THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

THE ADVOCATE

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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PRESIDENT'S MESSAGE

Writing to you as the new President of the Western Pennsylvania Trial Lawyers Association was bound to be intimidating. Long before I took office, I knew my audience would be comprised of the region's most successful and committed trial lawyers, lawyers who had invested decades of skill, passion and work to protect the rights of injured Pennsylvanians. In short, I knew I'd feel like the garage band guy addressing an audience of Rock and Roll Hall of Fame enshrinees. What I didn't know was that I'd be following the inestimable Dave Landay, assuming office amidst a pandemic, and asking lawyers who have already done so much for so many to once again come to the aid of Pennsylvanians and our great organization.

Incredibly, during this time when thousands of Pennsylvanians have been sickened, lost jobs and struggled to support themselves, civil justice opponents have seized on the COVID crisis to try to strip away the rights of the injured. No fewer than seven bills have been proposed in Pennsylvania's legislature seeking to immunize nursing homes; manufacturers, distributors and retailers of personal protective equipment; hospitals; and businesses who carelessly expose workers and other vulnerable Pennsylvanians to COVID. At the same time, legislators unhappy with Pennsylvania's Supreme Court are working to remove elected justices from western Pennsylvania and install a system that would elect justices by region, precluding the possibility of electing the most qualified candidates and undermining the independence of the judiciary.

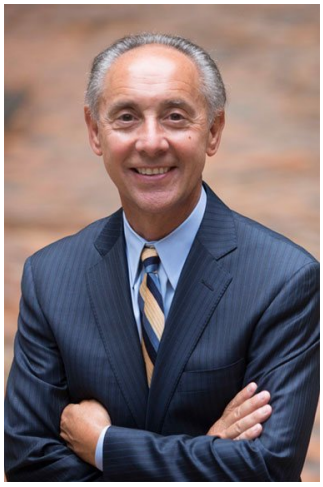
Fortunately for our members and their clients, Dave Landay was President when COVID struck Pennsylvania. By that time Dave had already had a successful term, working to increase membership, enhance public awareness of WPTLA and continue the proud traditions of our association. Dave, together with Laurie Lacher, steered WPTLA through the uncertainties of those early days and set the stage for how we would operate in the socially distanced environment that would, for a time, define our reality. Because of Dave's leadership, WPTLA continued to provide the necessary services and experiences that connect us as Western Pennsylvania Trial Lawyers, albeit virtually. I am grateful to Dave for his hard work and service and proud, if more than a little humbled, to follow in his wake.

Going forward, I promise you will be kept informed about the efforts of the enemies of civil justice and I promise that, as an organization, WPTLA will identify concrete action plans to protect the rights of the injured of today and tomorrow. I promise to safeguard the work of so many great past-Presidents in continuing our proud traditions, even if they must be virtual. I promise we will seek out western Pennsylvania trial lawyers who are not yet members of our association, and we will demonstrate to them that joining our proud association will help them become the best lawyers they can become while ensuring our association *Continued on Page 3*

WPTLA strives to be a valuable resource for you and for your practice during the ongoing pandemic. Please stay engaged with us through our social media pages, our website, and e-mail to let the Board of Governors know if there is anything more the organization can do to help the legal community during this time.

2020 DANIEL M. BERGER COMMUNITY SERVICE AWARD

The Western Pennsylvania Trial Lawyers Association has awarded the 2020 Daniel M. Berger Community Service Award to *The Gismondi Family Foundation*. Building upon prior philanthropic endeavors, *The Gismondi Family Foundation* was established in 2014 by John Gismondi – a past President of WPTLA – and Lisa, his wife, to provide assistance and grants to a number of non-profit organizations in the Western Pennsylvania region, especially those that focus on the basic necessities in life: food, shelter, clothing, education, and medical care.



Some of the beneficiaries of significant endowments include: **Children's Hospital** (establishing a mobile child safety program to eliminate common household dangers); **Catholic Charities** (creation of "*The Family Christmas Plan*" a program to help families afford Christmas gifts and perform acts of kindness to others); **Greater Pittsburgh Food Bank** (endowment to fund its 11-county service area); **Fayette County Meals on Wheels** (providing food for the elderly, incapacitated, and homebound); **Carnegie Library of Pittsburgh** (grant to support *"Books for Babies"* program, which encourages new parents to read to babies and toddlers); **Uniontown Public Library** (creating the *James F. Gismondi Learning Center* in the name of John's father); **Uniontown High School** (a grant to construct *The Gismondi Media Arts Center*); **Pittsburgh CLO** (providing grants to high schools to fund musical theater programs); **Allegheny County Bar Foundation** (funding an endowment for six law students every Summer to work at public interest legal clinics); **University of Pittsburgh Law School** (funding and staffing a series of practical classes for students looking to become trial attorneys); **Duquesne University School of Law** (endowing a scholarship for a student from Washington County in the name of Judge Gustave Diamond); **Washington & Jefferson College** (endowing a scholarship in the name of Jim Gismondi, John's late brother); **American Heart Association** (a legacy grant to support health care in Fayette County and CPR training); and **UPMC** (providing a lead grant to create the *Hardship Fund* that provides assistance to employees for unanticipated child care during the COVID-19 pandemic).

John and Lisa credit their parents for emphasizing the virtue of helping others and supporting not only the communities where they live, but where they came from as well. "My parents taught us to think about the plight of others and to help out when you can," says John, a Uniontown native. Lisa recalls, "I remember as a small child, my mom and dad helping families in our area who did not have a lot and that makes an impression on you for the rest of your life."

Both are actively involved with the Foundation and its ongoing development. While Lisa says that "John is more of a big idea person and organizer, [she] gets the most satisfaction out of helping individuals on a one-on-one level." "We complement one another," she adds. As John says, "the work of the Foundation is far from over. We are always looking for new opportunities and look forward to providing more support to help those in need as we carry on the Foundation's and our families' tradition of reaching out to the community."

By: Joseph R. Froetschel, Esq.

Gismondi & Associates, P.C.

Jrf@gislaw.com

Annual Comeback Award Dinner

postponed until

Thursday, April 8, 2021

The Duquesne Club, Pittsburgh

PRESIDENT'S MESSAGE ... FROM PAGE 1

remains strong for the future.

Of course, none of what I do will amount to a hill of beans without you, our members. You are the lifeblood of our organization. You are our reason for being and, collectively, you are our power. And so I make one last promise. I promise to ask you for your help when it is needed, starting now.

I ask two things of all of you, recognizing that you are free to say no but hoping you will once again rise to the challenge. First, talk about WPTLA, especially when you're with other trial lawyers. Make sure that trial lawyers you know are a member of WPTLA and, if they're not, tell them about WPTLA's great benefits and the good work we do for trial lawyers and injured Pennsylvanians. Ask them to join and share with them this link: https://wptla.org/join-wptla/

Second, please come to the phone if one of the volunteer lawyers from WPTLA calls. You are free to avoid the call or say no to the request we make of you, of course. But please take that call and please listen with a mind inclined toward yes.

Thank you for this opportunity.I look forward to a great and challenging year. Most of all, I look forward to working with all of you.

By: Eric J.Purchase, Esq. of

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THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 33, 2020-2021

	ARTICLE DEADLINE DATE	TARGETED PUBLICATION
Vol 33, No 2 - Winter 2021	Nov 27	Dec 11
Vol 33, No 3 - Spring 2021	Feb 26	Mar 12
Vol 33, No 4 - Summer 2021	May 21	Jun 4

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

INSIDE THIS ISSUE

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COMP CORNER

Court Reaches Decision Reinstating Total Disability Benefits as of the Date of an IRE

The Supreme Court has issued its decision in *Dana Holding Corp. v. WCAB (Smuck)*, 44 MAP 2019.

Claimant David Smuck (hereinafter referred to as "Smuck") suffered an occupational back injury in 2000. He began receiving total disability benefits in 2003. In June 2014, he underwent an IRE which determined a whole body impairment of 11%. The employer filed a Modification Petition to convert the Claimant to partial disability. Smuck alleged that he had not yet reached maximum medical improvement. The workers' compensation judge ultimately decided that the employer was entitled to convert Smuck to partial disability benefits.

Smuck appealed to the Workers' Compensation Appeal Board. Proceedings there were stayed at employer's request while *Protz v. WCAB (Derry Area School District)*, 639 Pa. 645, 161 A.3d 827 (2017) was being considered (hereinafter referred to as "*Protz II*"). After *Protz II* was decided, the Appeal Board reversed, reinstating benefits as of the date of the Impairment Rating Evaluation.

Employer appealed to Commonwealth Court. That Court found that *Protz* applied to every case where the IRE issue was in litigation at the time *Protz II* was issued. Employer's appeal to the Supreme Court followed.

The Supreme Court identified the issues as follows "...a review to the circumstances of the present case, in which it is undisputed that the constitutional non-delegation challenge to § 306(a.2) was raised in a manner that meets the legal requirements for issue preservation.

The Court then conducted an extensive review on retroactivity of case law versus prospectivity. It reviewed the most relevant case law of the United States Supreme Court including *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585. The Pennsylvania Supreme Court concluded that the US Supreme Court "largely ruled out the possibility of selective prospectivity across the wider range of cases." The Court next conducted a review of the legal issue "void ab initio" as treated by the US Supreme Court. It then turned to Pennsylvania precedent for the same legal issue. If focused heavily on *Blackwell v. State Ethics Commission*, 589 A.2d 1094 (Pa. 1991). The Court noted that Blackwell stood for the proposition that retroactive or prospective application of state rules is a matter of judicial discretion, but required "firm enforcement of the general rule applying new state rules to cases pending on direct appeal in which the issue has been preserved."

Ultimately, the Supreme Court in Dana Holding found the preservation of the issue at the time that *Protz II* was issued to be the controlling factor. It stated as follows: "In any event, we agree with the Commonwealth Court that a disability modification is not vested when it remains subject to a preserved challenge pursued by a presently aggrieved Claimant."

Query: What does this decision harbor for those individuals seeking reinstatement to the date of the IRE where no litigation was in place preserving the issue at the time *Protz II* was decided? Is Dana Holding a harbinger for determining that injured workers with no litigation pending preserving the IRE issue at the time *Protz II* was decided will only receive temporary total disability benefits as of the date of filing the Modification/Reinstatement Petition?

In the next edition of Comp Corner, we will deal with the Commonwealth Court interpretation of the above issues.

By: Tom Baumann, Esq. of

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FREE VIRTUAL CLE!!!

Know More - Win More:

What You Should Know About Your Investigator

On Thursday, Nov 5, 2020, Business Partners Chris Finley and Rod Troupe, of Finley Consulting & Investigations, will conduct a 1-hour substantive CLE. Among the topics discussed will be:

- PA's laws regarding private investigators
- the many differences in investigators
- types of investigations
- how an investigator can affect your case outcome

Plan to attend by contacting our Executive Director at laurie@wptla.org or 412-487-7644.

This course is free for all WPTLA members!

WPTLA OFFERS DISTANCE LEARNING

As the Covid 19 Pandemic set in, the executive board realized that for now we could not offer our usual high quality in person continuing legal education. As a result, Executive Director Laurie Lacher researched the requirements to provide remote learning CLE. The Board then agreed to begin the process of receiving accreditation as a Distance Learning Provider.

Accreditation as a Distance Learning Provider involves 2 steps. The first step requires that the organization submit one program meeting the board's standards. This was achieved by offering to the board a non-credit remote on July 30, 2020 with Brendan Lupetin as the presenter. The program was entitled "Trial Simplified". Unfortunately, because this was the initial submission in order to request provisional status, the participating board members were not able to receive credits but did receive insights that they will be able to use in their practice.

Following submission of the initial submission, the CLE Board informed WPTLA that it has achieved provisional accreditation, meaning that programs offered by WPTLA could award CLE Credits. However, the approval is considered provisional because WPTLA will need to submit the next 4 courses to the CLE Board to assure the consistency of these classes.

Once provisional approval of WPTLA as a Distance Learning Provider was granted, WPTLA was able to host its first open CLE for the general membership and bar. This CLE was a 1 credit CLE on August 25, 2020 entitled "Snow and Ice Slip and Falls – You Can Make Money!" During this CLE, the presenters, John Allin and Lisa Rose, experts in snow removal educated us on the standards applicable to snow removal companies and property owners.

WPTLA's second CLE was a free CLE with with Business Partner Bill Goodman, of NFP Structured Settlements on Thursday, September 17. The program was entitled *The World of Settlements 2020 and Beyond.*

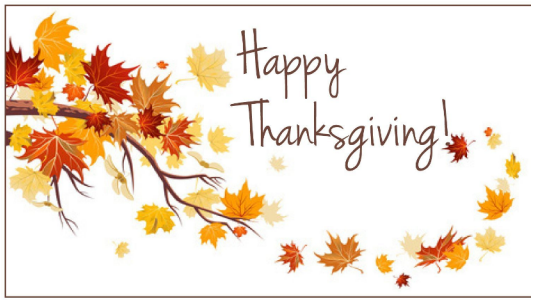
For those taking advantage of our remote CLE offerings you should be aware that the CLE Board does require us to offer a method of verifying your actual participation. Currently, we are using a code word which you will need to include on your enrollment/evaluation form. The code word will be provided more than once during the presentation and your attention will be drawn to the code word.

Future Remote offerings will depend on whether associated events can be held in person. In the event any scheduled CLE cannot be held in person, WPTLA will announce in advance what remote accommodations will be made.

By: Mark Milsop, Esq. of

Berger and Green

mmilsop@bergerandgreen.com



UPCOMING EVENTS

VIRTUAL SUBSTANTIVE CLE

Nov 5, 2020

via Zoom

CONVERSATION WITH A BUSINESS PARTNER

Nov 18, 2020

via Zoom

VIRTUAL BOARD OF GOVERNORS MEETING

Nov 19, 2020

via Zoom

VIRTUAL BEER & CHEESE HAPPY HOUR

Dec, 2020

via Zoom

VIRTUAL SUBSTANTIVE CLE

Dec 2, 2020

via Zoom

VIRTUAL ETHICS CLE

Dec 9, 2020

via Zoom

VIRTUAL SUBSTANTIVE CLE

Dec 15, 2020

via Zoom

VIRTUAL 5K WRAP

Our 20th President's Challenge 5K Run/Walk/Wheel was changed to a Virtual event, due to the restrictions of the pandemic. Registrations opened in August for the 2 week time period of Sept 26 - Oct 11 to complete your heat. We also accepted sponsorships for the event, as well as held a virtual 50/50 raffle.

We were thrilled to take 224 registrations for the event, topping last year's registration of 186. While we only had 76 people share their times with us for the 'official results,' we know many more folks did their heats at their convenience, and with friends and family.

We also were quite pleased with the sponsorship money collected this year - $28,625, which is less than $4,000 under last year's total sponsorship. See the full list of sponsors on pp 19-20.

And we sold $926 worth of 50/50 raffle tickets, providing the winner - Chris Mielo, a Steelwheeler - a prize of $463. Chris has shared with us that he plans to purchase basketballs for the Steelwheelers Basketball Team with his prize money.

For next year, the committee has chosen to proceed with the live event, but hasn't ruled out a virtual option, too! Proceeds will be announced soon.

Save the Date for next year's event:

Saturday, Oct 2, 2021

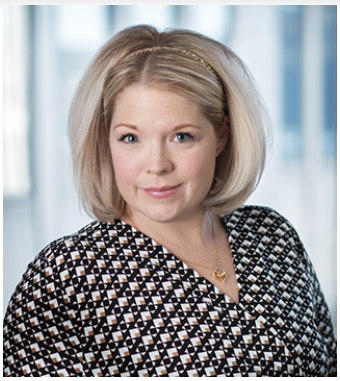
UPCOMING CLE SERIES

Stay tuned for more in the series of CLE programs featuring WPTLA members who have tried landmark cases.

War Stories: A Series

Be on the lookout for details on when and where you can attend one.

MEMBER PICTURES & PROFILES



Name: Katie Killion

Firm: Kontos Mengine Killion & Hassen

Law School: WVU College of Law

Year Graduated: 2005

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

Tell us something about your practice that we might not know: I do some civil rights litigation

Most memorable court moment: Obtaining a multi-million dollar verdict for a deserving family

Most embarrassing (but printable) court moment: When I was a young attorney, I spelled a Judge's name wrong on a Motion and he pointed it out in open court.

Most memorable WPTLA moment: Having my client win the Comeback Award.

Happiest/Proudest moment as a lawyer: Helping to create a successful law firm.

Best Virtue: Loyalty

Secret Vice: Driving too fast

People might be surprised to know that: I am a natural redhead

Favorite movie: The Dirt

Last book read for pleasure, not as research for a brief or opening/closing: Demi Moore's Autobiography

My refrigerator always contains: Cheese sticks

My favorite beverage is: Coffee

My favorite restaurant is: Anything Mexican

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

AUTHENTICATING DIGITAL EVIDENCE

Pennsylvania Rule of Evidence 901 pertaining to authentication has been amended to add a provision for the authentication of Digital Evidence. The new section 11(b) provides three methods for authentication.

The first method is direct evidence which requires testimony of a person with personal knowledge. As a practical matter, some attorneys do not always do paper discovery prior to depositions. However, one may want to consider making sure they have any digital evidence before examining a witness at a deposition. Nonetheless, in the case of a party, a Request for Admission may be used to directly authenticate a digital exhibit.

The other two methods are circumstantial. The rule allows circumstantial evidence through "identifying content." Presumably, a You Tube video showing the Defendant talking would be a good example, but other more subtle content may also work. In addition, "proof of ownership, possession, control or access to a device or account" is admissible if it is corroborated by indicia of ownership under the circumstances. Interestingly, the rule does not require that the access be exclusive so this is an area which may see some future rulings.

ORPHANS COURT

For those of you who occasionally venture into Orphans Court, you should be aware that State Rule 5.50 has now been adopted (effective October 1, 2020). This new rule provides a uniform statewide rule for the Settlement of Small Estates by Petition. This would apply to estates with a gross value of less than $50,000.00 (See 20 Pa.C.S. 3102). This rule was promulgated because there were varying local rules in various counties throughout the Commonwealth. This rule now establishes minimum standards for a Petition to settle a small estate.

CRAWFORD COUNTY ARBITRATION LIMITS

Crawford County has amended Local Rule 1301 to change the arbitration limit to read "the maximum limit prescribed by 42 Pa.C.S. 7361(b)(2). Sections 7361 currently sets the arbitration limit at $50,000.00.

By: Mark Milsop, Esq. of

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VIEW OUR

Upcoming CLEs

Nov 5, 2020 - Business Partners Chris Finley and Rod Troupe, of Finley Consulting & Investigations, will discuss *Know More - Win More: What You Should Know About Your Investigators.*

Dec 2, 2020 - Business Partner Matt Hanak, of Forensic Human Resources, will lead a 1 hour substantive discussion.

Dec 9, 2020 - 2-credit Ethics program featuring past members of the disciplinary board of the Supreme Court of PA Jack Goodrich, Larry Kelly and Chris Miller.

Dec 15, 2020 - Business Partner Cindy Miklos, of Planet Depos, will present a 1 hour substantive course.

Feb 18, 2021 - War Stories: A Series - CLE programs featuring landmark cases from WPTLA members continues with John Gismondi presenting a 2 hour program.

Franks v. State Farm, 2020 Pa. Super. 181 (July 31, 2020)

In an issue of first impression, the Superior Court held that the MVFRL requires a new stacking waiver anytime the stacked amount of UIM coverage changes, regardless of whether the change is an increase or decrease in the amount of coverage.

On August 11, 2016, Robert Franks sustained injuries in a motor vehicle accident caused by the negligence of another driver. After receiving the liability coverage available from the tortfeasor's auto policy, Robert Franks and his wife ("Plaintiff-insureds") asserted a claim for UIM benefits under their policy with State Farm. In response to the claim, State Farm paid the Plaintiff-insureds UIM benefits in the amount of $100,000, which State Farm believed represented the limit of unstacked UIM coverage. The Plaintiff-insureds believed that State Farm was obligated to pay a total of $200,000 in stacked UIM coverage for their claim.

On July 9, 2018, the Plaintiff-insureds filed a civil action seeking a declaratory judgment that they were entitled to stacked UIM coverage in the amount of $200,000 under their State Farm policy. Following a non-jury trial, the trial court entered judgment in favor of State Farm.

On appeal to the Superior Court, the following stipulated facts were reviewed regarding the issue. On January 18, 2013, the Plaintiff-insureds applied for automobile coverage with State Farm for two vehicles, a 2002 Nissan Xterra and a 1999 Ford Taurus. In connection with their application for coverage, the first named insured (Robert Franks) executed a form rejecting stacked UIM coverage. State Farm issued the policy with non-stacked UIM coverage limits of $100,000 / $300,000.

On January 22, 2014, a third vehicle, a 2012 Nissan Altima, was added to the policy. The Plaintiff-insureds executed a second rejection of stacked limits of UIM coverage. On July 23, 2014, at the request of Plaintiff-insureds, the 1999 Ford Taurus was deleted from the policy, reducing the total number of vehicles from three (3) to two (2). When the Taurus was deleted from the policy, the Plaintiff-insureds did not request and State Farm did not make any changes to the coverages for the 2002 Nissan Xterra and 2012 Nissan Altima.

On or about March 26, 2015,Plaintiff-insureds replaced the 2002 Nissan Xterra on the policy with a 2013 Nissan Frontier. From July 2014 though the time of the accident, the policy continuously insured two vehicles, and the declarations page of the policy provided non-stacked UIM coverage.

After the number of vehicles insured under the policy was reduced from three (3) to two (2), the Plaintiff-insureds were never provided with and did not sign another form rejecting stacked UIM coverage. From the time of the inception of the policy though the time of the accident, the Plaintiff-insureds were not charged a premium for stacked UIM coverage.

In an issue of first impression, the Superior Court held that Section 1738(c) of the PA MVFRL required a new stacking waiver whenever the stacked amount of UIM coverage changes, regardless of whether the change is an increase or decrease in the amount of stacked coverage. The Court noted that "[i]n determining whether a new stacking waiver is required, the critical question is whether there is a change in the potential amount of stacked coverage." The Court also noted that their holding complied with the stated policy of construing the MVFRL "liberally in favor of the insured so as to "afford the injured claimant the greatest possible coverage." Thus, in the present case, the Plaintiff-insureds were entitled to stacked UIM coverage in the amount of $200,000 and the trial court's declaratory judgment in favor of State Farm was reversed.

Maas v. UPMC Presbyterian et. al. No. 7. WAP 2019, (Pa. Supreme Court July 21, 2020),----A.3d ---- (Pa. 2020)

Continued on Page 10

Pennsylvania Supreme Court upholds the denial of a mental health treatment provider's summary judgment motion regarding their duty to warn third parties

In this case, a mental health patient who lived in a forty-unit apartment building had repeatedly told his doctors and therapists that he was going to kill an unnamed neighbor. On May 25, 2008, the mental health patient sought an in-patient admission at Western Psychiatric Institute and Clinic (WPIC), asserting he had not been taking his medication for weeks, was hearing voices and was having suicidal and homicidal thoughts. A case manager at WPIC dissuaded the patient from seeking admission and sent him home to his apartment with medication for agitation and a promise to secure him placement in a personal care home within 36 hours. Four days later the mental health patient murdered Lisa Maas in her apartment located five doors away from his own apartment. The mental health patient was arrested at the scene, admitting to police officers that he committed the crime and that he had warned treatment providers at WPIC that his medicine wasn't working and he was going to kill someone.

In a subsequent wrongful death litigation filed by the victim's mother, the Defendant treatment providers argued they had no duty to warn anyone about their patient's threats because he never expressly identified a specific victim. The trial court rejected this argument and denied the Defendant treatment providers' motion for summary judgment, allowing the case to proceed to trial. The Superior Court affirmed the decision of the trial court on appeal.

The Supreme Court granted discretionary review to determine whether an"identifiable third party" for purposes of a mental health professional's duty to warn third parties could consist of a group of unnamed neighbors under the Supreme Court's previous decision in *Emerich*.

In defining a mental health provider's duty to warn, the *Maas* Court found that their previous decision in *Emerich* relied upon §41.61 of the Code of Ethics of Pennsylvania's State Board of Psychology.§41.61 provides that psychologists should take reasonable measures to prevent harm when a client has expressed a serious threat or intent to kill or seriously injure an identified or readily identifiable person or group of people. The *Maas* Court held that both the trial court and the Superior Court had properly determined that the duty to warn applies not only when a specific threat is made against a single readily identifiable individual, but also when the potential targets are readily identifiable because they are members of a specific and identified group, which in this case were the "neighbors" residing in the patient's apartment building. The Court found that under these circumstances, the potential targets are not a large amorphous group of the public in general, but rather, a smaller, finite, and relatively homogenous group united by a common circumstance.

The Supreme Court concluded that the trial court did not err when it denied the Defendant treatment providers' motion for summary judgment. The Supreme Court also found that the Superior Court had correctly determined that the legal principles set forth in *Emerich* indicate the treating providers had a duty to warn "readily identifiable" victims, and the present record supported a finding that Lisa Maas, was just such a "readily identifiable" victim.

Kline v. Travelers No. 71. MAL 2020, (Pa. Supreme Court July 20, 2020),----A.3d ---- (Pa. 2020)

Pennsylvania Supreme Court denies insurer's appeal of stacking issue and household exclusion issue allowing Superior Court's decision in favor of the Plaintiff-insured on both issues to stand.

The Pennsylvania Supreme Court denied Travelers' petition for allowance of appeal from the Superior Court's decision in the case of *Kline v. Travelers*, 2019 Pa. Super. 343 (November 18, 2019), which involved both a stacking issue (*Sackett*) as well as the retroactive effect of the Pennsylvania Supreme Court's abolition of the household exclusion in *Gallagher*.

On September 18, 2012, Brad Kline ("Plaintiff-insured") was

Continued on Page 11

involved in a motor vehicle accident caused by another driver. As a result of his injuries from this accident, Plaintiff-insured asserted a UIM claim under his auto policy with Travelers. A declaratory judgment action ensured, which involved issues surrounding whether the Plaintiff-insured was entitled to stack his UIM coverage on two vehicles that had been added to his policy prior to the accident where the carrier did not secure new waiver of stacking forms.A secondary issue was whether the Plaintiff-insured was able to further stack coverage under a policy separately issued to his mother.

The trial court ruled in favor of the Plaintiff-insured on the stacking issue but against him on the household exclusion issue. Travelers appealed the stacking issue, and the Plaintiff-insured appealed the household exclusion issue.

[T]he Superior Court ruled that the Gallagher case rendered the household exclusion invalid and that the Plaintiff-insured could pursue stacked coverage, which included the coverage under his mother's policy.

The Superior Court found in favor of the Plaintiff-insured on both issues and vacated the lower court's decision. With regard to the stacking issue under his own policy, the Superior Court ruled that their previous decisions in *Pergolese* and *Bumbarger* supported the trial court's conclusion that Travelers had, as a matter of law,failed in its obligation to obtain a new stacking waiver from the Plaintiff-insured after he added two vehicles to the policy.Accordingly, Plaintiff-insured was permitted to stack the coverages under his own policy due to Travelers failure.

With regard to the household exclusion and the retroactive effect of the *Gallagher* decision, the Superior Court determined that, as a general rule, appellate courts are required to apply the law as it exists as of the time of appellate review before the court.The Superior Court determined that the Pennsylvania Supreme Court's decision in *Gallagher* applied to the present case, which was pending on appeal when *Gallagher* was decided. Accordingly, the Superior Court ruled that the *Gallagher* case rendered the household exclusion invalid and that the Plaintiff-insured could pursue stacked coverage, which included the coverage under his mother's policy.

With the Supreme Court's denial of Travelers' petition for allowance of appeal, the Superior Court's decision in favor of the Plaintiff-insured on both issues will stand.

Reubenstein v. Barax et. al. 2020 Pa. Super 179 (July 30, 2020)

Pennsylvania Superior Court Addresses Tolling Provision of MCARE Act and reverses trial court for granting summary judgment based on a two-year statute of limitations

Mary Ann Whitman died on April 28, 2010, as a result of a ruptured abdominal aortic aneurysm. Five days before her death, at the request of her primary care physician, Mrs. Whitman underwent a CT scan, which Dr. Barax reviewed. After reviewing the scan, Dr. Barax drafted a radiology impression stating that Mrs. Whitman had an abdominal aortic aneurysm that was "poorly visualized" on the study. His report did not document an aneurysm rupture, or any concern of a possible rupture. The report stated the findings were discussed with Mrs. Whitman's primary care physician, Dr. Conaboy.

In April of 2011, the administratrix of Mrs. Whitman's estate, commenced suit against Dr. Barax and his employer asserting causes of action under the Wrongful Death Act and the Survival Act. As discovery proceeded, the Estate made several unsuccessful attempts to schedule Dr. Barax's deposition. Following trial court intervention, the Estate finally deposed Dr. Barax in February of 2015. Dr. Barax testified during this deposition that he spoke with Dr. Conaboy and explained to him that the CT scan showed a previously undocumented abdominal aortic aneurysm, but because he could not visualize the aneurysm very well,

Continued on Page 12

HOT OFF THE WIRE ... FROM PAGE 11

he could not confirm whether it was bleeding or rupturing.

Based on Dr. Barax's deposition testimony, the Estate initiated a separate action against Dr. Conaboy and the family medicine practice ("Conaboy Defendants") he worked for asserting both wrongful death and survival causes of action. The Conaboy Defendants sought summary judgment citing the general two-year statute of limitations for personal injury actions and arguing that the discovery rule did not apply. The trial court granted summary judgment for the Conaboy Defendants concluding that this action was commenced more than two years after the death and there was no evidence of affirmative misrepresentation or fraudulent concealment of the cause of death.

On appeal, the Superior Court was tasked with interpreting Subsection 1303.513(d) of the Medical Care Availability and Reduction of Error Act ("MCARE"), which is a statute of limitations for medical professional liability wrongful death and survival actions. The Court found it significant that, in drafting this statute of limitations, the General Assembly included a provision to allow for equitable tolling of the two-year period in cases where there has been an "affirmative misrepresentation or fraudulent concealment of the cause of death". The Court held that the inclusion of such an exception recognizes that wrongful death and survival actions may involve situations where the patient's interest in fair compensation outweighs the interest in limiting medical malpractice insurance costs.

In furtherance of the stated purpose of fair compensation, the Court interpreted "affirmative misrepresentation or fraudulent concealment of the cause of death" to also encompass those acts which caused the patient to die. The Court found that where a medical practitioner hides an action that was directly related to the cause of the patient's death, the Commonwealth's interest in redress outweighs the interest in control of medical malpractice insurance costs.

Based on the Court's interpretation of subsection 513(d), it concluded that the trial court erred in in granting summary judgment based upon the two-year statute of limitations in favor of the Conaboy Defendants.The case was remanded back to the trial court for further proceedings on whether there was a fraudulent concealment or affirmative misrepresentation of an act by the Conaboy Defendants related to Mrs. Whitman's death.

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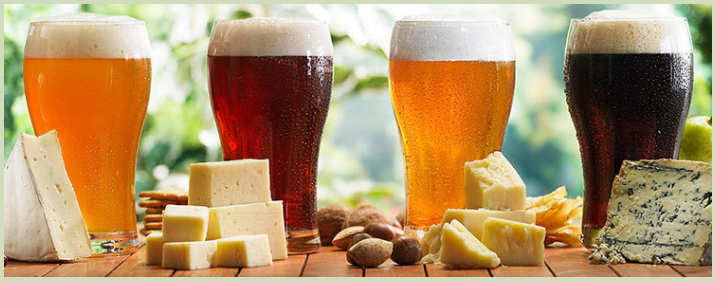
Online Beer & Cheese Pairing Experience Happy Hour!



Join us for a virtual beer and cheese tasting!

Beer & cheese will be delivered to you to enjoy during the Happy Hour. The box will include craft beers, cheeses, chocolate treats, and a koozie.

A craft beer expert will lead a Zoom session during the Happy Hour while you sit back and enjoy this unique pairing experience from the comfort of your own home.

Stick around after the expert's session and e-mingle with your peers for a while.

Look for details coming to your inbox soon!

FACTS:

In 2015 the Montana legislature enacted a tax credit scholarship program to provide parents and students a choice in their education for Kindergarten through 12thgrade. The statue gave a tax credit to individuals and businesses who donated to non-profit scholarship organizations. The organizations then gave scholarships to parents who wished to send their children to private schools. Montana excluded any school that was "owned or controlled in any part by any church, religious sect, or denomination." Three families filed suit alleging that the act violated the Religion and Equal Protection Clauses of the US Constitution.

The students were asked to respond in essay form to the following question:

Does a state student aid program violate the Religion and Equal Protection Clauses of the United States Constitution if it allows students the choice of attending a religious school?

The United States Constitution possesses a daunting yet brilliant ambiguity that often lends itself to intense scrutiny and discussion. This ambiguity is especially prevalent within the first amendment in regards to the Establishment Clause and the Free Exercise Clause, between the church and the state. In cases addressing conflict with church and state, the phrase, "play in the joints," is frequently mentioned and referenced repeatedly throughout arguments. This "play in the joints'' refers to the Establishment Clause's commitment "to make no law respecting an establishment of religion" and the Free Exercise Clause's affirmation to deny "prohibiting the free exercise thereof. "The addition of the fourteenth amendment in 1886, the Religion and Equal Protection Clause, requires the states to govern impartially across the nation and assures that all of these laws protect each United States citizen equally. James Madison and John Bingham did not write these laws to cause confusion, but it is evident that a straightforward answer to these disputes is not accessible due to the range of values that each citizen naturally possesses.

Montana state's student-aid program is one of these "play in the joints" disputes that requires the utmost scrutiny in order to answer with absolute justice to not only the Montana families involved but to the citizens of the United States of America.

Three Montana families who prefer to send their children to religious schools rather than public schools claim that Montana's student-aid program violates the Religious and Equal Protection Clauses of the United States Constitution by excluding religiously-affiliated schools from the program. However, the state claims that exclusion of any school "owned or controlled in any part by any church, religious sect, or denomination" is necessary in order to deem the program constitutional in respect of the Establishment Clause.

The program operates as a tax-credit scholarship to financially assist parents and students who wish to pursue an education outside of the public school system. Citizens of Montana can receive a tax-credit by donating to nonprofit scholarships which are then distributed by the Montana Department of Revenue for parents to enroll their children in private schools. The key components of this procedure lie in the public taxpayers' rights and government distribution of money. Including religious schools within this program would violate the public taxpayers' rights because Montana would indirectly be distributing money to schools with religious influence. The taxpayers have an undeniable right under both the first and fourteenth amendments to assume that their money will not be issued toward religious practices.

The Montana families may base their case off the Supreme Court's argument in *Trinity Lutheran Church of Columbia, Inc.v.Comer.*In the Trinity Lutheran case, the church was denied participation in Missouri Department of Natural Resource's public grant which helps provide funding for rubber playground surfaces made from recycled tires. This case ruled in favour of the church, declaring that the department violated the church's Free Exercise Clause by displaying significant hostility toward the church and thus strengthening the precedent on the basis of "religious identity" versus "religious practice."

Due to the binding precedent that Trinity Lutheran confirmed in Supreme Court hearings, there must be a clear distinction between Trinity Lutheran and Montana in order to prove that Montana's statute does not indeed violate the Free Exercise Clause. That clear distinction lies in the intentions of the funds. The Missouri department in Trinity Lutheran was subsidizing the turf of a playground for public benefit, unrelated to religious practice. Whereas, the

Continued on Page 15

families of Montana are requesting the subsidy of a school that undoubtedly imposes religious activity in the form of religious education. These cases demonstrate the difference between "religious identity" and "religious practice" and thereby are unqualified for equal comparison *(Trinity Lutheran, 2010).* The rules set by Trinity Lutheran would only relate to Montana if Montana had held a student from attending a public school solely on account of their individual religion. Doing so would be unconstitutional and in no circumstance what the Montana statute is enforcing.

Furthermore, Missouri is putting Trinity Lutheran in a position to either "participate in an otherwise available benefit program or remain a religious institution" *(Trinity Lutheran, 201O).* Whereas, Montana is not placing families in a hostile position because the families have the option of public education just like all United States citizens. The case of Trinity Lutheran delineates the distinct division in "the play within the joints"-the occasional movement between Free Exercise and Establishment. Indirect or direct government aid towards religious education does not qualify for that movement in the joints. Additionally, this aid does not condone violation of equal protection, affirming that Montana's statute is constitutional.

Montana's statute continues corroborating with the Religion and Equal Protection Clauses of the United States Constitution by virtue of *Locke v Davey,* another Supreme Court-argued case. Joshua Davey, a student pursuing a theology degree, claimed his Free Exercise right was violated after being denied a scholarship from Washington's Promise Scholarship Program. Washington's program distinctly articulates that a student "may not pursue a degree in theology" while receiving the scholarship on the rationale that under the Establishment Clause, the state of Washington or any state cannot fund religious education. Through this binding case, Montana state can validate that their statute is not functioning to deny or require "students to choose between their religious beliefs" *(Locke, 2004).* Rather, the state has chosen not to fund all religious schools directly and indirectly in an effort to protect each citizen equally by keeping the church completely separate from the state. Montana is not withholding privilege because the statute extends to any school "owned or controlled in any part by any church, religious sect, or denomination" and therefore does not show animus toward any specific religion. It is evident that Montana is attempting to act in the citizens' best interest and is logically based on anti-establishment concerns.

The Montana families add to their claims of Religion and Equal Protection violation in being treated unfairly under Montana's Blaine Amendment, contending that the "Blaine Amendment discriminates against religious conduct, beliefs and status in violation of the Free Exercise *Clause" (Espinoza).*The Blaine Amendments were proposed in 1837 to forever separate church and state. Although never named a federal constitution amendment, the majority of states have since adopted the Blaine amendments (today 37 states have, including Montana) and continue to respect these policies. First off, abolishing this amendment would provoke a tumultuous disorder of the United States' education structure that has sufficiently governed for almost two hundred years. Definitive separation between church and state constituted that two hundred years of sufficiency. Allowing exceptions of any kind, including tax credits, would incite further deterioration of the United States' commitment to not govern under an established religion and uproot the entire education system particularly in the other 36 states. Thus, it is necessary that the decision be approached from the perspective of the whole country, rather than from the individual Montana families who claim violation of their Religion and Equal Protection rights.

Moreover, the families' accusation that the Blaine Amendments are their source of restraint is invalid and proven false from *Eulitt v. Me. Dep't of Educ.* The *Eulitt* case took place in Maine, one of the few states that chooses not to follow a Blaine Amendment, yet still encounters conflict between church and state. In *Eulitt*, parents also alleged that their equal protection rights were violated after being prohibited from public tuition payments financing sectarian education. Even without the Blaine Amendment, the court ruled in favor of the state, failing the parent's equal protection claim. The court's reasoning in *Eulitt* articulated the state's responsibility in respecting equal protection: "Equal Protection Clause does not compel the provision of public funds to private sectarian schools, even when a school district has chosen to subsidize the payment of tuition to private nonsectarian schools" *(Eulitt, 2004).* This statement is relevant to Montana's debate because it demonstrates that the government is not required by the Equal Protection Clause to fund a parent's choice directly or indirectly. Furthermore, choosing not to fund that choice

Continued on Page 16

does not violate the parent's free exercise rights because the government is not prohibiting attendance at a religious school.

Unquestionably, the "play in the joints" between the first and fourteenth amendment is a fine line that deserves the utmost scrutiny. The families in Montana who claim violation of their Religion and Equal Protection rights present considerable reasoning, but they fail to provide an explanation that directly shows hostility toward their religion. Thus, the families' claims are inadequate to fall within the rare "play in the joints," and Montana's statute proves constitutional. The state of Montana applies the restriction of sectarian schools from their statute to effectively preserve equal treatment just as the United States declares to govern without religious influence for the sake of the citizens. Thereby, Montana's statute aligns with the Religion and Equal Protection Clauses of the United States Constitution.

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Caroline Lucas

North Allegheny Senior High School

Volunteering on Election Day

According to the National Council of Jewish Women, there are several ways you can volunteer on Election Day:

- **Poll Worker** Poll worker duties include helping set up the polls, explaining voting procedures, assisting voters with voting machines, registering individuals to vote (if located in a same day registration state), verifying registrants, and closing the precinct at the end of the day. Visit the US Office of Election Assistance Commission website at https://www.eac.gov/voters/become-poll-worker to check if you are eligible to a become poll worker, and if so, contact your local election office for more information.
- **Nonpartisan Citizen Observer** Some nonpartisan organizations train citizens to observe elections, and most groups are based in the states or counties in which they seek to observe. These observers work to protect the integrity of the electoral process and advance electoral quality and accountability regardless of the political outcome. Thirty-six states allow nonpartisan citizen observers to be present at elections.
- **Poll Watcher** Poll watchers observe polling places to ensure transparency in election. They guarantee that all votes cast are counted correctly, and report suspected irregularities to local officials. Most states allow at least some kind of observer in polling places, but the rules for how poll watchers are picked (and by whom) vary from state to state. Almost all jurisdictions require that official poll watchers be identified and approved in advance of Election Day. In many states, poll watchers are affiliated with a political party or candidate, and are sometimes referred to as partisan citizen observers. Check your state's rules.
- **Voter Protection Hotline** Volunteer at a voter protection hotline to assist voters across the country. The ability to speak multiple languages is especially useful. Sign up to volunteer:
  - 866-OUR-VOTE (English) – Lawyers Committee https://www.866ourvote.org/pages/electionprotection-volunteers
- **Legal Field Volunteer** The Lawyers Committee runs a legal field volunteer program in which lawyers can respond to and monitor voting problems at the polls in targeted locations as they arise. Learn more: https://www.866ourvote.org/pages/election-protection-volunteers.

TRIVIA CONTEST

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

Trivia Question #25

What famous American athlete and Olympic gold medalist may have served as the inspiration behind an earlier technical name for the now-ubiquitous #hashtag symbol?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by January 31, 2021. Prize for this contest is a $100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #24 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 #24 – **Of the original size NASA space shuttles, which one never flew a space mission?**

Answer: **Enterprise. Enterprise was the first space shuttle, although it never flew in space. It was used to test critical phases of landing and other aspects of shuttle preparations. Enterprise was mounted on top of a modified 747 airliner for the Approach and Landing Tests in 1977.**

Congratulations to contest #24 winner Katie Killion, of Kontos Mengine Killion & Hassen. Katie received a $100 Visa gift card.

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WPTLA & the Pittsburgh Steelwheelers
would like to thank the following for
supporting the ***20th Annual 5K Run/Walk/Wheel***
to benefit the Steelwheelers

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Through the Grapevine....

President's Club Member George Kontos, **Treasurer Katie Killion**, and **Board of Governors Member Brittani Hassen** have changed their firm name back to Kontos Mengine Killion & Hassen. They would like to also note that they hired **Member Ben Webb** and James Lopez.

Congratulations and Best Wishes to **Board of Governors Member Mike Ferguson** on the recent nuptials of his daughter and son-in-law.

Kudos to **President's Club Member Bradley Holuta**, who was recently selected for membership into the National Trial Lawyers Association Top 40 Under 40 Trial Lawyers.

Congratulations to **Young Attorney Carmen Nocera** for starting a new position as an associate at Matzus Law, LLC.

Well done to **President's Club Member Jonathan Stewart** on being listed as one of the Top 3 Personal Injury Lawyers in Pittsburgh by ThreeBestRated®.

Congratulations to **Vice President Erin Rudert** and **Member Jepthah Orstein** on being named Partners in the law firm of Ainsman Levine, LLC.

Way to go to **Member James Burn**, on being appointed recently to the professional sports union legal board of the NFL Players Association, and to **Member Doug Williams** on being recently appointed to the professional sports union legal board of the Professional Hockey Players Association.

And finally, our most sincere and heartfelt condolences to **Board of Governors Member and Past President Chad Bowers**, **President's Club Member Ken Fawcett,** and **Member Sherri Hurst** on the recent passing of Chad's dad and firm partner **Lucky Bowers**.