppose we are dealing with a condominium association's claim that its buildings were damaged in an earthquake and the insurance company handled the repairs in bad faith. Lengthy correspondence went back and forth between the insurance company and the association's agents, addressing complex insurance, engineering, and construction issues. The insurance company also has produced a three-foot-thick file stuffed with self-serving internal documents covering the claim. Making sense of these documents is difficult for the jury (or anyone).

But suppose we look at these documents through the lens of the claims-handling principles and standards (Example #1). Do they show the company was treating the policyholder's interests with equal regard to its own interests? Did the company assist the policyholder with the claim? Did the company pay all amounts not in dispute within thirty days? Chances are, the answer to all these questions is no.

The jury may never understand the fine points of the engineering and construction issues addressed in the documents, but it will easily understand whether these principles were honored. Complexity and confusion are replaced by clarity. And if you are on the right side of a case, clarity can only help you.

Conclusion

The *Rules of the Road* technique is a revolutionary new way to combat complexity, confusion and ambiguity in your case. You can use the *Rules* technique all through your case: from clarifying your argument in your first demand letter, to summation and appeal. However, it is only a tool, not a formula, and it must be adapted to the unique circumstances of each case. The *Rules* approach, when used strategically and judiciously, will anchor your case around unassailable standards of conduct, and improve your advocacy dramatically.

Article compiled from "Rules of the Road, 2nd Ed." by Trial Guides, 2011 (www.trialguides.com).

COMP CORNER

By: Thomas C. Baumann, Esq.

COMMONWEALTH COURT DETERMINES SUPPLEMENTAL UNEMPLOYMENT BENEFITS ARE TO BE INCLUDED IN THE AVERAGE WEEKLY WAGE CALCULATION

The Commonwealth Court recently addressed whether Unemployment Benefits and Supplemental Unemployment Benefits should be included in the calculation of the average weekly wage in *Bucceri vs. WCAB (Freightcar America Corporation)*, 2021 C.D. 2010. Bucceri was injured on June 4, 2002. He received disability benefits at the rate of $287.42 per week based on an average weekly wage of $319.36 per week. Bucceri filed a Review Petition alleging that his benefits had been calculated too low as he had a period of layoff in the year preceding the date of injury. He received Unemployment Compensation Benefits and Supplemental Unemployment Benefits pursuant to a Collective Bargaining Agreement. The amount of the Supplemental Benefit was based upon seniority. Both sides presented evidence demonstrating the sub-payments made to Bucceri prior to his injury. The Bargaining Agreement was also placed into evidence.

The Workers' Compensation Judge found that both the Supplemental Benefits and the Unemployment Compensation Benefits should be included in the calculation of the average weekly wage. The employer appealed to the Board, which reversed citing *Reifsnyder vs. WCAB (Dana Corporation)*, 584 Pa. 341, 883 A.2d 537 (2005) as to the Unemployment Compensation issue. The Board also found that the Supplemental Benefits should be excluded from the calculation of the average weekly wage, determining these benefits are to be paid when an employee is no longer working for an employer. Bucceri's appeal to the Commonwealth Court followed.

On appeal, the Commonwealth Court proved Solomonic. It, also, concluded that Unemployment Compensation Benefits could not be included in the calculation of the average weekly wage based on the Supreme Court's decision in *Reifsnyder*. More on that later. However, it concluded the Supplemental Benefits were properly included in the calculation of the average weekly wage.

The Court analyzed previous Commonwealth Court decision regarding Supplemental Benefit payments. It noted that it had addressed a subpay issue in *Dana Corporation vs. WCAB (Beck)*, 782 A.2d 1111 (Pa. Cmwlth. 2001). There the Court cited a prior case where it was determined that Supplemental Benefits were an accrued entitlement built up as a result of the claimant's employment. It determined there was no entitlement for a credit for such payments against Workers' Compensation payments.

The Commonwealth Court noted it had held that sickness and accident benefits were properly included in the calculation of the average weekly wage. *Shire vs. WCAB (General Motors)*, 828 A.2d 441 (Pa. Cmwlth.), appealed denied, 577 Pa. 675, 842 A.2d 408 (2003). Citing these cases and the humanitarian nature of the Act, the Court concluded that Supplemental Benefits were properly included in calculating the average weekly wage.

In dismissing the claim that Unemployment Compensation Benefits should be included in the average weekly wage, the Court noted this issue is now "settled" pursuant to *Reifsnyder*. Interestingly, the Court makes no mention of the concurring opinion in *Reifsnyder* where Judge Baer, joined by three other Justices at the time, declared, "I write separately only to distance myself respectfully from the majority's conclusion that Unemployment Compensation Benefits should not be included in the computation of an employee's average weekly wage under Section 309(d) where an employee's relationship with an employer involves periodic layoffs." 883 A.2d at 549. While the makeup of the Court has changed since the *Reifsnyder* decision, the author respectfully suggests the issue is not yet "settled."

PAJ Member Julie Fritch, Esquire represented the claimant. A request for allocator has been filed. PAJ Member Doug Williams wrote the Amicus Brief on behalf of PAJ.

Attn: President's Club Members

If you missed the recent 3-credit CLE program on February 13 in Pittsburgh, mark your calendar for **Friday, March 30, 2012**. A Koken seminar will be held at the New Castle Country Club. This will be your last chance to redeem your FREE CLE credits for this year.

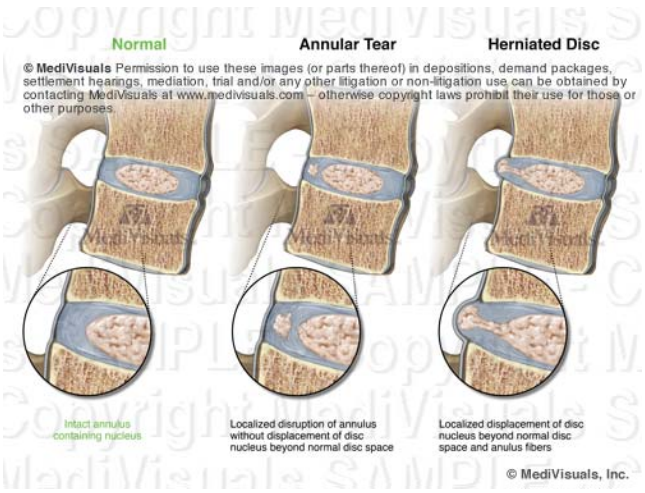
ANNULAR TEARS AND FISSURES

(Intervertebral Disc Pathology, Part 2 of 3)

By: Robert Shepherd MS, Certified Medical Illustrator,
Vice President and Director of Eastern Region Operations, MediVisuals Incorporated

This blog is a follow-up referencing language and labels used by health professionals to describe various types of intervertebral disc pathology as defined by a 1995 joint undertaking by representatives from the North American Spine Society, American Society of Spine Radiology and American Society of Neuroradiology. As a result of their efforts, a more uniform and widely accepted use of nomenclature to define intervertebral disc pathology was developed and published in "Nomenclature and Classification of Lumbar Disc Pathology".

A previous blog dealt with "Symmetrical" and "Asymmetrical" disc "bulge" and "Broad-based" v. "Focal" Herniations. The first disc pathology term discussed in this blog is "Annular Tear". This is essentially synonymous with "Annular Fissure," with perhaps "Fissure" being preferable over "Tear" because "Tear" may imply that the pathology was the result of some sort of traumatic event, and this specific pathology can occur without necessarily being the result of trauma. Annular Tears/Fissures, as seen in the below figure, can occur without fitting the definition of a "Herniation" (disc material extruding beyond its normal boundaries). As seen in the below illustrations, the fibers of the annulus can be torn with nucleus protruding into the annulus but without the annulus or nucleus extending beyond the bordering vertebral bodies. By contrast, when "Anular Tears/Fissures" result in disc material extending beyond its normal boundaries, the disc pathology is typically referred to simply as a "Herniation" without a reference to the presence of an Annular Tear/Fissure".



(Shepherd, Robert. "Annular Tears and Fissures." *MediVisuals Incorporated.* MediVisuals Incorporated. 7 Sept. 2011. Web. 30 Sept. 2011.)

CALENDAR OF EVENTS

Thursday, Mar. 22, 2012	Board Mtg / Member's Only Dinner Mtg	Willow Restaurant Pittsburgh, PA
Friday, Mar. 30, 2012	3-credit CLE Program	New Castle Country Club New Castle, PA
Thursday, Apr. 19, 2012	Board Mtg / Dinner Mtg	Hilton Garden Inn - Southpointe Canonsburg, PA
Monday, Apr. 23, 2012	Happy Hour w/ PAJ	Westin Convention Center Pittsburgh, PA
Friday, May 4, 2012	Annual Judiciary Dinner	Heinz Field Pittsburgh, PA

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 24 2011-2012

Issue	Spring '12	Summer '12
Article Deadline Date	March 16, '12	Late April, '12
Publication Date	May 25, '12	Late June, '12

PICTURES & PROFILES QUESTIONNAIRE

Name: Charles F. Bowers III

Firm: Bowers Ross & Fawcett

Law School: Duquesne

Year Graduated: 1990

Special area of practice/interest, if any: Drivers License suspension appeals

Most memorable court moment: Trying a civil motor vehicle death case with my Dad.

Most embarrassing (but printable) court moment: As a new lawyer when I wrote out my Direct of a witness and proceeded to ask my first few questions reading from my legal pad as if I was dictating them. "It's alleged comma.." and "What did you see question mark".

Most memorable WPTLA moment: Running the 2011 President's Challenge 5K.

Happiest/Proudest moment as a lawyer: Representing a Silver Star winning WWII veteran who fell and broke his hip due to an accumulation of ice.

Best Virtue: Honesty

Secret Vice: Chocolate

People might be surprised to know that: I played Rugby in College, Law School and for three years after graduation.

Favorite movie (non-legal): Blues Brothers

Favorite movie (legal): Anatomy Of A Murder

Last book read for pleasure, not as research for a brief or opening/closing: *The Art Of Fielding* by Chad Harbach

My refrigerator always contains: Iced Tea and Apples

My favorite beverage is: Beer

My favorite restaurant is: Andora

If I wasn't a lawyer, I'd be: A History Professor

U.S. SUPREME COURT UPHOLDS PLAINTIFF-FRIENDLY CAUSATION STANDARD FOR RAILROAD AND MARITIME WORKER INJURY CLAIMS

By: Rich Ogrodowski, Esq.

Earlier this year, in the article "An Attack on the Standard of Causation in FELA Cases," I reported in this publication on the Supreme Court of the United States granting CSX Transportation, Inc.'s petition for a writ of certiorari following the decision in *McBride v. CSX Transp., Inc.*, 598 F.3d 388 (7th Cir. 2010). The Court was to review the issue of "whether the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, requires proof of proximate causation," rather than the plaintiff-friendly "featherweight" causation standard federal and state courts have been applying for decades in FELA and Jones Act cases.

In *McBride*, the Seventh Circuit upheld the district court's use of the Seventh Circuit's Pattern Instruction on causation in FELA cases. The pattern instruction states in part:

> Defendant 'caused or contributed to' Plaintiff's injury if Defendant's negligence played a part -- no matter how small -- in bringing about the injury.

McBride, 598 F.3d at 390-391 n.2. The pattern instruction is based on language from the Court in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957).

On June 23, 2011, the Court, in a 5-4 decision, rejected CSX's argument and found that the district court did not err in using the Seventh Circuit's Pattern Instruction on causation in FELA cases. Specifically, the Court stated:

> The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

CSX Transp., Inc. v. McBride, 131 S.Ct. 2630, 2634 (2011). As such, the Court concluded:

> In accord with the text and purpose of the Act, this Court's decision in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957), and the uniform view of federal appellate courts, we conclude that the Act does not incorporate 'proximate cause' standards developed in nonstatutory common-law tort actions.

CSX Transp., Inc., 131 S.Ct. at 2634.

Thus, *McBride* confirms that the plaintiff-friendly "featherweight" causation standard will continue to apply in FELA and Jones Act cases.

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BY THE RULES

By: Mark E. Milsop, Esq.

DO YOU NEED AN EXPERT REPORT FROM YOUR CLIENT'S TREATING PHYSICIAN?

Traditionally, the problem had been the cost of an expert report. More recently I have encountered, on a couple of occasions, doctors who outright would not cooperate in writing a report. In one case, I was able to persuade the doctor to fill out a form that I called a statement of causation. In another case, I could not even get that. Hence, the question arises as to whether or not a treating physician may testify in the absence of a narrative report.

There is an easy answer to this question. However, there is the more difficult follow up question. The easy answer is that the treating physician may testify absent a report. The trickier question is whether testimony as to causation, prognosis/future treatment and disability may be admitted absent a report. I would suggest that the correct answer to this question is also yes – subject to the qualifier that there are judges out there who would not be inclined to agree with me.

The starting point is Pa.R.C.P. No. 212.2(5) which provides that a pretrial statement shall include "a copy of the written report or answer to written interrogatory consistent with Rule 4003.5, containing the opinion and the basis for the opinion of any person who may be called as an expert witness." Not defined by the rule is the term expert witness. However, additional guidance is provided by the note which states "the notes or records of a physician may be supplied in lieu of written reports." This really should be the end of the question. However some defense counsel (not all) take the position that this only allows the physician to testify as a fact witness. The remainder of this article shall address why defense counsel who make such an argument are wrong.

First, the rule (5) does not apply to fact witnesses, it applies to expert witnesses. As such, the clear intent of the note is to allow the notes and records to be treated as a substitute for an expert report.

Second, the treating physician is largely outside of the scope of rule 4003.5 (Discovery of Expert Testimony). Rule 4003.5 applies only to facts and opinions "acquired or developed in anticipation of litigation" This aspect of Rule 4003.5 is well recognized in case law. In Miller v. Brass Rail Tavern, 664 A.2d 525 (Pa. 1995) the issue was testimony by a coroner concerning cause and time of death. The Court held "there is no doubt that the opinions of Coroner Wetzler, especially relating to cause of death and time of death, constitute expert opinion. However, because Coroner Wetzler's opinions were not acquired or developed with an eye toward litigation, Rule 4003.5 is inapplicable."

Third, if the testimony that you wish to introduce is not explicitly contained in the report, the testimony may nonetheless be within the fair scope of the documentation that was produced and included in the Pre-Trial Statement. Hence, in Chanthavong v. Tran, 682 A.2d 334 (Pa. Super. 1996), a treating physician was allowed to testify as to the seriousness of an injury despite the fact that there was not a specific discussion of this issue in a report. Instead, the doctor had stated that the plaintiff had sustained a herniated disc. Hence, it was proper for the doctor to explain the effect of the herniated disc. In doing so, the Court looked to the testimony defining the fair scope of an expert report. In so doing, it recited the familiar language that the accent is on the word "fair". The Court further noted that "It is impossible to formulate a hard and fast rule …. Rather, the determination must be made with reference to the particular facts and circumstances of each case." It was therefore, concluded that "it naturally followed that appellant would attempt to establish not only the fact that he had sustained an injury, but also the effects thereof. We cannot see how Dr. Young's testimony would have surprised appellee or prevented him from preparing a meaningful response." Chanthavong, 682 A.2d at 340.

The foregoing third layer of analysis is particularly attractive in the case of a treating physician. Although the records rarely formally state an opinion on causation, the records will almost always contain a history that states something like "patient states sustained a soreness in his knee following a motor vehicle accident" or an impression of "status post motor vehicle accident" or "knee injury secondary to motor vehicle accident" In reality any of these types of statements will alert a defense attorney that the doctor in question is likely to testify to the causal nature of the accident and the injuries.

Fourth, as a fall back arguement, even if the report was required to be produced under Rule 4003.5 or Rule 212.2, there is case law that the testimony should not be automatically excluded. In Miller, after concluding that an expert report was not required under Rule 4003.5, Justice Montemuro further noted that testimony should be excluded for the failure to provide an expert report

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MID-TO-SMALL LAW FIRM ALERT:
Overcoming The Growing E-Discovery "Skill Gap"

*By Richard N. Lettieri, Esq.**

In the past two years, 87 of the top 200 AMLAW law firms have created E-Discovery Practices. Two years ago, that number was 6[1]. Within the next two years, it is estimated that nearly every large law firms will have their own E-Discovery Practice. What are the reasons for this dramatic development? First, large corporate clients understand the risks and the associated costs of e-discovery and have insisted that their outside counsel reduce the costs and mitigate the risks of e-discovery by having competent lawyers who can discuss the legal requirements of ESI with their corporate IT staffs. Second, larger firms with more experience in e-discovery, recognize the strategic importance of ESI in court and appreciate the competitive advantage to be gained from having experienced, knowledgeable, E-Discovery Counsel on their litigation teams.

Thus far, mid-to-small firms have not responded to the e-discovery challenge with the same urgency. Several reasons have been suggested for their slower response. First, they have fewer, if any, large corporate clients making the demand for e-discovery talent on their litigation teams; second, they appear to be generally unaware that larger firms are using this growing skill imbalance as a competitive advantage in litigation; and third, even if they do recognize that they are operating at a competitive disadvantage because of their lack of ESI skills, they lack the financial resources to add the specialized skills of an E-Discovery Counsel to their litigation teams.

The result: an ESI "skill gap" between large firms and mid-to-small firms has emerged and is growing rapidly, tipping the e-discovery playing field in favor of the larger firms and their large corporate clients.

This article addresses this growing ESI "skill gap" by 1) providing specific examples that demonstrate the negative impact that this growing skill imbalance is having on litigation in federal court, 2) outlining the options available to mid-to-small firms to combat this development and "level the e-discovery playing field", and 3) providing a "call to action" for mid-to-small firms to confront this new reality and take the appropriate action to protect their interests and those of their clients.

Real Examples

If you are a litigator in a mid-to-small firm, you may be asking: "Even if there is a growing ESI "skill gap", what impact does this development have on me and my litigation practice?"

Let's look at some real examples of trial lawyers from smaller firms who have been placed at a competitive disadvantage because of their lack of knowledge and experience when addressing ESI in federal court[2].

- An attorney from a small law firm representing a client in a personal injury case, is asked by E-Discovery Counsel from a large firm: "This is such a small case, do we really need the cost and aggravation of pursuing ESI"? The large firm attorney knows that his client's five custodians from this "small" case generated approximately 1-12 million emails based upon the fact that they are using five PCs, each holding 2-6 gigabytes (GB) of data representing approximately 100,000 pages of emails per GB. The small firm lawyer, unaware of these volumes of data, is unknowingly led to believe that the case is too small to warrant a consideration of ESI. The result is that the large firm attorney produced a small number of obviously relevant emails after her manual search of documents, instead of the thousands of potentially relevant documents that would have been expected from an electronic search of a dataset that large, if the small firm counsel had answered "yes"

[1] Cohen Group, October, 2010

[2] These are real examples. The names and specific circumstances of the cases have been changed to protect the confidentiality of attorneys and the clients

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BY THE RULES *(Continued from Page 11)*

only after balancing the facts and circumstances of the case. In performing the necessary balancing, there four basic considerations (1) prejudice or surprise in fact of the party against whom the witness would testify, (2) the ability of a party to cure prejudice, (3) the extent the calling the witness would disrupt the orderly and efficient trial of the case in question or other cases in the the court and (4) bad faith or willfulness. See Miller, 664 A.2d at 532 fn5 citing Feingold v. Southeastern Pennsylvania Transportation Authority, 512 Pa. 567, 517 A.2d 1270 (1986).

Fifth, as a second fall back argument you should be prepared to argue that even if the expert testimony is excluded, a non-suit should not be granted where expert testimony is not required to establish a prima facie case. This argument would apply in a case where there is an obvious injury which does not require expert testimony to establish causation. See e.g. Matthews v. Clarion Hospitial**,** 742 A.2d 1111 (Pa.Super.1999).

MID-TO-SMALL LAW FIRM ALERT ... *Continued from Page 12*

when asked "Do we really need to pursue ESI?"

- At the suggestion of Defense counsel, counsel for a mid-size firm in an employment-related litigation agrees to receive production documents in a TIFF format. Later, Plaintiff's counsel discovers that he cannot search the production documents causing him to spend a great deal of extra time and resource on the review. Also, because he is unaware that metadata will not be available in this TIFF format, he unknowingly gives up the ability to verify the create dates of several critical emails. Later, he realizes that both searchability of the documents and the access to the critical metadata would have been available had he insisted the production format be in native instead of TIFF.
- Opposing counsel attend a Rule 26(f) "meet & confer" at which a small firm counsel indicates she believes there are 25 custodians whose emails need to be reviewed for the 5 year period in question in an important employment law case. The large firm attorney cites several relevant court cases from other circuits, the value of the case, and offers several costs estimates from e-discovery suppliers who have been asked to perform the preservation/collection/filtering/processing/review and production of the documents. Each of these estimates represents a large portion of the total value of the case. Insisting that there are only 7 key custodians and the relevant time period is only 2 years and that the principal of proportionality requires the lesser scope, he convinces the small firm lawyer to reduce the scope of her request to 7 custodians and the time period to two years. The tactic saves the large firm's client a lot of money, and reduces the number of potentially relevant documents to be searched and produced by two-thirds. In this instance, the small firm counsel's determination of scope had been proportional to the facts and the value of the case. However, she lacked the ESI knowledge and experience to successfully defend her initial request to opposing counsel, resulting in significantly less relevant documents to support her client's position.
- The designation of data as "not accessible due to undue burden and cost" protects a party from the cost of producing data that needs to be "restored" before it can be produced, when the same data may be found in an accessible format. But what happens when a company creates records retention policies that limit the "life" of ESI and eliminates the data in accessible format, only allowing it to be retained on inaccessible back-up media?

  In a recent case, a large law firm represented a client that had a 90 day email retention policy. A product liability lawsuit was filed six months after a triggering event occurred giving the client reasonable anticipation that the suit would be filed. A reasonably prompt litigation hold was initiated, but potentially relevant emails were destroyed on the PCs of key custodians because of the short retention policy. The data was still maintained on "inaccessible" back-up tape. The large firm lawyer argued that the back-up tapes were "inaccessible" due to undue burden and cost, and the less experienced mid-size firm lawyer acquiesced until it was suggested at the Rule 26(f) conference by the E-Discovery Counsel that he hired, the company's records retention policy might be construed as one designed to "downgrade" accessible data for the purpose of making it inaccessible. Insisting that the large law firm's counsel agree to produce the relevant data in question from the back-up tape at its own expense, the large firm's lawyer reversed his position and provided the inaccessible data at his client's expense, after reviewing the applicable case law.

These real examples demonstrate some of the ways in which the growing e-discovery skill imbalance is working against the mid-to-small firm counsel and their clients who are less knowledgeable and less experienced in ESI.

Exacerbating the ESI Skill Imbalance

At the same time the large firms have been increasing their ESI knowledge and experience by creating E-Discovery Practices within their firms to help their litigators and their clients address ESI issues, federal judges have also been taking action to enhance their ability to address the growing ESI challenge.

In the five years since the Federal Rules of Civil Procedure have gone into effect, the federal court system has seen a gradual but steady increase in the number, complexity, and depth of ESI cases. In the U.S. Court, Western District of Pennsylvania, federal judges saw a gradual increase in ESI occurring in cases coming before them, as well as ESI issues emerging in what had formerly been considered "smaller cases," so they initiated several changes to the Local Rules and court practices designed to address the growing ESI challenge.

First, they created a committee of local attorneys to recommend modifications to the Local Rules that were adopted in 2009 to include a "duty to investigate" the IT systems of clients, so that counsel could come to the Rule 26(f) "meet & confer" better prepared to discuss the important ESI issues that require resolution at that session. Another 2009 recommended change in the Local Rules required an IT resource person be designated to help facilitate the acquisition and exchange of relevant IT information with opposing counsel, expected to result in a more meaningful ESI discussion at the Rule 26(f) conference. Finally, modifications to the Rule 26(f) Report to the Court were adopted that specifically outlined the ESI issues that the Court expected counsel to discuss and decide at the session.

This Report to the Court is currently viewed as an "early warning system" to alert the Judges regarding the level of completeness and agreement between the parties on the important ESI issues early in the litigation process at the Rule 16 scheduling conference.

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MID-TO-SMALL LAW FIRM ALERT ... *Continued from Page 13*

In addition to modifying the Local Rules to assist counsel in conducting meaningful Rule 26(f) conferences, The Honorable Joy Flowers Conti has co-authored two articles designed to explain judicial expectations relative to ESI at the Rule 26(f) "meet & confer" conference and outline specific suggestions for how these judicial expectations can best be met[3].

The Judge's in the U.S. Court, Western District of Pennsylvania, have also created an E-Discovery Special Master Program in 2011. As the Honorable Judge Nora Barry Fischer indicated in a February 2001 article on this topic that she co-authored for *The Federal Lawyer*[4]*:*

> *"The challenge posed by the production and discovery of electronically stored information is not likely to go away or recede in the next decade. Instead, cases involving ESI are expected to increase in amount and complexity."*

Because the Judges recognize that more and more cases, both large and small, will involve complex ESI issues, they have created a panel of E-Discovery Counsel they can appoint to help counsel and the Court resolve these issues when they arise.

All the above actions taken by the federal judiciary to address the ESI challenge further exacerbates the disparity of the ESI skills between the large and the mid-to-small law firms.

In response to this enhanced level of ESI preparedness by large firms and the federal judiciary, what actions can mid-to-small law firms take to reduce the growing ESI "skill gap" and overcome the growing e-discovery skill imbalance?

"Crash Course" in ESI

Many mid-to-small firms have attempted to address the ESI challenge by designating a young associate as their ESI specialist and asking them to take a "crash course" in ESI. This approach is based upon the premise that ESI is a topic that can be addressed in a two-day or one week seminar. What they discover is information technology (IT) is a discipline with as many complexities and sub-specialties as there are in the law. Therefore, sending a novice lawyer to depose a software engineer responsible for corporate optical storage sub-systems, (the equivalent to sending an estate planning lawyer into court to litigate a class-action, employment law case), is fraught with risk. Since the credentials of a bona fide, E-Discovery Counsel at most large law firms are impressive, mid-to-small law firm partners are quickly learning that someone of equal skill and experience is required to go "toe-to-toe" against that level of skill.

Hire a Full-Time E-Discovery Counsel

A few mid-to-small law firms have considered hiring their own E-Discovery Counsel. However, while this approach might solve the growing E-discovery imbalance, it is impractical since a mid-to-small law firm generally lacks the financial resources and the volume of ESI matters to justify the cost of a full-time E-Discovery Counsel.

Hire an E-Discovery Counsel on an "As-Needed" Basis

Hiring an E-Discovery Counsel to augment the mid-to-small firm's litigation team on an "as-needed" basis has proven to be a successful and cost-effective approach for many mid-to-small firms. First, the approach counter-balances the large firm's ESI advantage and protects the firm and their client's interests in the current litigation. Second, if the mid-to-small firm insists that the "for-hire" E-Discovery Counsel provides substantial "knowledge transfer" to the firm and staff as part of the engagement, the firm gains the additional benefit of practical ESI training for their litigation team. Enough can be learned from these experiences to permit lawyers in the mid-to-small firm to routinely handle the ever-increasing number of small, similar matters involving ESI. The E-Discovery Counsel remains available on an "as-needed" basis to handle the complex ESI case that is beyond the evolving skill of the mid-to-small firm's in-house team.

Conclusion: A "Call to Action" For Mid-to- Small Firms

There is a growing E-Discovery "skill gap" between large and mid-to-small law firms and this skill imbalance is exacerbated by actions taken by the federal judiciary. Over the past two years, 87 of the top AMLAW 200 law firms have created E-Discovery Practices and this number was 6 just two years ago. It is estimated that almost every large law firm in the U.S. will have in-house E-Discovery capability within the next two years.

The federal judiciary in Western Pennsylvania and elsewhere have augmented their ESI capability through changes to their Local Rules and the increased availability and use of E-Discovery Special Masters to help resolve ESI issues in federal court.

It's time for mid-to-small law firms to respond to the growing ESI skill imbalance. Lawyers at these firms have a professional and ethical responsibility to themselves and their clients to do so without further delay[5].

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[3] Hon. Joy Flowers Conti and Richard N. Lettieri, *E-Discovery and Pre-Trial Conferences: A Primer for Lawyers and Judges*, 46 Judges J., no. 3,34 (2007); Hon. Joy Flowers Conti and Richard N. Lettieri, *In re ESI: Local Rules Enhance the Value of Rule 26(f) "Meet and Confer", 49 Judges j., no. 2, 29 (2010).*

[4] Hon. Nora Barry Fischer and Richard N. Lettieri, *Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court*, The Federal Lawyer magazine of the Federal Bar Association, February, 2011

[5] Richard N. Lettieri, *"How to Level the E-Discovery Playing Field", The Advocate*, Quarterly magazine of the Western Pennsylvania Trial Lawyers Association, Fall, 2010.

PA SUPREME CT. ISSUES OPINIONS ON REDISTRICTING

By: Ken Rothweiler, Esq.

LRC's Plan Unduly Split Too Many Political Subdivisions--2001 Map Remains in Effect For Now

February 6, 2012 – Late Friday afternoon, Feb. 3, the Pennsylvania Supreme Court issued opinions on the 2011 Legislative Redistricting Plan, which was designed to map out new state senate and house districts based on the 2010 census.

The opinions, along with the Court's January 25 Order and Dissenting Statement, can be found on the Supreme Court's web site: www.pacourts.us/default.htm

At this point, the 2001 map should remain in effect. However, Republican leadership in both the state Senate and House are challenging this in federal court today. There are also published reports that the Republican leadership may attempt to change the dates for the Spring primaries in order to try and have a new map passed and approved. We will keep you apprised of any development.

Writing the majority opinion, Chief Justice Castille said the Final Plan's challengers demonstrated that the Final Plan "contains numerous political subdivision splits that are not absolutely necessary, and the Plan thus violates the constitutional command to respect the integrity of political subdivisions."

Castille added that the appellants have shown that the Legislative Reapportionment Commission (LRC) "could have easily achieved a substantially greater fidelity to all of the mandates in Article II, Section 16 [of Pennsylvania's Constitution] – compactness, and contiguity, and integrity of political subdivisions – yet the LRC did not do so in the Final Plan." The mandate for "compactness, and contiguity, and integrity" of political subdivisions, Castille noted, is as important as the mandate for population parity in legislative districts.

In remanding the plan to the LRC, Castille acknowledged the impact on the 2012 primary election landscape, but the disruption "was unavoidable in light of the inexcusable failure of the LRC to adopt a Final Plan promptly so as to allow the citizenry a meaningful opportunity to appeal prior to commencement of the primary season."

Until a revised final 2011 Legislative Reapportionment Plan is approved, the 2001 Legislative Plan shall remain in effect. The Court did not provide detailed direction for the Commission to draft a new Plan or a date for the primary elections.

Castille was joined by Justice Baer, Madame Justice Todd, and Justice McCaffery.

Separate concurring and dissenting opinions were filed by Justice Saylor and Justice Eakin.

Justice Orie Melvin filed a dissenting opinion.

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HOT OFF THE WIRE!

By: Chris Hildebrandt, Esq.

SUPREME COURT OF PENNSYLVANIA

It is not in the overall public interest for Pennsylvania to recognize the tort of negligent spoliation of evidence.

Pyeritz v. Commonwealth, 2011 Pa. LEXIS 2831 (Nov. 23, 2011)

This is a case of first impression, addressing whether Pennsylvania recognizes a cause of action for negligent spoliation of evidence. The Supreme Court concluded Pennsylvania has not and does not recognize such a cause of action.

The decedent, Daniel Pyeritz, went hunting on October 30, 2001. He climbed up to a tree stand and lashed himself to the tree stand with a black nylon tree stand safety harness. He was found the next day dead at the bottom of the tree. The harness had ripped in two. The Pennsylvania State Police investigated the death as suspicious. A State Trooper took the two pieces of the harness into custody and logged them into evidence at the State Police barracks. In November 2001, an attorney, retained to pursue a civil action, sent the State Trooper a letter requesting the harness be retained. In November 2002, a coroner's inquest was held, which concluded the manner of death was an avoidable accident. Shortly thereafter, the decedent's civil attorney again requested the State Trooper keep the harness pieces in the evidence room, and the Trooper agreed to the request. The investigation into the decedent's death was transferred to a new State Trooper, and in July 2003, the two harness pieces were destroyed "presumably pursuant to the State Police Evidence Guidelines." The decedent's civil attorney learned in August 2003 the harness had been destroyed.

The Commonwealth was subsequently sued in negligence "for failure to preserve evidence necessary for plaintiffs' third-party claim." The Commonwealth moved for summary judgment. At argument, decedent's counsel argued "a bailment had been created, which gave rise to a special relationship which, in turn, would warrant holding [the Commonwealth] liable for spoliation." The trial court granted summary judgment in favor of the Commonwealth. The Commonwealth Court affirmed.

On appeal, the Supreme Court was tasked with determining whether the Commonwealth had a duty to preserve the harness, considering five factors: (1) the relationship between the parties; (2) the utility of the defendant's conduct; (3) the nature and foreseeability of the risk in question; (4) the consequences of imposing the duty; and (5) the overall public interest in imposing the duty. The Supreme Court concluded none of the five factors supported the creation of a duty, which would result in a cause of action for negligent spoliation of evidence.

The Court determined that "the negative consequences of imposing a duty not to commit negligent spoliation of evidence outweigh any benefits the recognition of this tort might afford." The Court held that "as a matter of public policy, this is not a harm against which [the Commonwealth] should be responsible to protect." Significantly, the Court feared if the tort were recognized "the inability of the parties to assess meaningfully the impact of the missing evidence on the underlying litigation would result in potential liability based on speculation." In addition, the Court determined under existing law a party may obtain injunctive relief to preserve evidence, and to the extent the recognition of the tort of negligent spoliation would encourage the preservation of evidence, the benefit is outweighed by the financial burden the tort would impose. The Court held because the tort "would permit the imposition of liability based on speculation, would create the potential for the proliferation of litigation, and would confer a benefit already sufficiently achievable under existing law, it is in the overall public interest not to recognize the tort."

Williams v. GEICO, 2011 Pa. LEXIS 2522 (October 19, 2011)

Public policy does not require that police officers in Pennsylvania should not be subject to the regular use exclusion.

Williams, a Pennsylvania State Police Trooper, was seriously injured while operating a police cruiser owned and maintained by the Pennsylvania State Police. Williams sought UIM benefits through a personal automobile insurance policy with GEICO. GEICO filed a declaratory judgment action seeking a judicial determination that its policy did not cover Williams' claim based upon the "regular use" exclusion.

The trial court granted GEICO's Motion for Summary Judgment. The Superior Court affirmed, following Brink v. Erie Ins. Group, 940 A.2d 528 (Pa. Super. Ct. 2008). The Supreme Court of Pennsylvania accepted appeal on the limited issue of whether "public policy requires permitting a police officer to recover UIM benefits under his personal automobile policy."

The Supreme Court of Pennsylvania rejected Williams' argument that police officers in Pennsylvania should not be subject to the regular use exclusion. In doing so, the Court explicitly reaffirmed its holding in Burnstein v. Prudential, 809 A.2d 204 (Pa. 2002), holding that "the regular-use exclusion is not void as against public policy." The Court concluded a "contrary decision is untenable, as it would require insurers to compensate for

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risks they have not agreed to insure and for which premiums have not been collected."

SUPERIOR COURT OF PENNSYLVANIA

In a post-Koken third-party/UIM insurer lawsuit, because the defendants are not jointly or jointly and severally liable, venue against the third-party tortfeasor may not be proper in the same county as the insurer.

Sehl v. Neff et al., 2011 PA Super 153 (July 25, 2011)

Plaintiff, a resident of Montgomery County, was involved in an automobile accident in Montgomery County. Plaintiff filed a complaint in Philadelphia County against the other driver for negligence in causing the accident and against State Farm for breach of contract, relating to the denial of Plaintiff's claim for UIM benefits. The tortfeasor-driver filed preliminary objections alleging improper venue, which were sustained, and the matter was transferred to Montgomery County.

On appeal, the plaintiff argued because venue was proper against State Farm in Philadelphia County, venue was also proper against the tortfeasor-driver. The Superior Court succinctly framed the issue: if the tortfeasor-driver and State Farm may be held jointly or jointly and severally liable, then venue in Philadelphia County is proper.

The Superior Court affirmed the trial court's decision. The Court noted the plaintiff did not plead joint or joint and several liability in her complaint. More importantly, the tortfeasor-driver "would not be liable for the amount, if any, owed to [the plaintiff] by State Farm. Likewise, State Farm would not be liable for the amount, if any, owed to [the plaintiff by the tortfeasor-driver]." Accordingly, because the plaintiff's claims against each defendant were for "separate and distinct" liabilities, Pa. R.C.P. Rule 1006(c) is inapplicable and venue in Philadelphia County is improper.

Allstate Fire & Cas. Ins. Co. v. Hymes, 2011 PA Super 200 (September 13, 2011)

Motorcycle operator, who was injured after being thrown from his motorcycle and impacting another vehicle's windshield, was barred from recovering UIM benefits pursuant to a household exclusion because he sustained the injuries while "in, on, getting into or out of" his motorcycle.

Hymes was operating his motorcycle when he collided with another vehicle. The other driver was determined to be at fault, but the limits of liability insurance were insufficient to fully compensate Hymes for his injuries. Hymes sought UIM benefits from his parent's Allstate insurance policy. Allstate denied Hymes' claim pursuant to the policy's "household exclusion." Allstate filed a declaratory judgment action, and the Court subsequently granted Allstate's Motion for Judgment on the Pleadings.

On appeal, Hymes contended that the trial court erred in determining that the "household exclusion" barred recovery, because he did not suffer injuries while "in, on, getting into or out of" his motorcycle; instead, he suffered injuries after being thrown from his motorcycle and impacting the other vehicle's windshield. The Superior Court squarely rejected Hymes' argument, concluding the exclusionary language was clear and unambiguous and adopting Hymes' argument would "result in an absurd construction of the policy." The Court, construing the words of common usage in the exclusion in their natural, plain, and ordinary sense, determined Hymes' injuries were suffered as a result of his operation of the motorcycle while "on" the motorcycle.

COMMONWEALTH COURT OF PENNSYLVANIA

It is for the trier of fact to determine the sufficiency of notice given to a Commonwealth agency pursuant to 42 Pa. C.S. § 8522(b)(5).

Walthour v. Com. of Penn., Dept. of Transp., No. 390 C.D. 2011 (Pa. Cmwlth. Ct. Nov. 17, 2011)

This was an appeal from the Court of Common Pleas of Allegheny County, which had granted PennDOT's Motion for Summary Judgment, dismissing the claim against it, because the Court concluded PennDOT did not have actual written notice of the pothole, which caused the alleged harm, as required by 42 Pa. C.S. § 8522(b)(5).

Plaintiff, a motorcycle passenger, was injured when the motorcycle she was on hit a pothole. She claimed PennDOT had actual notice of the pothole pursuant to a letter written by State Senator Sean Logan to PennDOT regarding the "disrepair" of the roadway itself. PennDOT contended, and the trial court agreed that "general allegations of road conditions are insufficient to constitute notice under the pothole exception."

The Commonwealth Court reversed, rejecting PennDOT's position that the notice was not sufficient because it did not identify the specific pothole at issue. The Court, citing Starr v. Veneziano, 747 A.2d 867 (Pa. 2000), Carpenter v. Pleasant, 759 A.2d 411 (Pa. Cmwlth. Ct. 2000) and Fernandez v. City of Pittsburgh, 643 A.2d 1176 (Pa. Cmwlth. Ct. 1994), concluded the notice requirement is met when the facts demonstrate the governmental entity was aware of the dangerous condition which caused or contributed to the plaintiff's injuries. Moreover, because notice is a question of fact, it was improper to grant PennDOT's Motion for Summary Judgment in this case, because the sufficiency of the notice given to PennDOT was a disputed material fact.

HABITAT FOR HUMANITY

By: Gregory Unatin, Esq.

On December 10, 2011, a sturdy bunch met at the top of "Hospital Hill" in New Brighton to volunteer for Habitat for Humanity. The dozen or more semi-professional contractors gathered to hang drywall at the future home at 713 Penn Avenue. We were joined by Sue, the home's future owner, whose hard work helped energize the crew on a Saturday morning.

Joe, the foreman, split the troops to measure, cut, lift, and screw on two fronts: upstairs and downstairs. As usual, Habitat provided all the best tools and instructions. Even the volunteer, self-impressed by hanging a picture on the wall or replacing a lightbulb, was a competent drywall hanger by the end of the day.

The work truly reflected the spirit of teamwork and guidance among the members of WPTLA. Some had never worked with drywall, let alone used a power tool to do anything in a half-completed house. Others were clearly more handy and experienced. Fortunately, the more experienced took the lead. But, no matter the skill level, each volunteer did his or her best to contribute. And just as we share our insight concerning influential rulings and other important developments in our field, the volunteers happily shared their tape measurers, box cutters, and straightedges.

With the crew buzzing to the sound of screw guns, the hours passed remarkably fast. Our volunteers barely stopped to refuel with pizza. No stud could escape our wrath.

Pictured above, WPTLA's Justin Joseph and Greg Unatin work together to install ceiling boards.

By 2:30 p.m., we managed to put quite a dent in the job, having installed dry wall for three ceilings and several walls. Satisfaction truly set in when a member of the Habitat crew told us not worry about the little dents and imperfections left behind from that screw or two, which would not find a joist, or the measurement off just a few eighths of an inch.

All together, the event presented an enjoyable opportunity to meet with fellow members and their families while making an honest attempt at true craftsmanship. As usual, there was no shortage of honest lawyers doing an honest day's work.

Pictured on left, is that Board of Governors member Dave Landay, or a professional carpenter? Below, Board of Governors member Jim Ross prepares himself.

WPTLA Members helping out on Dec. 10, 2011 were; Chad Bowers, Troy Frederick, Justin Joseph, Dave Landay, Drew Leger, Chris Miller, Jim Ross, Greg Unatin, and Dave Zimmaro.

Special thanks also to Beth Frederick, Troy's wife; Rob Leger, Drew's son; Cathy Ross, Jim's wife; and Christian Tocci, Laura's son.

Pictured above, Board of Governors Member Dave Zimmaro shows his prowess with a power tool. At left, Secretary Chris Miller gets a little measuring assistance from Cathy Ross, Jim's wife. Below, Board of Governors member Drew Leger holds a board while others do the attaching. And aligning.

From Joey and his Mom …

Thank you very very much for making the Comeback Award dinner so special for me. I had an awesome time. Thank you also for all of the nice gifts that you bought for me. I really love the Pitt and Steelers stuff and I can't wait to wear them.

Thank you again for your kindness. I really appreciated it.

Sincerely, Joey Sarandrea

Just wanted to take this opportunity to thank you, as well as everyone else at WPTLA, for such an amazing evening. The venue was beautiful, the food was fabulous, and the guest of honor could not have been happier. The 2011 Comeback Award Dinner was a night in Joey's life that he will never forget. Thank you so much for everything you did to make the evening such a special and elegant one. We enjoyed ourselves immensely. Thank you for giving Joey a night to be proud of for the rest of his life. We appreciated it greatly.

Sincerely, Paula

December 9, 2011

Words cannot describe the look on Joey's face when he opened your package and saw the autographed Wisconsin basketball—all I can say is, priceless! It was shortly followed by the biggest smile in the universe. Thank you so very much for your amazing thoughtfulness. I can't imagine that obtaining this ball was an easy feat and I appreciate your effort more than you'll ever know. You definitely made our day. Joey was beaming. Thank you so much for all that you've done for him. You have made him so happy during this difficult time, and this has given each of us something to smile about when smiling hasn't been easy lately.

Thank you again, from the bottom of our hearts, for your kindness, your thoughtfulness, and your generosity. It meant more to us than I can ever express in words. May you have a blessed and wonderful Christmas, and the Happiest of New Years.

With much gratitude and appreciation,
Paula

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…Through the Grapevine

Board of Governors Member **Andrew J. Leger, Jr.** can now be found at Andrew J. Leger, Jr., P.C., 310 Grant St., Ste. 2630, Grant Bldg., Pittsburgh, PA 15219

Secretary **Christopher M. Miller** and **Brian W. DelVecchio** have joined forces to create DelVecchio & Miller, LLC. They can be reached at 1300 Fifth Ave., Pittsburgh, PA 15219, P: 412-434-1400, F: 412-434-1441, info@delvecchioandmiller.com.

Board of Governors Member **James R. Moyles** has opened a second office in Harrisburg. The details are 819 Landau Ct., Camp Hill, PA 17011. P: 717-774-1375 F: 717-774-1379.

Board of Governors Member **Steven M Barth** has also moved. His new firm, Barth & Associates, LLC can be contacted at P.O. Bo 23627, Pittsburgh, PA 15222. His temporary phone is 412-779-3806 and the email is smbassociates@gmail.com.

Past President **Mark J. Homyak** can be reached through The Homyak Law Firm, P.C. All other information remains the same.

Congratulations to Board of Governors Member **Eve W. Semins** on her recent marriage. She can be found at 1502 Ashbury Ln., Pittsburgh, PA 15237, P: 412-725-5299, email: esemins@yahoo.com

Past President **Louis M. Tarasi, Jr**. has been named in the 2012 Edition of the *Best Lawyers in America*. In addition, Lou has been named as the "Pittsburgh *Best Lawyers* Mass Tort Litigation Lawyer of the Year" for 2012. Congratulations, Lou!

Our best to Board of Governors Member **James J. Ross**, who is recuperating from knee replacement surgery.