THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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30TH ANNUAL ETHICS & GOLF RECAP

It must be the Friday of Memorial Day weekend, which means that the 30th Annual Western Pennsylvania Trial Lawyers Ethics and Golf Outing took place at the beautiful Shannopin Country Club in Ben Avon Heights, PA. There were 41 participants that started the day, with Rich Schubert and Larry Kelly giving an always excellent update on the State of the Union on Ethics. There was a beautiful buffet breakfast that the Honorable Judge Regan attended as well.

After the ethics seminar, the members and guests played the challenging 18 holes in an absolutely gorgeous weather setting.

The winning team of Larry Kelly, Joe George, and their paid assassins, slayed the course with a winning score of 14 under. In second place was the team of Bill Goodrich, Josh Geist, Gary Ogg and Brad Holuta.

Prize winners were as follows:

Team Winners:

1st Place Team = 57
Larry Kelly
Wynn Hassan
Mike Gierlawski
Joe George

2nd Place Team = 61
Josh Geist
Billy Goodrich
Gary Ogg
Bradley Holuta

Skill Prize Winners:

Closest to the Flagstick (tee shot)
#7 - Josh Geist - 2'10"
Closest to the Flagstick (tee shot)
#14 - Sean Carmody
Closest to the Flagstick (2nd shot)
#13 - Bradley Holuta - 6'10"
Longest Drive (in fairway)
#1 - Mike Gierlawski
Longest Putt Holed
#18 - Shawn Kressley - 23'2"

I would like to thank the following individuals and organizations for their contributions of items for use during the golf outing and prizes for the winners: Planet Depos, Bill Goodman, and Pete Giglione. After golf, we had a scrumptious lunch on the veranda overlooking the City of Pittsburgh.

Mark your schedules now for next year's Ethics & Golf Seminar on Friday, May 24, 2024 at Shannopin Country Club.

By Jack Goodrich, Esq.
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See photos from the event on page 23.

2023 JUDICIARY DINNER RECAP

The Annual Judiciary Dinner was held on Friday, May 5, 2023. The signature event produced near-record attendance, with a total number of attendees at 137. This included members, guests and 17 sitting Judges from all over Western Pennsylvania.

The event, held at Acrisure Stadium, honors those members of the Judiciary who retired or achieved Senior Status during the preceding calendar year. This year, we honored those qualifying judges for 2023. The judges, in attendance, who were honored included: the Honorable Stephanie Domitrovich, The Honorable Oliver J. Lobaugh, The Honorable Jeffrey A. Manning (represented by the Honorable Philip Ignelzi in attendance), and The Honorable William R. Shaffer. The Honorable Max Baer was honored post humously.

The evening began with a cocktail reception featuring passed hors d'oeuvres, then moved to a beautiful sit down dinner before the program began. The program included summaries and interesting facts about the life and career of each Judge being honored. The Judges were presented with a custom-engraved leather coaster set thanking them for their years of service on the bench.

The Association made its annual presentation of the Daniel M. Berger Community Service Award. The 2023 winner was Edgar Snyder and Associates, who orchestrates and participates in multiple projects that benefit various members and organizations throughout the Western Pennsylvania Community. The Edgar Snyder Foundation received $2,500.00, as well as a plaque to Edgar Snyder & Associates.

WPTLA also presented the 2023 Champion of Justice Award. The winner was Cynthia Danel. The award is given in recognition to those who fight, unwavering, for injured victims and preserve the rights of all people to have fair access to the court system. Cindy received a plaque.

Three high school seniors, Katherine Peng from North Allegheny High School, Julie Phillips of Pine Richland High School and Jackson White of Uniontown High School, attended the dinner with their families in order to be recognized as the winners of the WPTLA Scholarship Essay Contest. This year, the Association received 26 essay submissions. The Committee members scored and graded the essays, which is a difficult task every year as all of the submissions are worthy of winning and it seems that the essays get better year after year. These three students' essays stood out from the rest and were selected as the best after the Committee vote. Each received a certificate and a scholarship check in the amount of $2,000.00.

The Steelwheelers were also recognized, with the following members in attendance at the dinner: Mike Adams, Audra Glover (coach of the quad rugby team), and Shawn Polach. In November, they received a check in the amount of $40,900.00, which represents the proceeds raised by WPTLA during its annual 5K race at North Park.

The evening concluded with dessert and conversation, as many of the Judges and attendees stayed to converse after the program. We hope to see everyone in attendance at next year's event.

By: Katie A. Killion, Esq. of

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Photos from the event can be found on page 22.

SAVE THE DATE ...

President's Challenge 5K Run/Walk/Wheel

Sat, Oct 7, 2023

at the North Park Boathouse

Benefits the Steelwheelers

Details coming soon to your inbox.

SPECIAL NEEDS POTPOURRI

A 2023 Special Needs Refresher

We can all attest to the fact that all clients are special and have varying levels of unique or "special needs," as they may be.

When referring to "Special Needs," however, practitioners are normally referring to clients who have some level of mental or physical impairment which may result in their current or future eligibility for certain public benefits.

Those public benefits are broken down into two categories: "means-tested" public benefits, such as Medical Assistance (Medicaid) and Supplemental Security Income (SSI), the eligibility for which is generally contingent on having income and often assets below a limited threshold; and "entitlement" public benefits, such as Medicare and Social Security Disability, Retirement or Dependent Insurance, the eligibility for which is generally contingent on having a work history that resulted in payment of sufficient credits into the federal system.

It is important to recognize that not all Special Needs clients will be on such benefits presently but rather may wish to qualify for them in the future, and that the category of benefits received may change over time with age, changes in condition, or modifications to the public benefit programs.

Depending on Special Needs clients' ability to function independently, which again may change over time, Special Needs Planning also often involves installing legally recognized surrogate decision makers like court appointed guardians or agents under power of attorney instruments, as well as planning for future incapacity in the event of a cognitive decline.

Special Needs Planning therefore often focuses on public benefits eligibility and installing decision makers when capacity considerations are present.

Two common legal practices in which Special Needs Planning presents itself are Estate Planning and Litigation.

Special Needs Estate Planning

In the Estate Planning context, family and friends plan for Special Needs loved ones like children born with a congenital condition or who suffered a birthing injury, or children who experience the onset of a medical condition like autism or schizophrenia later in life.

A primary goal of Special Needs Estate Planning is to ensure that inheritances or lifetime gifts for the Special Needs loved ones are structured in a way that does not result in their receipt of assets which could disqualify them for means-tested public benefits by placing them over the applicable asset limit. This planning is often done via the use of Third-Party Funded Supplemental Needs Trust, perhaps combined with the use of 529A ABLE Accounts as discussed below.

Another important goal of Special Needs Estate Planning is to identify and install legal decision maker for Special Needs loved one with limited capacity to ensure they have sufficient representation and advocacy when parents or family friends are no longer able to support them. Time and time again the biggest concern expressed by family and friends with Special Needs loved ones is who will care for them when they no longer can.

Special Needs Litigation Planning

In the litigation context, plaintiffs' attorneys need to identify whether their injured clients are capable of fully representing and advocating for themselves in their litigation and recovery. See my past Article published in the *(Continued on Page 4)*

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Winter 2023 Advocate, entitled "Considerations in Representing A Client with Diminished Capacity" for further discussion.

Plaintiffs' attorneys must also identify whether their injured clients have a condition that may result in their current or future receipt of public benefits and, if so, which benefits may be implicated.

It is imperative to correctly identify the potential public benefits in place, and too often clients may not fully appreciate or understand the benefits they receive.

When injured clients' treatment was covered through Medicare and/or Medicaid, litigation attorneys will need to consider Medicare Secondary Payer and Medicaid Third Party Liability liens and may also need to determine whether a Medicare Set-Aside is indicated if Medicare may cover future treatment of the injury for which recover was secured.

Litigation attorneys must also consider whether their injured clients' receipt of a lump sum may place them over the applicable asset limit and therefore render them ineligible for present or future means-tested public benefits like Medicaid and SSI.

In such cases, the litigation attorney might engage the services of a Special Needs Planning attorney to advise their injured clients on how the recovery may impact their benefits and what planning options may be available.

Protecting these benefits in litigation is often accomplished through the use of Special Needs Trusts to shelter the litigation recovery. Special Needs Trusts are not appropriate for all clients or situations, particularly where insurance coverage or the recovery is limited or the client is over age 65. Additional planning tools include Settlement Protection Trusts (possibly with Special Needs provisions allowing the trust to "flip" to a Special Needs Trust if benefits are needed in the future), 529A ABLE Accounts, qualified structured settlement or Medicaid-compliant annuities, and a rapid spend-down.

Special & Supplemental Needs Trusts

Nationwide variations of the phrase "Special Needs Trust" apply to those trusts uniquely drafted to maintain or obtain eligibility for means-tested public benefits. Varying slightly by jurisdiction, federal and state law generally authorize the use of such trust instruments to shelter the assets held in trust so that they are not countable towards the trust beneficiaries' applicable asset limit, thus allowing them to remain eligible for means-tested public benefits.

Special Needs Trusts can be broken down into two major categories: those which are Self-Settled and those which are Third-Party Funded.

Self-Settled Special Needs Trusts are specially carved out by federal law, 42 U.S.C. § 1396p(d)(4), and can be grouped into two main categories: "Payback," "d4A" or "Stand-alone" trusts and "Pooled" trusts, the latter of which must be administered by a non-profit organization.

Self-Settled Special Needs Trusts are typically funded with assets of the Special Needs beneficiary and are subject to inflexible requirements, the most notable of which are that the trust:

- be established for an individual who is disabled as defined under the Social Security Act;
- be for the sole benefit of the disabled beneficiary; and
- provide for payback to State Medicaid Agencies upon termination of the trust.

Third-Party Funded Special Needs Trusts, also often referred to as "Supplemental Needs Trusts," are conversely derived from state law, which varies from jurisdiction to jurisdiction.

Third-Party Funded Special Needs Trusts are funded with assets belonging to a third party and not the Special Needs individual and are therefore not subject to the aforementioned restrictions imposed upon Self-Settled Special Needs Trusts, thereby making them more advantageous. The most notable advantage for Third Party Funded Special Needs Trusts is that they avoid payback to State Medicaid Agencies.

Despite their significant differences, Self-Settled and Third-Party Funded Special Needs Trusts share many administrative characteristics. This is because their beneficiaries are often attempting to qualify for the same means-tested public benefits. Generally, both categories of Trust must be administered within the discretion of an independent third party to supplement, and not supplant, public benefits and be legally unavailable to the Special Needs beneficiary.

General considerations in Special Needs Trust planning include:

- Understanding when payback is required, and how to avoid it;
- Proper drafting to comply with public benefits rules and challenges;
- Knowledge of the Special Needs beneficiary's circumstances and familiarity with public benefits rules.

(Continued on Page 5)

SPECIAL NEEDS POTPOURRI ... FROM PAGE 4

529A ABLE Accounts

On December 19, 2014, the Stephen Beck, Jr. Achieving a Better Life Experience (ABLE) Act became law and amended Section 529 of the Internal Revenue Code to add Section 529A to allow for the creation of state-specific tax free savings accounts to cover "qualified" expenses for individuals with disabilities for tax years 2015 and forward.

ABLE accounts are allowed a tax exemption similar to a Qualified Tuition Program or Section 529 Plans. Non-tax deductible contributions may be made to an ABLE account by any person (the disabled account beneficiary, family or friends), and income earned in a 529 ABLE account is tax-exempt or in some instances tax-deferred.

Like Section 529 Plans, ABLE programs are state-run with options varying from state to state. Designated beneficiaries of a 529A ABLE account may be changed so long as a newly designated beneficiary is likewise eligible under the program and a family member of the initially designated eligible beneficiary.

Qualified disability expenses from 529A ABLE accounts include education, housing and transportation, with cited examples of medical and dental care, education, community based supports, employment training, assistive technology, specialized housing and disability-related transportation.

Similar to Special Needs Trusts created under 42 U.S.C. § 1396p(d)(4)(A), 529A ABLE accounts are designed to "supplement and not supplant" means-tested public benefits and may be subject to payback upon termination, although Pennsylvania's 529A ABLE account program has waived this payback requirement at the present.

529A ABLE accounts do have limitations, which include:

- the 529A ABLE account beneficiary must have significant disabilities meeting Social Security standards with a disability onset date prior to age 26 (to be increased to age 46 in 2026);
- only one 529A ABLE account may be established per disabled individual;
- total annual contributions to an individual's 529A ABLE account by participating individuals may not exceed the applicable annual gift exclusion ($17,000 in 2023);
- total cumulative contributions to an individual's 529A ABLE account over time may not exceed the state-specific limits for education-related 529 savings accounts; and
- 529A ABLE account beneficiaries who receive SSI may not have more than $100,000 in a 529A ABLE account: anything over $100,000 may be considered an "available" asset that could cause a loss in SSI benefits.

This article is not intended to replace and may not be relied upon as legal advice. For further guidance or updates as regulations become available contact Nora Gieg Chatha of Tucker Arensberg, P.C. at nchatha@tuckerlaw.com or 412-594-3940.

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THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES VOLUME 36, 2023-2024

Vol 36	ARTICLE DEADLINE DATE	TARGETED PUBLICATION
Fall 2023	Sep 8	Sep 22
Winter 2024	Dec 1	Dec 15
Spring 2024	Feb 23	Mar 8
Summer 2024	May 17	May 31

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

POINTS FOR CHARGE IN A PREMISE CASE AGAINST A LANDLORD

I recently had the opportunity to go to trial in a case arising out of a tenant who was injured due to a defective common area for his rental unit. During the process of preparing for trial, I learned that the Standard Points are not particularly helpful in establishing the Landlord's duty.

The problem lies in the fact that caselaw holds that the tenant is a licensee and not an invitee. See e.g. Kobylinski v. *Hipps,* 359 Pa. Super. 549, 519 A.2d 488 (1986)[1]. Fortunately if you look for the standard instruction for the duty owed to a licensee (See Pa Suggested Standard Jury Instruction 18.50), the note makes it clear that this charge is not to be given in light of *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979).

In the end, there is not a standard charge to be given here. As such, I am sharing with you the points that I used.

1. In determining whether the landlord in this case used the required reasonable care, you are to apply the following legal standard:

> [A] landlord of a multiple-tenanted building, reserving control of common approaches, such as sidewalks, passageways, steps is bound to keep such approaches and parts reasonably safe for the use of tenants and a landlord becomes liable where he either had actual notice of a defective condition therein or was chargeable with constructive notice, because had he exercised reasonable inspection he would have become aware of it.

Sprouse v. Keller, 2020 Pa.Super. Unpub. Lexs 4014, 2020 WL 7706808, 245 A.3d 1105 (Pa. Super. Ct. 2020)[2];

"[A] landlord may . . . be found liable if 'as an inducement to the execution of [a] lease for premises which were obviously in a defective condition, the landlord promised the tenant to remedy this defective condition and, in reliance upon that promise, a lease was negotiated.'"

citing *Cholewka v. Gelso*, 2018 PA Super 216, 193 A.3d 1023, 1031 (Pa. Super. 2018)[3]

Affirmed _____Denied _____Covered _____

2. In addition, the Pennsylvania Landlord and Tenant Act provides in relevant part:

> The retention of control of the stairways, passages, roadways and other common facilities of a tenement building or multiple dwelling premises places upon the landlord, or other possessor, the duty of reasonable care for safety in use.

68 Pa. Stat. Ann. § 250.502-A (LexisNexis, Lexis Advance through 2022 Regular Session Act 166; P.S. documents are current through 2022 Regular Session Act 166)

Affirmed _____Denied _____Covered _____

Note these points should be given in conjunction with Pa SSJI 13.10 on negligence and 13.1000 concerning negligence *per se*.

There is no need to save this article as these points have been submitted to WPTLA's Plaintiff's data base. If you have not explored the database yet, it is a wonderful resource and member benefit.

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[1] *Although I understand that this is what the law is, it really does not make sense to me intellectually. Perhaps in the right case someone will question this and change the law. The rationale appears to be that the tenant is a social guest.In my mind that is simply not the case. The landlord is a business person who receives monetary consideration for renting the property.*

[2] *This passage has been modified from the original text in light of the facts of this case.*

[3] *This charge was crafted for a common area situation. However the broader rule recognizes that:*

> *a landlord out of possession, however, may be liable (a) where he conceals a dangerous condition of which he has knowledge and of which the tenant has no knowledge or cannot be expected to discover and (b) where he knows or should know of a dangerous condition and leases the premises for a purpose involving a 'public use' and has reason to believe the tenant will not first correct the condition; (4) a landlord of a multiple-tenanted building, reserving control of the common approaches, such as sidewalks, passageways, etc., or parts of the building common to all tenants, such as the roof and walls, is bound to keep such approaches and parts reasonably safe for the use of tenants and their invitees and a landlord becomes liable where he either had actual notice of a defective condition therein or was chargeable with constructive notice, because had he exercised reasonable inspection he would have become aware of it.*
>
> *Furthermore, a landlord may also be found liable if "as an inducement to the execution of [a] lease for premises which were obviously in a defective condition, the landlord promised the tenant to remedy this defective condition and, in reliance upon that promise, a lease was negotiated."*

Cholewka, 193 A.3d at 1031 (citations omitted).

(Continued on Page 7)

BY THE RULES ... FROM PAGE 6

SUBPOENAS FOR OUT OF STATE WITNESSES

I was recently asked about the procedure to subpoena out of state witnesses. Although this used to be a major undertaking and expense with the need to hire local council, Pennsylvania adopted the Uniform Interstate Depositions and Discovery Act in 2012. Due to the somewhat obscure nature of this act, I thought it may be helpful to briefly outline.

The Pennsylvania version of this act has been codified at 42 Pa.C.S 5331 et. seq. According the Uniform Law Commission website (Accessed May 19, 2023), 46 other states have adopted their version of this law. (The non-adopting states are Texas, Missouri, Massachusetts and New Hampshire.) A number of states have adopted some local requirements in addition to the uniform act so it is important to check that state's law before proceeding.

Under the Pennsylvania version of the law, the attorney in the state in which the lawsuit pending would first obtain a subpoena from that state. The attorney would then present that subpoena to the appropriate officer (here a prothonotary or department of court records) who would then issue a subpoena in the state in which the witness is located. That subpoena would then be served in accordance with the rules for service of a subpoena.

The act as enacted in Pennsylvania provides that a request for issuance of the subpoena does not constitute an appearance in the Pennsylvania Courts.

The act also contains procedures for a protective order or to enforce compliance.

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MEMBER PICTURES & PROFILES

Name: Greg Unatin

Firm: Lupetin & Unatin

Years in practice: Approaching 17

Bar admissions: 2006

Special area of practice/interest, if any: Medical malpractice

Tell us something about your practice that we might not know: Our dedication to helping victims of medical malpractice is inseparable from our deep respect for doctors and nurses, the vast majority of whom care about nothing more than the well-being of their patients.

Most memorable court moment: We were pacing the main street of Hollidaysburg on a beautiful summer day during the pandemic, nervously waiting as the jury deliberated in a Blair County medical malpractice case. Eventually, the judge's chambers called about a question from the jury: they asked if they could have a calculator. Not long afterwards, the jury returned a wonderful verdict for our client and his family.

Most embarrassing (but printable) court moment: During my first trial as second chair, Chuck Evans asked if I would pour him a cup of water before he began an examination. As I started to pour, the top of the pitcher flew off and water spilled all over counsel's table. At least the jury was amused.

Most memorable WPTLA moment: The Habitat for Humanity days stand out for generating so many positive vibes. I look at each event as a great opportunity to gab with fellow members and really get to know their interests, learn a new skill like hanging dry wall, and give back to the community. And sometimes Laurie brings coffee and donuts.

What advice would you give yourself as a new attorney just passing the bar?: Spend as much time as possible learning the trade of plaintiffs' civil litigation, no matter what seemingly insignificant work senior associates or partners may throw your way.

Secret Vice: Hot Ramen noodle baths (and bad jokes!)

People might be surprised to know that: I'm not in my thirties anymore.

COMP CORNER

Supreme Court Issues Decision Regarding Subrogation for Dram Shop Payments to Injured Public Safety Officer

The Pennsylvania Supreme Court has once again clarified subrogation under the Workers' Compensation Act against recoveries in third-party actions arising out of a motor vehicle accident involving the public safety employee. The court analyzed the interplay between the Workers' Compensation Act, the Heart & Lung Act and the so-called Dram Shop Act.

In *Alpini v. WCAB (Tinicum Township)*, 2 MAP 2022, the court analyzed the above acts and concluded that Section 1720 of the Motor Vehicle Financial Responsibility Law precludes subrogation against Alpini's third-party settlement of claims made pursuant to Section 493 of the liquor code.

Alpini was injured on April 17, 2011, while employed as a police officer. He was injured in a work-related motor vehicle accident involving an intoxicated driver. A Notice of Temporary Compensation Payable was issued which converted into a Notice of Compensation Payable. He received Heart & Lung benefits rather than Workers' Compensation benefits.

Alpini filed an action against the driver of the other vehicle and two taverns alleging violations of the Dram Shop Act. The case eventually settled for $1,325,000 with $25,000 paid by the driver's insurance company and the remaining funds paid by the two taverns, which allegedly served the intoxicated driver. Subsequently the employer sought subrogation by filing a Modification Petition through the Bureau of Workers' Compensation. The Workers' Compensation Judge granted the Modification Petition finding the subrogation lien was proper. Appeals were taken to the Workers' Compensation Appeal Board which ultimately sustained the action of the Workers' Compensation Judge.

Alpini appealed to the Commonwealth Court. The Commonwealth Court upheld the finding for subrogation determining that the actions against the taverns did not constitute having arisen involving a motor vehicle but rather from their negligence of serving an intoxicated person. On appeal to the Supreme Court Alpini properly argued that under Pennsylvania law he could not prove damages related to the benefits received pursuant to Heart & Lung. Therefore, the employer should not be able to maintain subrogation rights against the recovery devoid of damages arising from payments made pursuant to Heart & Lung. Alpini further argued the actions against the two taverns arose from the use of a motor vehicle.

In a thoughtful majority opinion by Justice Robson the court detailed the evolving case law regarding subrogation and public safety employees that this author perceives as bending towards justice. For those involved in cases of this type the court's decision is a must read as a summation of the relevant case law in the area.

The Supreme Court applied the Statutory Construction Act to the *Alpini* case. The court cited to "clear and unambiguous interpretation of Section 1720 of the Motor Vehicle Financial Responsibility Law to the facts of this case, we must conclude that the 'action through which claimant asserted his Dram Shop claims against tavern owners' arose out of the maintenance or use of a motor vehicle." Therefore, subrogation was not permitted.

This case is very beneficial to individuals who represent recipients of Heart & Lung benefits received as a result of work-related motor vehicle accidents. The court has hopefully finally clarified that subrogation does not lie in the circumstances despite the evolving theories put forth by various municipal employers. Query whether this case represents the last nail in the coffin of municipal employer's attempts to subrogate for Heart & Lung benefits.

Mark Milsop wrote the PAJ Amicus Brief and Dan Siegel represented Alpini at the appellate level. Kudos to both PAJ Stalwarts.

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SPEED NETWORKING WITH OUR BUSINESS PARTNERS - PART 1

Tues, June 20 * 5:00-7:30 pm * Sienna Mercato - 3rd floor

For WPTLA members only: free registration, free drinks, free food!!

- Because this event is gratis for WPTLA members, your attendance for the entirety of the speed networking portion of the event is expected.
- There are a limited number of spaces available for members. Registration is first come, first serve.

Register online at www.wptla.org/events/

Franks v. State Farm ***No. 42 MAP 2022 (Pa. April 19, 2023)***

Pennsylvania Supreme Court holds that a new UIM Waiver Form is not required when a vehicle is removed from coverage under a multi-vehicle policy.

On January 18, 2013, Robert and Kelly Franks, ("Plaintiffs") applied for automobile coverage with State Farm for two vehicles. The first named insured under the policy executed a form rejecting stacked UIM coverage. State Farm issued the policy, with non-stacked UIM coverage limits of $100,000 per person/$300,000 per accident.

In 2014, the Plaintiffs added a third vehicle to the policy and executed a second rejection of stacked limits of UIM coverage. Subsequently at the request of the Plaintiffs, a vehicle was deleted from the policy, reducing the total number of vehicles from three (3) to two (2). When the third vehicle was deleted from the policy, Plaintiffs did not request and State Farm did not make any changes to the coverages for the two (2) remaining vehicles.

On August 11, 2016, Plaintiff-husband sustained injuries in a motor vehicle accident that was caused by the negligence of another driver ("tortfeasor") After ascertaining that the bodily injury liability coverage available to the tortfeasor was insufficient to fully compensate them, the Plaintiffs asserted a claim for UIM benefits under the policy. In response to the claim, State Farm paid the Plaintiffs UIM benefits in the amount of $100,000.

Section 1738 requires insurance companies to secure a new written waiver of UIM coverage whenever an insurance policy is purchased

On July 9, 2018, the Plaintiffs filed a complaint for declaratory judgment, contending that State Farm was obligated to pay them an additional $100,000 in UIM benefits because there was no valid waiver of stacked UIM coverage in effect at the time of the accident. State Farm filed a counterclaim for declaratory judgment, seeking a declaration that it was obligated to pay only the $100,000 already tendered. Following a non-jury trial, the trial court entered an order granting declaratory judgment in favor of State Farm, ruling that the insurer was only obligated to pay a total of $100,000 in UIM coverage to the Plaintiffs.

The Superior Court sitting *en banc* and in a matter of firm impression affirmed the trial court finding that the removal of a vehicle from an insurance policy does not constitute a "purchase" of coverage requiring that the insured be provided the opportunity to waive the stacked limits of coverage at the time of removal. (*See* HOTW Winter 2021).

In this appeal by permission, the Supreme Court addressed whether the Superior Court erred as a matter of law by holding that removal of a vehicle from a multiple motor vehicle insurance policy, in which stacked coverage had previously been waived, does not require a renewed express waiver of stacked coverage pursuant to Section 1738(c) of the MVFRL.

The Supreme Court affirmed the Superior Court's decision. The Court concluded that Section 1738 requires insurance companies to secure a new written waiver of UIM coverage whenever an insurance policy is purchased. In this case, there was a change made to an existing policy but a new policy was not purchased. As such, there was no requirement under the law for the carrier to secure a new waiver form. The Court held that "[t]he removal of a vehicle from coverage under a multi-vehicle policy under conditions that do not alter the pre-existing coverage or costs relative to the remaining vehicles is not a purchase requiring a renewed express waiver per section 1738(c)".

Edwards v. Norfolk Southern Railway Co. 2023 PA SUPER 45 (Pa. Super. March 21, 2023)

Superior Court affirms the denial of summary judgment and holds that, under the relation back doctrine, the appointment of a personal representative to her late husband's estate two months after the expiration of the statute of limitations relates back to her timely-filed personal injury lawsuit.

On October 27, 2015, Douglas Edwards died of

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HOT OFF THE WIRE ... FROM PAGE 10

renal cancer. On October 26, 2018, with one day left before the statute of limitations expired, his widow, Denia Edwards (Edwards), filed an action under the Federal Employers' Liability Act (FELA) alleging that her late husband's cancer was caused by his two-decade-plus employment with Norfolk Southern. The complaint named the plaintiff as "Denia Edwards, personal representative for the estate of Douglas A. Edwards." At the time, however, Edwards had neither applied for nor been appointed the personal representative of her late husband's estate, even though she was named the executor in his will. On December 27, 2018, two (2) months after the statute of limitations for a FELA action had run, Edwards applied and was appointed to be the personal representative of her late husband's estate.

Norfolk Southern filed an answer and new matter raising the statute of limitations as a defense. It then moved for summary judgment on that basis asserting that the action was time-barred because Edwards did not apply to be the personal representative until after the statute of limitations had expired. Edwards countered that her appointment as personal representative related back to her filing the complaint. The trial court agreed and denied summary judgment.

In this interlocutory appeal by permission, the Superior Court considered whether the relation back doctrine applies when a plaintiff timely files an action on behalf of an estate but does not apply to be appointed the personal representative until after the statute of limitations has run. The Court observed that, under the relation back doctrine, Pennsylvania courts, in certain situations, have validated the acts of a personal representative of an estate that predate their official appointment.

After review, the Superior Court determined that the trial court did not err in denying summary judgment and concluding that the relation back doctrine applied. The Superior Court noted that Edwards was named the executor in her late husband's will and she timely filed her FELA action in which she averred that she was the personal representative of her late husband's estate. Thus, Norfolk Southern was notified before the statute of limitations had expired that an action had been filed against it by a plaintiff "who was, at least putatively, the personal representative of the decedent's estate. "While the Court noted that it may be preferable for a plaintiff to seek appointment before the statute runs, the Court did not find that failure to do so compels dismissal of a complaint when the plaintiff is the named executor and avers that she is the personal representative in the timely-filed complaint.

Santiago v. Philly Trampoline Park, LLC, 2023 PA SUPER 47 (Pa. Super. March 21, 2023

In an issue of first impression, Pennsylvania Superior Court holds that a parent cannot waive a child's right to jury trial by signing an arbitration agreement on his/her behalf.

In August 2018, Ryan Shultz took his son to Sky Zone, a Philadelphia trampoline park. In order to use the facilities, Mr. Shultz was required to execute a six-page digital document entitled "Participant Agreement, Release and Assumption of Risk (Agreement)." In addition to, recognizing a voluntary assumption of risk, allowing Sky Zone to use the children's' images on social media, agreeing to receive e-mail promotions, and broadly acknowledging "that if I or any of my children are injured in any way, this waiver prevents and prohibits any recovery of money from any Sky Zone related entity," the Agreement also contained an arbitration provision waiving the singing parent, his/her spouse and the child's right to a jury trial and agreeing to arbitrate any disputes.

In February 2019, Jennifer Santiago took her minor daughter to a different Sky Zone location. Prior to admittance in the play area, Ms. Santiago executed the same six-page digital Agreement as did Mr. Shultz, acknowledging that she was waiving her rights, as well as those of her spouse and children, to seek redress in a jury trial for any injuries sustained or to recover any damages for such an injury, and agreeing to arbitrate any disputes.

After Mr. Shultz and Ms. Santiago signed the Agreement, their respective children were both injured while playing at Sky Zone. Personal injury lawsuits on behalf of the injured minors were brought in the Philadelphia Court of Common

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Pleas by the parents who had not signed the Agreement. In both instances, Sky Zone moved to compel arbitration based upon the Agreement. In both instances the trial court denied the Sky Zone motions compelling arbitration.

In consolidated appeals, the Superior Court was, as an issue of first impression, asked to determine whether a parent's role as natural guardian entitles the parent to bind a minor child to an arbitration agreement and waive that child's right to seek redress for injuries in a court of law. After reviewing the law of agency and contract law, the Superior Court concluded that the trial courts properly ruled that no agreements bound the children or the non-signing spouses to resolve the alleged negligence claims in arbitration rather than in the courts.

Specifically, the Superior Court found that Sky Zone failed to meet its burden to show that the signatory parents to the Agreement were also acting as the agents of the non-signing parents. The Court found that absent some verbal or non-verbal communication from the non-signing parent that provided authority to the signing parent to agree to the arbitration clause, Sky Zone had failed to establish that the signing parent had the authority to act as the non-signing parent's agent.

> If [a defendant] wishes to create enforceable agreements to arbitrate from the laundry list of people it seeks to preclude from filing claims against it in a court of law, then obtaining the assent of each of those persons, directly or through the recognized principles of agency, is precisely what it must do.

[T]he statuses of Mr. Shultz and Ms. Santiago as natural guardians [of the minor children] did not *ipso facto* grant them the authority to bind their minor children to an arbitration agreement.

Further, the Court held that the parent-child relationship did not empower the signing parents to waive their minor children's rights to have their claims resolved in a court of law. Specifically, the Court concluded that, in the absence of any suggestion that the minor children were third-party beneficiaries of the Agreement, or that their respective parents were authorized to sign the agreements on their behalves, the statuses of Mr. Shultz and Ms. Santiago as natural guardians did not *ipso facto* grant them the authority to bind their minor children to an arbitration agreement.

The Superior Court affirmed both of the trial court orders that denied Sky Zone's motions to compel arbitration.

Matos v. Geisinger Medical Center, 2023 PA SUPER 38 (Pa. Super. March 10, 2023)

Superior Court affirms the denial of summary judgment holding that medical providers may be held liable under the Mental Health Procedure Act for refusal to provide voluntary inpatient examination and treatment to a person who requests such treatment.

In an interlocutory appeal by permission, the Superior Court was asked to review a trial court's refusal to grant summary judgment based on an immunity defense under the Mental Health Procedures Act ("MHPA") brought by Geisinger Medical Center and Alley Medical Center arising from a wrongful death action brought by the Estate of Jessica Frederick.

By way of background into the case, Westley Wise ("Wise"), who had a record of acute psychiatric issues, sought voluntary inpatient examination and treatment at Geisinger and then at Alley. Medical personnel at both facilities examined Wise but denied his requests for treatment despite reports that he felt both suicidal and homicidal on the date in question. The very same day he was refused the treatment he sought, Wise returned home to his apartment where he subsequently murdered his girlfriend, Frederick, and unsuccessfully attempted to kill himself.

The Estate alleged that Geisinger and Alley were liable for gross negligence and/or willful misconduct because they denied Wise's request for

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voluntary treatment. Relying on the Supreme Court's previous decision in *Leight v. University of Pittsburgh Physicians*, Geisinger and Alley argued that they were not liable under the MHPA because no written application was ever made to admit Wise for voluntary inpatient treatment.

After a detailed analysis of the MHPA and relevant caselaw, the Superior Court affirmed the trial court's decision to deny summary judgment. The Court found that the prerequisites to triggering application of the MHPA are not the same for involuntary examination, the process analyzed in *Leight*, and voluntary inpatient treatment, the process at issue in the case *sub judice*. The Court found that while the MHPA requires a written application to begin the involuntary examination process, it does not require a written application to begin voluntary inpatient examination and treatment. Accordingly, facilities such as Geisinger and Alley may be held liable for refusal to provide voluntary inpatient examination and treatment to a person who submits himself for examination and treatment when the refusal constitutes willful misconduct or gross negligence.

Based on their review of the law, the Superior Court concluded that the trial court properly denied summary judgment to Geisinger and Alley on their claims of immunity under the MHPA. Accordingly, the Court affirmed the order denying summary judgment and remanded the case to the trial court for further proceedings.

By: Shawn Kressley, Esq.,

of DelVecchio & Miller

shawn@dmlawpgh.com

UPCOMING EVENTS

Fri, Aug 11, 2023– 1st Board Meeting & Breakfast
Rivers Club, Pittsburgh

Tues, Aug 29, 2023– Business Partner Speed Networking, Part II – Sienna Mercato, Pittsburgh

Mon, Sep 11, 2023– Beaver Dinner & CLE
Wooden Angel, Beaver

Sat, Oct 7, 2023- 5K Run/Walk/Wheel
North Park Boathouse

Wed, Nov 8, 2023- Comeback Award Dinner
Duquesne Club, Pittsburgh

Dec 2023– *CLE "Practices in Judge McGinley's Courtroom"*

Jan 11, 2024– *Junior Member Meet & Greet, Pittsburgh*

Jan 2024– *Zoom Board Meeting*

Feb 2024– *CLE*

Mar 2024– *Microbrewery Event, Pittsburgh*

Apr 2024- *Membership Dinner + Elections Carmody's Grille, Pittsburgh*

May 2024- *Annual Judiciary Dinner*

Fri, May 24, 2024– *Ethics and Golf – Shannopin Country Club, Pittsburgh*

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PRESIDENT'S MESSAGE

Thanks for a great year!

As I reach the end of my year as President of WPTLA, many people have asked me some variation of whether I'm happy to see the year come to a conclusion. While taking a leadership role in any organization requires attention and time, WPTLA is an important and worthwhile use of both of these (at times scarce) resources. What others may not also realize is how much support Laurie Lacher provides to the Board, the Executive Board, and the President. Laurie's dedication to WPTLA and its goal is commendable, especially as she is not an attorney and does not benefit in practice from WPTLA's efforts the same as the members do.

Over the past year as President and the past five years as an Executive Board member, I have seen firsthand how much Laurie knows about WPTLA. Whether the question is currently or historically, by custom or by by-law, Laurie has an answer on hand for almost every issue, question, scenario, or concern that is raised. If there is something that Laurie doesn't know, she will find the answer and come back with citations to the answer and a proposed solution. Laurie is a problem solver in a world where so many people seem satisfied simply pointing out the problems. WPTLA's ongoing success is personal for Laurie and she clearly cares about the organization as a whole and about our individual members.

If you have concerns about becoming involved with WPTLA due to it being "too much work" - I would encourage you to reach out to any of the current Board Members or Executive Board Members to ask for a very honest answer as to how much "work" is involved with leadership roles. Each Board Member is asked to make certain time commitments with attending events and participating in a committee, but Laurie is doing most of the heavy lifting. Laurie makes everything run smoothly - she has calendars and timelines and sends reminder e-mails and arranges things so all we have to do as the members in leadership is show up. The number of times I've looked at Laurie and said "What am I supposed to do now?" should probably be embarrassing for me - but Laurie always has an answer without judgment. Laurie does an amazing job in minimizing how much "work" we each have to do and making sure that our time is spent on the things that are important.

Laurie wears a lot of different hats with WPTLA as the Executive Director. Her job responsibilities have expanded every year, particularly recently with the pandemic and the emphasis on remote attendance opportunities. She's the ultimate "fixer" when it comes to the day-to-day management of this organization. So when people ask me if I'm ready to be done with my year as President - my answer has consistently been to praise Laurie and the excellent job she does in making a year's worth of Presidential duties and responsibilities seem effortless.

By: Erin Rudert, Esq. of

Ainsman Levine

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It's time to renew your Membership Dues for the coming year!

July 1, 2023 - June 30, 2024

Register online at www.wptla.org/join-wptla
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To keep current on all things WPTLA,
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Please support our Business Partners, as they support WPTLA.

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TRIVIA CONTEST

Enter for a Chance to Win a $100 Visa Gift Card

Trivia Question #36

For what events did Walter Winans win Olympic gold medals?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by September 7, 2023. Prize for this contest is a $100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #36 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!

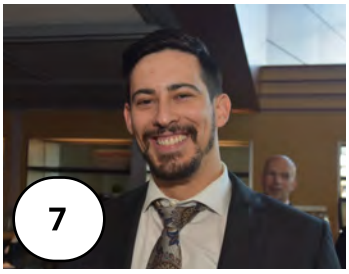
The correct answer to each trivia question will be published in the subsequent issue of The Advocate along with the name of the winner of the contest. If you have any questions about the contest, please contact Erin Rudert – er@ainsmanlevine.com.

Answer to Trivia Question #35 – **What name did Frank Epperson originally give to his frozen dessert creation when he "invented" it by accident in 1905 at the age of 11?**

Answer:Epsicle.Frank Epperson "invented" the popsicle by accidentally freezing a soda with a stirring stick left in it.He called it the Epsicle, but in the 1920s his children and their friends started to call it "Pop's 'sicle" – which was shortened to Popsicle.

Congratulations to Beth Tarasi, a President's Club member with Tarasi & Tarasi, on winning a $100 Visa gift card!

JUDICIARY DINNER PHOTOS



In photo #1: Champion of Justice Awardee and Past President Cindy Danel, Past President Larry Kelly

In #2: Board of Governors Member Ben Schweers and Mark Smith

In #3: Justin Joseph, Secretary James Tallman, Board of Governors Member Rich Ogrodowski

In #4: Armand Leonelli and Board of Governors Member Nick Katko

In #5: President Erin Rudert and President-Elect Greg Unatin

In # 6: Mike Rosenzweig, Mollie Rosenzweig, Past President John Quinn

In #7: Board of Governors Members Tyler Setcavage

In #8: Mike Calder, Joni Perry, Treasurer and Dinner Co-Chair Jennifer Webster, Alex Perry

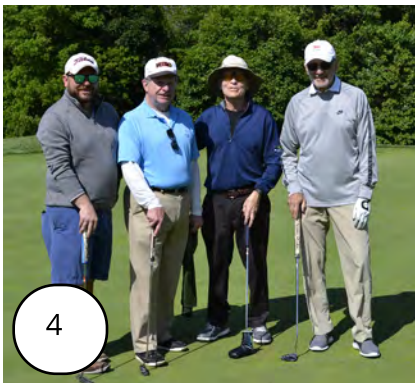
In #9: top row: Becky Romano, President Erin Rudert, 5K Committee and Dinner Co-Chair Katie Killion; bottom row: Steelwheelers Jonathan Wherry and Nick Romano

In #10: Board of Governors Member Brendan Lupetin

In #11: President-Elect Greg Unatin and Board of Governors Member Joe Froetschel

In #12: Tony Mengine, Board of Governors member Brittani Hassen, Taylor Martucci, Vice President and Dinner Co-Chair Katie Killion, George Kontos

30TH ANNUAL EITHCS & GOLF PHOTOS



In #1: Brad Holuta, Josh Geist, Gary Ogg, Bill Goodrich

In #2: Bernie Caputo, Chair Jack Goodrich, Bill Goodrich

In #3: Matt Melczak, Joe Massaro, Shawn Kressley, Kelton Burgess, Drew Leger

In #4: Brendan Schubert, Rich Schubert, Bill Chapas, Chuck Alpern

In #5: Pete Giglione, Mike Collis, Corey Young, Ryan Duty

In #6: Brian Gastaldi, William Flannery, Phillip Clark, Mark Homyak

In #7: Michael Megrey, Chris Halesey, Mark Mislanovich, John Zappone

In #8: Mike Gierlawski, Joe George, Larry Kelly, Wynn Hasson

In #9: James Scanlon, Matt Scanlon, Tim Wojton, Matt Dolfi

In #10: James Crosby, Terry Ging, Sean Carmody, Bernie Caputo

In #11: John Linkosky, Jordan Dunsmore, Mark Aletto, Dick Kelly

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Through the Grapevine....

The attorneys of Barth Rovnan have new emails. **Board of Governors and President's Club Member Karesa Rovnan** can be reached at kmr@brtrialteam.com, and **President's Club Member Steve Barth** can be reached at smb@trialteam.com.

President's Club Member Caitlin Harrington has joined Harry S. Cohen & Associates, P.C. She is located at Two Chatham Center, Suite 985, Pittsburgh 15219. Phone: 412-281-3000 Fax: 412-232-6688 Email: charrington@medmal1.com

Matthew Wimer has moved his office to 1208 Tynsfield Rd, Oakmont, PA 15139. Phone: 412-445-3322

Continued healing to **Past President and President's Club Member Jack Goodrich**, who very recently had elbow reconstruction surgery.

Best of luck to **Past President and President's Club Member Liz Chiappetta** as she becomes PAJ's President at their retreat July 19-21.

Congratulations to all who have been named PA Super Lawyers!