



THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

THE ADVOCATE

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COMMONWEALTH V STEVENSON

Commw. of PA v. Raheem Stevenson

Pennsylvania Supreme Court Preserves Litigants' Right to Appeal and Rejects the Federal *Ohler* Doctrine

In a landmark decision for Pennsylvania trial attorneys, *Commonwealth of PA v. Raheem Stevenson*, the Pennsylvania Supreme Court rejected the federal *Ohler* doctrine and held that a litigant does not waive the right to appeal an adverse ruling on a Motion in Limine permitting the use of impeachment evidence where that litigant preemptively introduces that evidence during trial. 318 A.3d 1264 (Pa. 2024).

This ruling is critical for civil trial attorneys as it allows for strategic trial decisions regarding the best possible presentation of evidence to the fact-finder without fear of waiving the right to appeal an adverse evidentiary ruling in a Motion in Limine.

Factual & Procedural Background

In *Stevenson*, the defendant in a criminal case was tried on charges of robbery, burglary, and conspiracy to commit armed robbery. During the trial, counsel for the defendant made an oral motion to preclude the presentation of evidence relating to the defendant's 2005 conviction for burglary on the basis that it was too remote in time. The trial court denied the oral Motion in Limine and ruled that the conviction was admissible.

In light of this ruling, and knowing that the prosecution intended to use the 2005 conviction to damage his client's credibility, the defense attorney made a

strategic decision and elected to preemptively introduce the conviction during his direction examination. The admissibility of the 2005 conviction was later challenged in a post-sentence motion, which was denied by the trial Court.

On appeal to the Pennsylvania Superior Court, a three-judge panel affirmed the denial of the post-trial motion relying on the federal *Ohler* doctrine. The basis for the *Ohler* doctrine arises from the United States Supreme Court decision in *Ohler v. U.S.*, 529 U.S. 753, 760 (2000). In this case, the United States Supreme Court applied Federal Rule of Evidence 103 (Rulings on Evidence) and held that a defendant waives their right to appeal a trial court's ruling on a Motion in Limine, when that defendant preemptively introduces that evidence during trial. 529 U.S. at 760.

The Pennsylvania Superior Court explained that the criminal defense attorney in *Stevenson* "made the strategic decision to admit his prior conviction in order to lessen the sting of the Commonwealth's anticipated elicitation of the conviction on cross-examination." *Commw. v. Stevenson*, 287 A.3d 903, 906 (Pa. Super. 2022), appeal granted, 303 A.3d 118 (Pa. 2023), and rev'd and remanded, 318 A.3d 1264 (Pa. 2024). Given this tactical decision, the Pennsylvania Superior Court held that the criminal defense attorney waived the right to appeal the trial court's adverse ruling on the admissibility of the 2005 conviction. This issue was then appealed to the Pennsylvania Supreme Court.

(Continued on Page 2)



COMMONWEALTH V STEVENSON ... (FROM PAGE 1)

Pennsylvania Supreme Court Decision

Justice Brobson, writing the unanimous opinion for the Pennsylvania Supreme Court, overturned the Superior Court's ruling based on distinctions between Pennsylvania Rule of Evidence 103 and the application of the federal *Ohler* doctrine, which was based on federal common law and the application of Federal Rule of Evidence 103.

Pennsylvania Rule of Evidence 103 states that “[a] party may claim error in a ruling to admit or exclude evidence only: (1) if the ruling admits evidence, a party, on the record: (A) makes a timely objection, motion to strike, or motion in limine; and (B) states the specific ground, unless it was apparent from the context.” Pa. R.E. 103(a). Further, Pennsylvania Rule of Evidence 103(b) states that “[o]nce the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” Pa. R.E. 103(b) (emphasis added). Further, the Pennsylvania Rules of Evidence are to be “applied so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.” Pa. R.E. 102.

In contrast to the specific preservation of appeal language in Pa. R.E. 103, which is triggered upon the filing of a Motion in Limine, the language within the federal counterpart, F.R.E. 103, does not mention Motions in Limine, and instead requires that a “substantial right of the party” be affected in the evidentiary ruling. When examined side-by-side, it is apparent that the filing a Motion in Limine definitively protects the right to appeal under Pa. R.E. 103.

Focusing on these differences and the dissenting opinion in *Ohler*, the Pennsylvania Supreme Court reasoned that “the majority rule in *Ohler* is in tension with our state rules and that notions of fairness weigh in favor of adopting the approach of the *Ohler* dissent.” Accordingly, the Pennsylvania Supreme Court held that “a defendant does not waive his or her right to appellate review of the admissibility of a prior conviction for impeachment purposes under the circumstances presented—i.e., where the defendant preemptively introduces that evidence on direct examination following a trial court's definitive ruling against him on a motion in limine.” *Commw. v. Stevenson*, 318 A.3d 1264, 1282–83 (Pa. 2024).

Practical Implications for Pennsylvania Trial Attorneys

The holding by the Pennsylvania Supreme Court in

Stevenson is extremely important for civil trial attorneys, as it provides protection for strategic trial decisions regarding the presentation of evidence to the jury—without the fear of waiving the right to appeal an adverse ruling on a Motion in Limine.

In a personal injury case, the most common Motions in Limine focus on prior medical conditions, injuries, or accidents, as well as prior lawsuits, criminal history, subsequent remedial measures, and the admissibility of expert testimony. Under the Superior Court's holding, if the trial court denied a Motion in Limine to prevent the introduction of a prior medical condition, then the Plaintiff would have to remain completely silent on this issue during their case in chief—direct examination, witnesses, and expert testimony, etc.—in order to simply preserve the right to appeal that ruling. This leads to a fundamental unfairness as the trial attorney needs to choose between preserving an appeal and presenting the most compelling case possible to the jury.

“The holding . . . in Stevenson is extremely important . . . as it provides protection for strategic trial decisions regarding the presentation of evidence to the jury.”

Fortunately, the Pennsylvania Supreme Court recognized the unfair nature of these circumstances and overturned the Superior Court's holding. Civil trial attorneys now have the ability to proactively disclose potentially damaging evidence during their case in an effort to mitigate the potential negative impact. After the *Stevenson* decision, it remains critical for civil trial attorneys to identify potentially damaging evidence and file a Motion in Limine to preclude the use of this evidence at trial. If the Motion in Limine is denied, then trial counsel can make the tactical decision to preemptively disclose this evidence and the right to appeal will still be preserved under Pa. R.E. 103.

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ART OF PERSUASION

How ChatGPT Can Supercharge Your Personal Injury Practice

"The future belongs to those who see possibilities before they become obvious."— John Sculley

When the first cars were invented, people called them "horseless carriages," thinking they were just improved stagecoaches. Early cars even looked like stagecoaches. But over time, people realized cars weren't just a better stagecoach—they were a completely new way to travel. This shift in thinking led to innovations that changed transportation forever. The lesson is clear: those who recognize the power of new technology early are the ones who benefit the most.

As trial lawyers, we face a similar opportunity with tools like ChatGPT. This AI technology isn't just a faster way to do what we already do—it can help us think about cases, clients, and our work in entirely new ways. ChatGPT can improve the way you analyze cases, understand medical records, communicate with clients, and prepare for trial. If you use it well, you can work smarter, save time, and get better results for your clients.

Analyzing Your Cases

Figuring out what happened in a case and who is responsible takes time and effort. ChatGPT can help by analyzing the facts you provide and pointing out possible legal issues, strengths, and weaknesses in your case. For example, in a medical malpractice case, ChatGPT can help you organize a timeline of events, identify where mistakes may have been made, and suggest questions to ask during discovery or depositions.

This tool acts like a fresh pair of eyes. It helps you spot details you overlooked and suggest ideas on how to strengthen your case. By working faster and smarter, you'll be better prepared to take on opposing counsel.

Understanding Medical Records

Medical records are often long and full of terms that are hard to understand. ChatGPT can summarize these records, explain medical terms in plain language, and highlight important details. For example, if you're handling a case about a delayed cancer diagnosis, ChatGPT can help you break down lab results, treatment plans, or doctor's notes into something clear and actionable.

This isn't just helpful for you. It also makes it easier to explain complex medical issues to your clients, expert witnesses, and juries. By making complicated information simple, you can focus on what matters most: building a strong case. Be mindful, however, of what medical information you submit to ChatGPT and how you provide it as HIPAA, confidentiality, and privacy issues are in play.

Better Legal Writing and Research

Writing strong arguments is one of the most important parts of your job. ChatGPT can help by drafting documents like demand letters, motions, or summaries. It can also suggest ways to make your arguments clearer and more convincing. If you're writing a brief, ChatGPT can help you organize your points and make sure nothing is left out.

ChatGPT can also speed up your legal research. It can find relevant case law, statutes, or rules for you to explore further. While it's not a replacement for legal research tools, it's a great way to get started quickly.

Communicating with Clients

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ART OF PERSUASION ... FROM PAGE 3

Good communication is key to keeping clients happy and informed. ChatGPT can help you write clear, easy-to-understand explanations about their cases, what's happening next, and what to expect. For example, you can use it to draft an email explaining what a deposition is or how a settlement offer or mediation works.

ChatGPT can also create FAQs, brochures, or guides to educate your clients about their rights and the legal process. When clients understand what's going on, they feel more confident in your work and more comfortable working with you.

Preparing for Depositions and Focus Groups

ChatGPT can help you prepare for depositions by generating potential questions to ask witnesses or simulating what opposing counsel might ask. This helps you think through different strategies and prepare your witnesses more effectively.

For focus groups, ChatGPT can help you create questions to test how jurors might see your case. It can also help you analyze their feedback to adjust your trial strategy. These insights can be the difference between a good trial outcome and a great one.

Building Trial Strategy and Jury Arguments

Trials aren't just about the law—they're about telling a story that connects with the jury. ChatGPT can help you brainstorm themes, opening statements, and closing arguments. For example, it can suggest ways to simplify complex medical ideas or make your client's story more relatable. You can even use ChatGPT as an opposing witness as you work through your cross exam plan.

By using ChatGPT to refine your strategy, you can present your case more clearly and persuasively, increasing your chances of success.

Saving Time on Admin Tasks

ChatGPT isn't just for big-picture work—it can also handle small but important tasks like drafting letters, organizing timelines, or creating discovery checklists. By letting ChatGPT take care of some of these routine tasks, you can focus on the parts of your job that require your full attention.

Attracting Clients with Better Marketing

A strong online presence helps bring in new clients, and ChatGPT can make creating content faster and easier. It can help you write blog posts, FAQs, and articles about common legal issues, like medical malpractice or car accidents. These can help your website rank higher on Google and show potential clients that you're an expert in

your field.

Staying Ethical

While ChatGPT is a powerful tool, it's important to use it carefully. Make sure you don't share confidential client information, and always double-check the AI's work for accuracy. ChatGPT is here to help you, but you're still the expert who makes the final decisions. This of ChatGPT as a paralegal.

The Future is Now

The shift from stagecoaches to cars teaches us that new technology isn't just about doing old things better—it's about changing the way we think and work. ChatGPT gives trial lawyers like us the chance to work smarter, handle cases more efficiently, and get better results for our clients.

By embracing tools like ChatGPT, you can stay ahead of the curve and build a stronger, more successful practice. Now is the time to seize this opportunity.

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THE ADVOCATE



ARTICLE DEADLINES and PUBLICATION DATES VOLUME 37, 2024-2025

Vol 37	ARTICLE DEADLINE DATE	TARGETED PUBLICATION
Spring 2025	Feb 21	Mar 7
Summer 2025	May 16	May 30

The Editor of The Advocate is always open to and looking for substantive articles. Please send ideas and content to er@ainsmanlevine.com

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PRESIDENT'S MESSAGE

Holidays are stressful for everyone. This is especially true for Plaintiff trial attorneys- like us! Don't get me wrong, the holiday season is a time for joy, celebration and quality time with family. However, it is also a time of high expectations. There is the great end-of-the-year push where we are all trying to resolve cases and generate more income. It is quite common to feel overwhelmed and stressed. We also struggle finding time to spend with family and friends and attend all those holiday parties. Some of us must remember to hide an Elf each and every night to ensure our little ones have a magical Christmas.

So, how do we get through all of this? There are a multitude of methods to ensure we stay on track with work tasks, while managing stress and enjoying the season. Here are a couple of fail-proof methods I use to make this time of year easier at work and home:

1. **Set realistic goals.** Think about how you can be successful at home and at work during the holiday season. At home, I have an ultimate goal of making sure everyone gets along (harder than it sounds, right?) and is content accomplishing what they need to do to be successful. At work, I always have a goal of resolving a list of cases by year's end. With each case you resolve by the end of the year, there is a sense of accomplishment. Completing goals you set for yourself brings guaranteed happiness.

2. **Make lists** to help you achieve your goals. I start every day with a to-do list and I include everything. It oftentimes includes big and small work projects, but it also has tasks I need to accomplish for my family. It is so rewarding to cross out an item that has been completed. Sometimes I write down completed tasks just so I can cross them out immediately. I am sure I am not the only one guilty of this! Completing your to-do list each day brings about a great sense of accomplishment which in turn makes us happy!

3. **Stay organized** to ensure you don't create more stress accomplishing your goals. This one is the most important to me. If things are not organized, I have a downward spiral into procrastination. Making lists is one way I stay organized. I also ensure I keep a tidy home and workspace. This makes it easier to find things and creates an environment to be more efficient. When things are in their place and organized, I am happy.

4. **Ask for help.** There is no need to do everything yourself- delegate tasks to your family members and co-workers that can help. Let your kids help with decorating and wrapping gifts- it doesn't have to be

perfect. Ask your assistant to run errands. I find that people are always willing to help. Less tasks on our own plate will surely bring happiness.

5. **Take time for yourself.** This can be extravagant-like massages and vacations or it can be 5 minutes in the car alone listening to music or going to the gym. The key is to find what works for you and utilize it to feel less stressed. I like to get a massage after hours of wrapping presents. At work, I like to take an afternoon walk to get coffee. After all the holiday hustle and bustle, try to get a night away with a spouse or family member. These things keep us grounded and patient when stressful situations arise. When we are not stressed and enjoying "me time" we are happy.

So, what's the common theme of my itemized methods to get through a stressful holiday season? Happiness. Plain and simple. Happiness is the one thing we all strive for during any season- it is just harder, at times, to find during the stressful holiday season.

If you find yourself unhappy or even depressed during the holiday season, there are several avenues to happiness. For one, you can look to your fellow attorneys in WPTLA. We are all plaintiffs' attorneys and, in some ways, suffer through similar situations. Ask a fellow lawyer to grab coffee and talk. It is surprising how the small act of conversation can lift your spirits.

You can also reach out to LCL- Lawyers Caring for Lawyers. This is an organization that started in 1988 and helps lawyers with very significant situations like depression, substance abuse and more. I encourage you to google them and reach out if you are having overwhelming stress during the holidays or any other time. WPTLA recently did a wonderful CLE featuring the executive director of LCL. If you missed the December 5th program, you could always watch the online seminar on the WPTLA website.

In closing, I wish everyone a wonderful holiday season and, most of all, HAPPINESS. It has been a tough year for some. If it has been stressful for you, remember- a new year begins on January 1, 2025. You can always reset and develop new goals and strategies to be successful and happy in the new year. Happy Holidays!

By: Katie Killion, Esq. of

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CLE RECAP

On December 5, 2024, WPTLA hosted a 1.5 credit ethics CLE entitled: Shacked to Our Screens: How Technology Has Imprisoned the Legal Profession.

The topic was presented by Laurie Besden, Esq., the Executive Director of Lawyers Concerned for Lawyers of Pennsylvania.

Laurie provided compelling and honestly somewhat terrifying evidence on how our dependence on screens (cellphones, computers, etc.) is negatively impacting our mental health. She explained that the prevalence rates of substance use and mental health challenges in the legal profession were already out of control and warned that our inability to "de-screen" was only magnifying feelings of isolation and loneliness.

Laurie emphasized that as we navigate our "new normal," in this post-Covid world, it is more important than ever that we are mindful of our screen time and intentional about how we prioritize time for our own self-care and wellness. She gave our audience tips and strategies that we could easily implement into our daily lives in order to find more time to un-plug.

Laurie also shared her personal story through addiction into long term sobriety with our attendees. Her journey included a loss of her licenses to practice law and the privilege to drive as well as the loss of her personal freedom. Her story was devastating, incredible, and inspiring all at once. It's a redemption story for the ages, which will almost certainly have your jaw on the floor. Then, just when you think it couldn't possibly get any more extraordinary, it does.

Laurie has presented on these topics all over the country, including the Judge Advocate General's ("JAG") Corp; Harvard Law School; the Pennsylvania Bar Association, the Pennsylvania Conference of State Trial Judges and The National Council of Lawyer Disciplinary Boards. Laurie's personal story has been filmed and presented by both the Pennsylvania Bar Institute and the American Bar Institute.

Our organization was really lucky to have Laurie speak about these very important topics, which are not typically discussed and all too often ignored.

Laurie's CLE presentation was recorded for future use as an online CLE for WPTLA. For those of you who were unable to attend, I highly recommend that you go online and watch her presentation when it becomes available.

By: Shawn D. Kressley, Esq. of

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UPCOMING EVENTS

Jan 8, 2025 – Junior Member Meet & Greet The Foundry Table & Tap, Pgh

Jan 15, 2025 – Zoom Board Meeting

Feb 25, 2025 - Zoom CLE w/ Dr. Rao, of Pain & Spine Specialists

Mar 13, 2025 – Fun at Topgolf, Pgh

Apr 9, 2025 - Membership Dinner + Elections Carmody's Grille, Pittsburgh

May 2, 2025 - Annual Judiciary Dinner Acrisure Stadium, Pittsburgh

May 23, 2025 – Ethics and Golf Shannopin Country Club, Pittsburgh

Jun, 2024 – Community Service Day, Angel Ridge Animal Rescue, Meadowlands

Junior Member Meet & Greet

Wed, Jan 8, 2025

5:30-7:30pm

The Foundry Table & Tap, North Shore, Pgh



Registration includes a free drink and hors d'oeuvres.

Registrations/Cancellations needed by Dec 24.

wptla.org/event-registration/?event_id=18248

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COMEBACK DINNER RECAP

WPTLA's Annual Comeback Award Dinner was held on November 13, 2024 at the Duquesne Club. As always, the Comeback Award dinner was an inspiring event that truly reminds us why we chose to be Plaintiff's attorneys. This year's Comeback Awardee was Jonathan Heubel, who was represented and nominated by Brendan Lupetin and Mark Smith. Jonathan's concussion was misdiagnosed, and he was permitted to return to playing high school football too soon. A routine tackle during a game caused Johnathan to sustain an intracranial hemorrhage that led to a traumatic brain injury with quadriparesis. Jonathan's close-knit family rallied around him and shifted their life's focus to getting Jonathan the best medical care possible. Jonathan has been under the care of renowned neurosurgeon, Dr. David Okonkwo, who the family credits with saving Jonathan's life.

Jonathan and his family continue to show true perseverance and determination in overcoming Jonathan's injury. Jonathan fully embodies the characteristics of a Comeback Award Winner – and when he stood from his wheelchair with the help of his family and Dr. Okonkwo to accept the award, the entire room was overcome with emotion.

This year's charity selection by Jonathan was the Okonkwo Research Lab, as part of the University of Pittsburgh, Department of Neurosurgery. Dr. Okonkwo joined us for the dinner and accepted WPTLA's charitable donation with praise for Jonathan's efforts and with gratitude for being able to care for Jonathan.

The Heubel family now lives in Florida and their home was struck by both recent hurricanes. WPTLA members made donations to the Heubel family by way of gift cards or checks to help them get back on their feet after the hurricanes destroyed their Florida home. It was a great ending to the Comeback Award Dinner when WPTLA President, Katie Killion, was able to present the collected donations to the Heubel family.

Photos from the evening can be found on p. 20.

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MEMBER PICTURES & PROFILES

Name: Gianna Kelly

Firm: Luxenberg, Garbett, Kelly and George

Years in practice: 7

Bar admissions:
Pennsylvania and West Virginia

Special area of practice/interest, if any: Personal Injury

Tell us something about your practice that we might not know: Our firm has been in our community for 90 years!

Most memorable court moment: Being sworn in to practice law by my dad, Larry Kelly!

Most embarrassing (but printable) court moment: Having my sister stand next to me during motions court for emotional support

Most memorable WPTLA moment: Becoming a WPTLA Board Member 😊

What advice would you give yourself as a new attorney just passing the bar?: Find good mentors- they will help you more than any law school course

Secret Vice: Middle Eastern food

People might be surprised to know that: I have 3 sisters!

Last book read for pleasure, not as research for a brief or opening/closing: Verity

My refrigerator always contains: Olives

My favorite beverage is: Coffee

My favorite restaurant is: Mary's Restaurant

If I wasn't a lawyer, I'd be: A Pilates instructor



COMP CORNER

Two New Bills Affecting Worker's Compensation Practice

The Legislature has recently passed two bills affecting Pennsylvania workers compensation claimants which have been signed into law by the governor. These will impact the representation of injured workers.

The first bill is Senate Bill number 1232 amending the Worker's Compensation Act to provide for direct deposit of periodic compensation payments. All insurers and self-insured employers are obligated to permit payment of compensation by direct deposit one year from the effective date of the bill.

Insurers and self-insured employers are obligated to notify claimants of this option. Claimants are obligated to provide a valid payment authorization form either by mail or online. If the claimant fails to provide the authorization form the insurer and the self-insured employers are still obligated to pay compensation by paper check. The text for the bill can be found at the General Assembly website.

The second bill of note is Senate Bill number 365. This bill provides for compensation for post-traumatic stress injury for first responders.

First responders include EMS providers, fire company employees or volunteers, Pennsylvania State police and a peace officer as defined in 18 Pa.C.S. Section 501 who responds to emergency calls.

The act sets out certain qualifying traumatic events that can lead to payment for post-traumatic stress disorder. They include incidents resulting in serious bodily injury or death to an individual, an incident where a minor has been injured killed, abused, or exploited, incidents involving an immediate threat to the life of the claimant or another individual, mass killings or crime scenes under investigation.

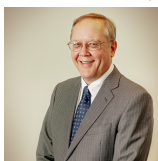
A claimant still has a burden that the injury was "the result of the individual undergoing a qualifying traumatic event and was sustained in the course and scope of the individual's employment as a first responder." However, the first responder is NOT required to show abnormal working conditions in order for the injury to be compensable.

There are multiple other issues of which practitioners need to be aware. When confronted with such a claim for these benefits by a first responder, the author recommends a thorough review of the change in the law. The text of the bill can be found at the General Assembly website.

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2024 5K RACE RECAP

WPTLA held its annual President's Challenge 5K on Saturday, September 21, 2024, at North Park. This year marked the 24th year of the race. Many volunteers arrived early to set up the registration tables, snack area and raffle tent. Registration and arrivals were brisk and everyone enjoyed the pre-race socialization and snacks. This year there were 216 registrants and 178 participants.

The race concluded with the raffle prizes, door prizes, and awards for this year's category winners. The day was a huge success, with many members, Steelwheelers, friends, family, and four-legged companions in attendance. The 50/50 winner was Tiffany Eyler. The proceeds of this event, \$31,700.00, were sent to the Steelwheelers. This brings WPTLA's total contribution to the Steelwheelers over the past 24 years to \$673,935.00!

Next year's race is scheduled for Saturday, September 20, 2025, at North Park, so save the date!

By: Chad McMillen, Esq. of

McMillen Urlick Tocci & Jones

cmmcillen@mutjlaw.com



Pictured above, from L to R: Immediate Past President Greg Unatin, President-Elect James Tallman, Past President Carl Schiffman, and Board of Governors Member Mitch Dugan.

More photos from the race can be found on p. 21.

"...thank you so much for what the WPTLA does for the Steelwheelers organization. I've been injured now for 23 years and a member of the Steelwheelers for 22. The wheelchair rugby team taught me when I first started, so much more than x's and o's, it taught me how to live as a quadriplegic and that's what I love about our organization. For myself and some of my Rugby teammates, it's a peer group where we can share our experiences and struggles as quads. and none of this would be possible if it wasn't for the generosity of the WPTLA and its members, so again, thank you.

-Ron Migyanko



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Happy Holidays!

As the holiday season approaches, we would like to take a moment to express our sincere appreciation for your continued trust and partnership with us throughout the years.

Working with you is always a privilege, and we are incredibly grateful for the opportunity to serve you and our shared clients. Your support and collaboration have made our success possible, and we are committed to delivering even greater value in the coming year.

We wish you, your team, and your loved ones a joyful and peaceful holiday season, and a prosperous New Year filled with health, happiness, and success.

*Billy, Leigh Ann
and Staff*



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BY THE RULES

2 Noteworthy Opinions of the Superior Court Concerning Rule 238

Litigants seeking an award of delay damages must be careful to strictly comply with all of the requirements of Rule 238. In *In re Arreguin*, 2024 Pa. Super. LEXIS 481, 2024 PA Super 258, the plaintiff lost out on delay damages on a 4-million-dollar verdict due to non-compliance with the rule.

In particular, Rule 238(c) provides in pertinent part that:

the motion shall begin with the following notice:

NOTICE

You are hereby notified to file a written answer to the attached motion for delay damages within twenty days from the filing of the motion or the delay damages sought in the motion may be added to the verdict or decision against you.

Pa. R.C.P. No. 238

Unfortunately, the Plaintiff in *Arreguin* failed to include such a notice. Accordingly, the motion for delay damages was denied. On appeal, the Superior Court in an opinion by Judge Sullivan (joined by Judge Dubow) held that the denial of the motion was not error. In so doing, the Court looked to the rules of construction and noted that the rule states that the motion *shall* begin with the notice. In doing so, the Court bolstered its position by referring to other rules in which it held that the failure to include notices which the rules state shall be provided did not constitute substantial compliance.

The *Arreguin* decision is also significant in its application of PaRAP 1925, The plaintiff in *Arreguin* advanced an argument on appeal that the denial of delay damages was a disproportionate penalty for the failure to include the notice. However, because that claim was not included in the Rule 1925 statement, it was waived.

Another significant matter to note is that for the purpose of construction of the rule, the Court did use the Rules of Construction which had been transferred to the Rules of Judicial Administration rather than the Rules of Construction that were formerly found in the Rules of Civil Procedure.

Judge Stabile did file a dissenting opinion in which he argued that the outcome was contrary to Rule 238's

requirement that delay damages shall be added to the compensatory damage award.

Although no practitioner would want to be in the position of having to save an award of delay damages after failing to include the notice, the Court's decision does note that the notice was never provided. As such, the door may remain open to amend such a motion to include the notice. In the absence of prejudice, it would seem that allowing amendment would result in a fair outcome.

Another panel of the Superior Court issued another interesting ruling on delay damages. In *Vega v. Jones*, 2024 Pa. Super. Unpub. LEXIS 201, 313 A.3d 207, 2024 WL 303640, the Court held that a trial court may either add delay damages to the judgment on the verdict or enter a second judgment in the amount of the delay damages.

The *Vega* Court also confirmed that it is the defendant which bears the burden of proving that any delay was attributable to the plaintiff; and that the plaintiff does not have a burden to show that it did not cause delay.

Amendment to Supreme Court Internal Operating Procedure for Filing Petitions for Allowance of Appeal

The Pennsylvania Supreme Court has substantially reworked Rule 6A of its Internal Operating Procedure. The rule now lists 4 defects that the Prothonotary is to note if present (hybrid representation, no proof of service, the filing fee/in forma pauperis filing or the word count). If these are present the petitioner is to be notified and afforded an opportunity for correction "while preserving the filing date." However, the Rule does allow for the refusal of an untimely petition without further action of the Court.

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Arreguin v. Kinsing, 2024 PA Super 258 (Pa. Super. Nov. 5, 2024)

Superior Court affirms trial court's decision to deny a motion for delay damages based on Plaintiff's failure to have the required notice set forth at Pa. R.C.P. 238(c)

In an issue of first impression, the Superior Court was asked to determine whether a Motion for Delay Damages that did not have the required notice set forth in Pa. R.C.P. 238(c) was a fatal defect.

This issue arose from an underlying personal injury action where Defendant, Charles Kinsing operated a motor vehicle under the influence of alcohol and caused a violent chain reaction crash, which left Minor Plaintiff with several facial injuries requiring multiple surgeries and causing permanent scarring. Following a non-jury trial, the Minor Plaintiff was awarded \$4,111,746.38 in damages. Minor Plaintiff filed a timely Motion for Delay Damages. However, it was denied by the trial court based on the absence of the notice requirement set forth by Rule 238. Minor Plaintiff appealed the trial court's denial of her motion for delay damages.

On appeal to the Superior Court, Minor Plaintiff argued that the trial court's ruling ignored the true purpose of the rule, which was to improve the flow of cases in trial courts and encourage defendants to settle meritorious cases.

The Superior Court disagreed, finding that resolution of the issue would be based upon a strict interpretation of the text in Rule 238. The Court found that the plain language of Rule 238(c) required that a Motion for Delay Damages "**shall begin**" with the following notice":

NOTICE

You are hereby notified to file a written answer to the attached motion for delay damages within twenty days from the filing of the motion or the delay damages sought in the motion may be added to the verdict or decision against you.

The Superior Court found that Rule 238(c) unambiguously states that in order to obtain delay damages, a prevailing plaintiff must file a motion which begins with the notice from the Rule. The Court noted that by definition the term "shall" is mandatory when used in a statute. It was uncontested that the Minor Plaintiff's motion for delay damages did not contain this notice.

The Court also determined that where a rule is unambiguous, like Rule 238(c) was, the plain language could not be ignored under the pretext of pursuing the rule's spirit. As such, Minor Plaintiff's argument to look to the true intent of Rule 238 was invalid.

Based on the plain language analysis of Rule 238, the Superior Court found that Minor Plaintiff's failure to include the required notice with her motion for delay damages was a facial defect in the pleadings and the trial court did not error in denying the motion.

Dailey v. Smith, 2024 Pa. Super. 235 (Pa. Super. Oct. 10, 2024.)

Superior Court orders a new trial in case where the trial court prohibited the jury from considering Plaintiff's comparative negligence despite evidence that he was speeding at the time of the crash.

This action arose out of a March 20, 2019, two-car accident in Philadelphia. Defendant attempted to make a left turn across traffic while the Plaintiff was approaching on the same roadway but in the opposing lane of travel. Plaintiff filed a personal injury lawsuit as a result of injuries he sustained in the crash.

At trial, Plaintiff testified that Defendant made a left turn in front of him when he was almost in the intersection and that he slammed on his brakes but was unable to stop. The Plaintiff also admitted in both the opening statement and his trial testimony that he was driving 30 to 35 miles per hour and that the speed limit was 25 miles per hour. Defendant testified that she believed when she started her turn that she could make it safely and that she did not see Plaintiff's car until she began her turn.

At the close of evidence, Plaintiff moved for a directed verdict that Defendant was negligent and that her negligence had caused his injuries. Defendant moved for a directed verdict that Plaintiff had been negligent in speeding and that his negligence was a cause of the accident. The trial court granted Plaintiff's motion, denied Defendant's motion, and ruled that Defendant could not present the question of Plaintiff's comparative negligence to the jury. The trial court charged the jury only with determining the extent of damages. The jury awarded \$285,000 to Plaintiff.

On appeal to the Superior Court, Defendant argued that the trial court erred in granting Plaintiff's motion for a directed verdict and in not submitting the issue of Plaintiff's comparative negligence to the jury. After an analysis of the law on comparative negligence, the Superior Court found that the trial court had abused its discretion in removing the issue of Plaintiff's comparative negligence from the jury's consideration. The Court noted that where there is evidence in a case that a Plaintiff was negligent and that the Plaintiff's negligence may have caused the alleged injuries, such issues must be proceed to a jury for determination. In this case, the act of speeding, which was admitted, was not just mere negligence, but could also be negligence

(Continued on Page 15)

per se. The Court concluded that the Plaintiff-vehicle's speed could have affected both the time to avoid a collision and the forces involved in the collision.

The Superior Court also held that the element of causation in routine automobile accident negligence cases did not require expert testimony on liability issues as the subject was not beyond the knowledge of ordinary jurors. In this case, neither party had an expert on the liability issues presented.

The Superior Court vacated the judgment entered in favor of Plaintiff and remanded the case to the trial court for a new trial on liability and damages at which the issue of Plaintiff's comparative negligence was to be submitted to the jury.

Schmidt v. Pennsylvania Dept. of Transp., No. 33 C.D. 2023 (Pa. Cmwlth. Oct. 11, 2024)

Commonwealth Court reverses trial court decision to deny summary judgment against PennDOT for a falling tree branch over its right of way that killed a motorist.

On March 2, 2018, Geoffrey J. Schmidt (Plaintiff) sustained fatal injuries after the branch of a large tree, overhanging the road, fell and crushed his vehicle as he drove on South Gulph Road, a Commonwealth highway, in Montgomery County. The tree was planted on property owned by the Southeastern Pennsylvania Transportation Authority (SEPTA). Although branches of the tree extended over the road and PennDOT's right-of-way, the base of the tree was located outside of PennDOT's right-of-way.

Plaintiff's widow filed a lawsuit against PennDOT, SEPTA, and others claiming the tree had severely decayed and was leaning over the roadway creating a dangerous condition. Following discovery, PennDOT filed a motion for summary judgment, arguing these claims were barred by sovereign immunity and not subject to any of the enumerated exceptions to that immunity. Specifically, PennDOT claimed that the real estate exception did not apply because the base of the tree was located on property owned by SEPTA rather than the Commonwealth. Plaintiff responded by highlighting expert evidence that the decayed portion of the tree overhung PennDOT's right-of-way.

The trial court denied summary judgment finding that the applicability of the real estate exception depended on the location of the dangerous portion of the tree with respect to the Commonwealth's property. Based on the Plaintiff's expert evidence the trial court concluded that the real estate exception to PennDOT's sovereign immunity was applicable.

On appeal the Commonwealth Court was asked to determine whether PennDOT was entitled to

sovereign immunity from the claims against it, where the tree that fell did not derive, originate from, or have as its source any PennDOT real estate.

The Commonwealth Court noted that it was required to narrowly construe exceptions to PennDOT's sovereign immunity. Based on the evidence presented, it was determined that the trial court had erred when it broadened the scope of the real estate exception. The Commonwealth Court held that in order to trigger the real estate exception, a dangerous condition must derive, originate from, or have as its source on Commonwealth realty. However, in this case, the dangerous condition was the branch of a tree, which originated from beyond PennDOT's right-of-way. This was insufficient to trigger the real estate exception to the Commonwealth's sovereign immunity. Accordingly, the Commonwealth Court reversed the trial court's order and remanded with instructions to enter summary judgment in favor of PennDOT.

"[W]here there is evidence in a case that a Plaintiff was negligent and that the Plaintiff's negligence may have caused the alleged injuries, such issues must be proceed to a jury for determination."

Baclit v. Sloan, 2024 PA Super 182 (Pa Super. Aug. 16, 2024)

Superior Court affirms a trial court's finding of a de facto waiver of stacking in a commercial insurance policy, which violated the PA MVFRL and Gallagher v. Geico.

On December 5, 2021, Plaintiff-decedent, Tim Baclit ("Plaintiff") sustained fatal injuries while aiding another motorist ("Sloan") who had been involved in a single car accident in Beaver County. Sloan's vehicle had crashed into a bridge retaining wall. Plaintiff, who had been driving an automobile owned by his mother, exited the vehicle to provide assistance. While aiding Sloan, Plaintiff fell from the bridge retaining wall and suffered injuries resulting in his death.

Sloan maintained automobile liability coverage through Farmers Insurance ("Farmers") in the amount of \$100,000. Farmers tendered the limits of the policy. Plaintiff's mother's vehicle was insured under a multi-vehicle policy provided by State Farm with stacked UIM limits of \$300,000. As Sloan's policy was not sufficient to cover the damages sustained by Plaintiff, State Farm paid the limits in UIM coverage. Plaintiff also insured his motorcycle through

HOT OFF THE WIRE ... FROM PAGE 15

Progressive, which included \$15,000 in UIM coverage. Progressive paid the UIM limits in accordance with this policy.

At the time of his death, Plaintiff was also the owner of a trucking business. Under that business, there was a commercial automobile insurance policy where the trucking company was the named insured and the Plaintiff was designated as a driver. There was no waiver of stacking signed under that policy and premiums for stacking had been paid by Plaintiff despite the fact that there was only one (1) vehicle on the policy.

At the trial court level, the parties filed cross-motions for summary judgment against one another. The trial court granted Plaintiff's motion for summary judgment and denied Defendant, United's finding that Plaintiff, as the sole owner of the trucking company, was an "insured" entitled to receive stacked UIM coverage under the PA MVFRL.

On appeal by Defendant, United, the Superior Court of Pennsylvania affirmed the trial court. Relying on precedent set in *Miller v. Royal Ins. Co.*, the Superior Court held that "the owner and/or officers of a corporation are 'class one' insureds under a policy issued in the name of a corporation." 510 A.2d 1257, 1258 (Pa. Super.1986), *aff'd*, 535 A.2d 1049 (Pa. 1988). The Superior Court agreed with the trial court's finding that to conclude otherwise would render the stacking benefit under the policy illusory.

The Superior Court explained that in the absence of finding Plaintiff was an insured under the United policy, the language therein would operate as a *de facto* waiver of stacking coverage because, as in the Supreme Court's decision in *Gallagher v. Geico*, there was no ability for anyone to obtain stacked UIM benefits. This was despite the fact that, as in *Gallagher*, Plaintiff paid increased premiums to obtain stacked UIM benefits under the policy, and, as the sole officer of the company and the one who made the payments, reasonably expected to receive such benefits. Accordingly, the Superior Court determined that unless Plaintiff was found to be a named insured by operation of law, United's limited definition of who could be an "insured" for purposes of collecting stacked UIM benefits under this single-vehicle business automobile policy would violate the MVFRL. The trial court's order granting summary judgment in favor of the Plaintiff was affirmed.

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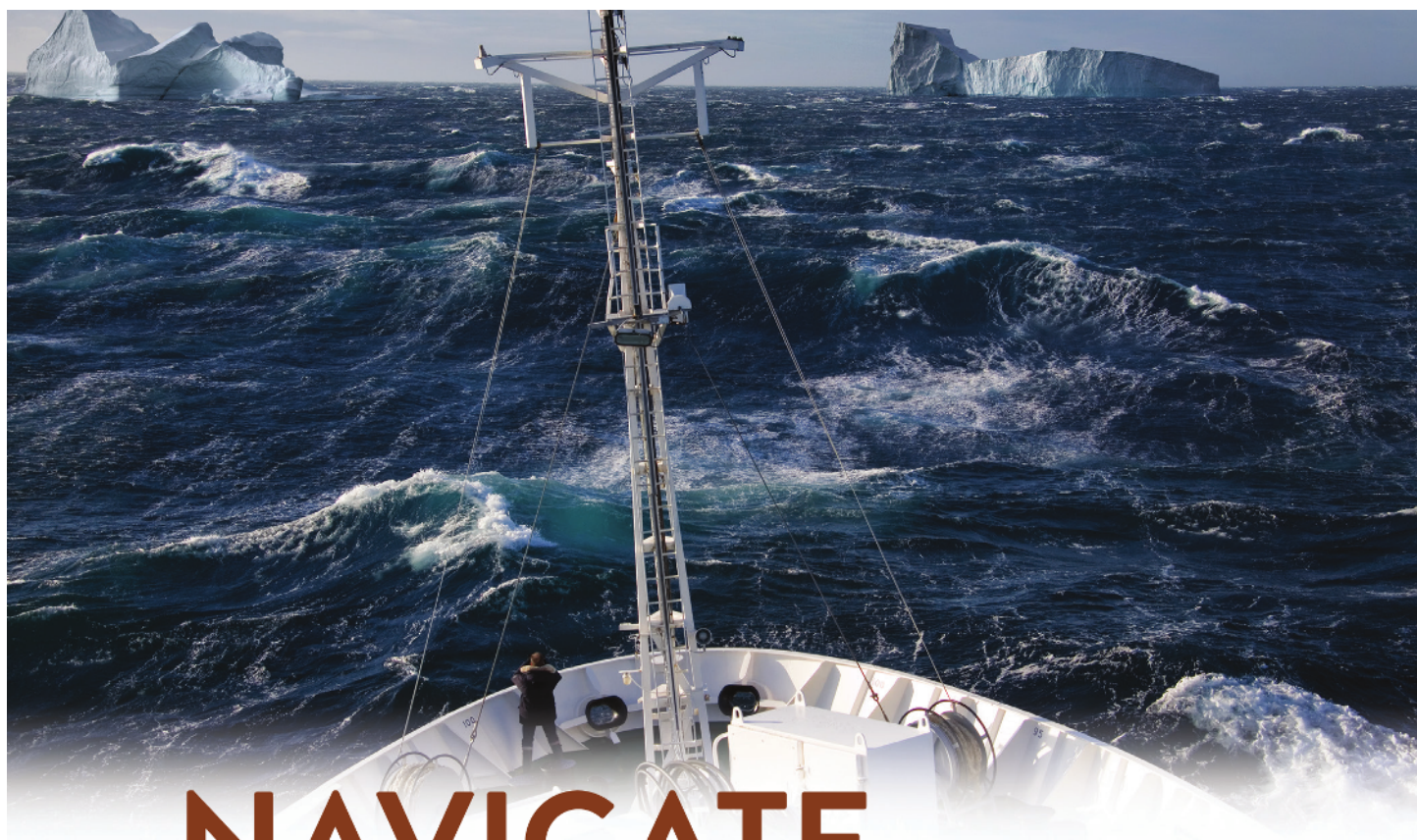
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TRIVIA CONTEST**Enter for a Chance to Win a \$100 Visa Gift Card****Trivia Question #42****What animal has fingerprints that are nearly identical to human fingerprints?**

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by February 21, 2025. Prize for this contest is a \$100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #42 will be published in the next edition of The Advocate.

Rules:

- Members only!
- One entry per member, per contest
- Members must be current on their dues for the entry to count
- E-mail responses must be submitted to admin@wptla.org and be received by the date specified in the issue (each issue will include a deadline)
- Winner will be randomly drawn from all entries and winner will be notified by e-mail regarding delivery of prize
- Prize may change, at the discretion of the Executive Board and will be announced in each issue
- All entries will be considered if submitting member's dues are current (i.e., you don't have to get the question correct to win–e-mail a response even if you aren't sure of your answer or have no clue!)
- There is no limit to the number of times you can win. Keep entering!

The correct answer to each trivia question will be published in the subsequent issue of The Advocate along with the name of the winner of the contest. If you have any questions about the contest, please contact Erin Rudert – er@ainsmanlevine.com.

Answer to Trivia Question #41 –**What literary work inspired Pink Floyd's "Chapter 24" song?**

Answer: **The I Ching (Book of Changes). Chapman, Rob (2010). "Distorted View–See Through BabyBlue". Syd Barrett: A Very Irregular Head (Paperback ed.). London: Faber. p.151**

Unfortunately, we have no winner of contest #41, as we had no entries!



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Pictured in #1, at top: 2007/2008 Awardee Karrie Lee Coyer; at bottom, from L to R: 2001 Awardee Beckie Herzig, 2024 Awardee Jonathan Heubel, 2012 Awardee Davanna Feyrer, and 2021 Awardee Melanie Vadzemnieks. In #2, Business Partner Charile Georgi of Planet Depos, Board of Governors Member Gianna Kelly, and Lauren Kelly Gielarowski. In #3, Business Partner Jayme Hartnett of Pain & Spine Specialists, and Past President and Board of Governors Member Erin Rudert. In #4, from L to R: Vice President Jennifer Webster, Board of Governors Member Drew Rummell, Secretary Shawn Kressley, and Treasurer Russell Bopp. In #5, from L to R: Business Partner Anthony Mastriani of Synergy, Tony Mengine and Nick LaCava. In #6, from L to R: Board of Governors Member Matt Logue, Business Partner Justin Garlow of Ford Office Technologies, Tom Crenney and Alicia Nocera. In #7, from L to R: Justin Selepe, Immediate Past President Greg Unatin, and Board of Governors Member Nick Katko. In #8, from L to R: Board of Governors Member Brendan Lupetin, Dr. David Okonkwo, and President Katie Killion. In #9, from L to R: Board of Governors Member Rich Epstein and Past President John Quinn. In #10, from L to R: Past President Richard Catalano, Past President and Board of Governors Member Mark Milsop, and Ken Fawcett. In #11, from L to R: Business Partner Leigh Ann Smith of NFP Structured Settlements, Board of Governors Member Gina Zumpella, and Maggie Rosenzweig. In #12, from L to R: Mark Smith, 2024 Awardee Jonathan Heubel, and Board of Governors Member Brendan Lupetin. In #13, from L to R: Board of Governors Members Brad Holuta and Joe Massaro.



Pictured in #1, back row from L to R: Board of Governors Member Carmen Nocera, Board of Governors Member Rich Ogradowski, Mike Murphy, Board of Governors Member Mitch Dugan, Board of Governors Member Nat Smith, Past President Dave Landay, Board of Governors Member Mike Gianantonio, Board of Governors Member Karesa Rovnan, and Ryan Carroll. Front row, from L to R: Sean Carmody, Board of Governors Member Joe Massaro, Past President and Board of Governors Member Mark Milsop, Pete Giglione, Kelly Tocci, Board of Governors Member Holly Deihl, Board of Governors Member Gianna Kelly, Bianca DiNardo, Kirsten Kennedy, President Katie Killion, Board of Governors Member Gina Zumpella, Board of Governors Member and 5K Chair Chad McMillen, and Marikate Reese.

In #2, Board of Governors Member Nat Smith and his wife Leslie Smith.

In #3, Board of Governors Member Karesa Rovnan, her husband Matthew and their son Maddox.

In #4, Male WPTLA Member 1st place winner Ryan Carroll.

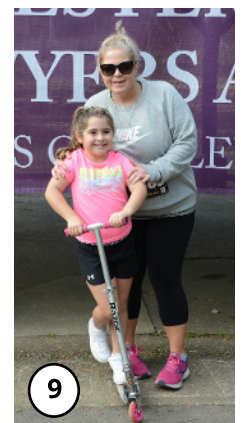
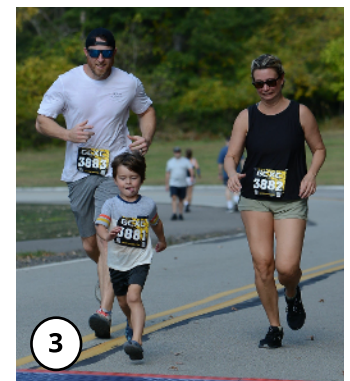
In #5, Board of Governors Member and 5K Chair Chad McMillen

In #6, Board of Governors Member Mike Gianantonio and his dog.

In #7, President-Elect James Tallman.

In #8, Female WPTLA 1st place winner and Board of Governors Member Gianna Kelly, Female WPTLA Member 2nd place winner Kirsten Kennedy.

In #9, President Katie Killion and her daughter.



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WPTLA's 2023 Scholarship Essay Contest drew 26 submissions from school districts across western Pennsylvania. The prompt for this year's contest asked "Should the test for whether a work is transformative, and therefore, a 'fair use' and not a copyright infringement, rest on whether it is "recognizably derived" from the original work?" A factual background was provided for them, as well as the suggestion to use any of the briefs or petitions cited in the Supreme Court case *Vidal v. Elster*, No. 22-704.

The winners of the contest were Lindsay Bush, of Kiski Area High School, Kevin Hutchinson, of Baldwin High School, and Lea Kasmer, of Greensburg Salem High School. Read below for the essay written by Kevin Hutchinson, of Baldwin High School.

Marked: Why Anti-Defamation Restrictions on Trademark Issuance are Not a Violation of First-Amendment Rights

In the United States, the intersection of free speech and intellectual property protection has long been a subject of fierce contention and debate. The case of California attorney Steve Elster's denied trademark application for the phrase "Trump Too Small" highlights this ongoing discussion, particularly regarding the restrictions imposed on trademarks that incorporate the names of living presidents or famous figures without their consent. The slogan, created by Elster as a jab at Trump's apparent insecurities about his manhood during the 2016 presidential campaign, was meant to poke fun at the former president. And while some may argue that the restriction of Elster's trademark impeded upon the First Amendment's guarantee of free speech, a closer examination reveals that such limitations are necessary to maintain the delicate balance between individual rights and social interests. Federal trademark restrictions, specifically those prohibiting the registration of marks using the names of politicians or famous people, are not violations of the First Amendment but rather a necessary system of bulwarks against profuse and unwarranted defamation. In this case, the restrictions do not deny the Constitution; instead, they protect individual rights and curb the chaos of slander that is all-too-common in our political life today.

In the Court opinion on the Elster case, Chief Justice John Roberts articulated the delicate balance between free speech and the protection of an individual's right to his or her own identity. He said "Trademark law's restriction on the registration of marks containing the names of living presidents or famous persons without their consent does not inhibit legitimate expression but rather serves to prevent the potential harm that may arise from the unauthorized commercial use of well-known names." This sentiment underscores the necessity of trademark restrictions in safeguarding individuals from unwarranted exploitation; for, without these protections, reputations would needlessly be put at risk. And while the First Amendment safeguards the right to express one's opinions freely, it also recognizes the importance of preserving individuals' autonomy over their own identities. Without such protections, the marketplace would be susceptible to abuse, where the names of public figures could be co-opted for commercial gain without regard for the personal, social, or societal harm that such defamation can inflict.

Moreover, Justice Ginsburg emphasized the importance of maintaining a distinction between expressive speech and commercial speech. She noted, "While the First Amendment protects individuals' rights to freely express their

opinions and ideas, it does not provide unfettered license to use the names of public figures for purely commercial purposes without their consent." This distinction highlights the governmental interest in regulating commercial activities to prevent the commodification of individuals' identities, ensuring that trademarks serve as indicators of source rather than tools for appropriation and exploitation. Beyond the confines of trademark law, this principle upholds the dignity and autonomy of individuals, affirming their right to control the commercial use of their names and likenesses. By delineating between expressive and commercial speech, society can foster a marketplace where ideas can flourish while respecting the rights and identities of its citizens.

Additionally, Justice Kavanaugh reinforced the notion that trademark restrictions do not burden free speech but rather strike a reasonable balance between competing interests. He observed, "The Federal law's prohibition on trademark registration for marks containing the names of political or famous figures without their consent reflects a careful consideration of the need to protect individuals' rights to control the use of their names while also fostering innovation and competition in the marketplace." This acknowledgment underscores the government's legitimate interest in promoting fair competition and preventing consumer confusion, thereby justifying the limitations imposed on trademark registration for marks containing the names of public figures. Indeed, by safeguarding individuals' rights to their own identities, trademark restrictions serve not only to protect the reputations of public figures but also to maintain the integrity of the marketplace, where people can make informed choices without being misled.

In conclusion, the debate surrounding the intersection of free speech and trademark restrictions underscores the intricate balance required to uphold both individual rights and collective interests. As demonstrated through the analysis of the Supreme Court case *Vidal v. Elster*, No.22-704, it is evident that Federal trademark restriction serves legitimate governmental interests in protecting individuals' rights to their own identity and reputation. While the First Amendment safeguards the right to free expression, it does not grant absolute immunity to exploit the names of public figures for commercial gain. By imposing reasonable limitations on trademark registration, the government aims to prevent the commodification of individuals' identities, maintain fair competition in the marketplace, and protect consumers from deception or exploitation. To say otherwise is to suggest that the trademark can be a weapon deployed in Internet reputation wars, acidifying the already-toxic media landscape and misleading the public. And such a possibility would not make speech more 'free;' rather, it would confine Americans to a dark future in which any baseless slander could be not only tolerated, but legally protected.

Essay submitted by Kevin L. Hutchinson, of Baldwin Area High School.

Kevin's future plans were to attend the University of Alabama.

He stated "I am honored to accept this scholarship, and on behalf of my family and everyone who has supported me on my endeavors, I am excited to start the next chapter of my life."



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Through the Grapevine....

The staff of The Advocate apologizes to **Junior Member and Law Student Joseph Leckenby**, who was erroneously omitted from being named in the photographs of the Legislative Meet & Greet event, from the Fall 2024 issue of The Advocate. He is pictured in #5, on p 18.

Kudos and congratulations to **Board of Governors Member Jason Schiffman** on being named as 2024 Visionary of the Year with the Leukemia & Lymphoma Society. Jason raised an incredible \$162,408 for LLS.

Our sincere sympathies to **Members Matthew and Patrick Loughren**, and their family and staff, on the recent passing of their partner and father, Louis Loughren.

More sincere sympathies to **Members Ken Fawcett and Sherri Hurst**, and their staff, and to **Business Partner Howie Schulberg of Schulberg Mediation**, on the passing of their friend and partner and step-brother, **Past President and Board of Governors Member Chad Bowers**.

