THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

Trial Attorneys Continue to Matter: Mark Homyak stood firm for his clients and delivered a win for all motorists traveling within the Commonwealth of Pennsylvania.

In yet another example of why trial attorneys continue to matter by standing up for the rights of injured individuals, Mark Homyak, a WPTLA Past President and an exceptional and well-regarded trial lawyer, successfully convinced the Pennsylvania Supreme Court to reject years' worth of jurisprudence and reverse course in a stunning win for his clients and all motorists in Pennsylvania. On February 21, 2018, Justice Christine L. Donohue, writing for a majority of the Supreme Court, issued a decision meant to "clarify the contours of the real estate exception to sovereign immunity." Importantly, each member of the Court agreed with the outcome of the case.

On January 26, 2015, Joisse Cagey was traveling southbound on S.R. 551 in Beaver County, when she encountered snow and ice on the roadway.[1] She lost control and the vehicle spun off the roadway and slammed into the end treatment of the guiderail adjacent to the road. The end treatment of the guiderail penetrated the driver's side of the vehicle, resulting in substantial injuries to Mrs. Cagey, including toe, foot, and leg fractures. The Cageys filed a negligence action against the Commonwealth (PennDOT) for Joisse Cagey's injuries and for Dale Cagey's loss of consortium. Their complaint alleged that Mrs. Cagey's injuries and the couple's damages were the result of PennDOT's negligence in: 1) installing of a guiderail system within an area that should have been traversable by vehicles; and, 2) installing a dangerous "boxing glove" type guiderail system that was not crashworthy, which allegation included claims that PennDOT negligently failed to inspect or correct the "boxing glove" type guiderail system after installation.

PennDOT filed a Motion for Judgment on the Pleadings, arguing that the Sovereign Immunity Act, 42 Pa.C.S. §§ 8521-8528, barred the Cageys' claims. PennDOT argued that the Cageys' cause of action did not fall within any enumerated exceptions to sovereign immunity. The Cageys conceded that the trial court was bound by *then* existing Commonwealth jurisprudence interpreting *Dean. v. Commonwealth, Dep't. of Transp*., 751 A.2d 1130 (Pa. 2000). The trial court granted PennDOT's motion for judgment on the pleadings.

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[1] *The trial court opinion erroneously indicated that Mr. Cagey was also in the vehicle at the time of the incident. Mr. Cagey was not in the car, and his claim was solely for loss of consortium.*

"[T]he Supreme Court recognized that injuries and damages caused by the negligent installation or design of a guiderail may support a claim against PennDOT under the exceptions to sovereign immunity."

THE ADVOCATE

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

ASSOCIATION OFFICE:
909 MOUNT ROYAL BLVD, STE 102
PITTSBURGH, PA 15223-1030
412-487-7644
LAURIE@WPTLA.ORG
WWW.WPTLA.ORG

THE FALL OF THE "HOUSEHOLD VEHICLE EXCLUSION"

"Wow – that's not fair!" That was my first reaction after GEICO denied the underinsured motorist claim for my client, Mr. Gallagher. I realize many attorneys have that feeling often during a career, but this was different. This was a gut reaction that was like being bullied at the playground and wanting to fight instead of quietly walking away. After a long fight, on January 23, 2019, the Pennsylvania Supreme Court issued an opinion that struck down the "household exclusion" and made the playing field a bit more level for Pennsylvania motorists.

This article contains insight into the details of the case of *Gallagher v. GEICO Indemnity Company*, ___ A.3d ___, 2019 WL 290122 (January 23, 2019), and a review of the Pennsylvania Supreme Court holding that was issued on January 23, 2019. As you will see, there were some interesting details that had to line up to bring this matter to the conclusion reached in the decision of the Court.

Overview of the Facts

The facts in the case were not in dispute. Mr. Gallagher had purchased insurance for his two of his household vehicles from GEICO and he purchased stacked underinsured motorist coverage on that policy. When he wanted to insure his Harley-Davidson, he turned to GEICO for coverage and made the same decisions about underinsured motorist coverage: He purchased stacked UIM coverage for the motorcycle. Stacked UIM coverage came with a higher premium. Mr. Gallagher never signed a stacking waiver. GEICO unilaterally made the decision to place the motorcycle on a separate policy. As a deposition of a GEICO representative would later reveal, this was a business decision.

Unfortunately, on August 22, 2012, Mr. Gallagher was seriously injured when a motorist pulled out from a stop sign and struck the side of his motorcycle. He missed work and eventually had to undergo surgery. As with so many of our clients, he had worries about his health and his ability to return to work.

"[O]n January 23, 2019, the Pennsylvania Supreme Court issued an opinion that struck down the 'household exclusion' and made the playing field a bit more level for Pennsylvania motorists."

In June of 2013, after settling the underlying liability claim against the at-fault driver, the UIM coverage was claimed from GEICO for both the motorcycle and his household vehicles. GEICO paid the limits of the UIM coverage for the bike but refused to pay any UIM coverage on the car policy, citing the exclusion in the policy which read: "This coverage does not apply to bodily injury while occupying or from being struck by a vehicle owned or leased by you or a relative that is not insured for Underinsured Motorists Coverage under this policy." After suit was filed, a Motion for Summary Judgment was granted in favor of GEICO in February of 2016.

This first and most important thing that allowed this case to move forward was the patience of my client. So many clients cannot go through this process and need a quick settlement to help get themselves back on track financially. My client gave me the luxury of proceeding.

Prior Case Law

When this case came in, my legal research lead me to the 2011 case of *Government Employees Insurance Company v. Ayers*, 610 Pa. 205, 18 A.3d 1093 (April 28, 2011), which was remarkably similar. That case made news because the end result was a 3 - 3 tie when decided by the Pennsylvania Supreme Court. That tie decision required that we revert to and follow the Superior Court's decision, which ended in favor of the insurance company's argument to uphold the household exclusion and prevented stacking among multiple policies. Then-Chief Justice Castille, joined by now-Chief Justice Saylor and Justice Eakin, stated they would affirm the Superior Court while Justices Baer, Todd and McCaffery would reverse. Justice Saylor stated, in support of the affirmance, "I would disapprove the utilization by an insurer of separate policies pertaining to multiple vehicles within the same household solely to subvert intra-policy stacking without any risk-based justification." *Id.* at 206.

That case intrigued me because it was such a great lawyerly theory of liability advanced by Attorney Judd Crosby. The case was presented as two claims. The first claim came from the "occurrence," where a pick up truck struck the motorcycle operated by Ayers, and the second claim came from the "occurrence" where the pick up truck then ran over the motorcyclist on the roadway. There were two very different outcomes in each claim. The first claim resulted in Ayers being denied the ability to stack his motorcycle and household car UIM coverages because Ayers occupied the motorcycle

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PRESIDENT'S MESSAGE

I was inspired to write this article after attending our Junior Member event which was held at Evangeline at the Distrikt Hotel on February 19, 2019. At that event, I had the opportunity to meet and speak at length with several of our junior members (for those of you who are not aware, Junior Membership is offered to law students and law clerks who have an interest in litigation). Each and every one of the junior members that I spoke with was excited to be among the seasoned trial lawyers that comprise our membership. I heard countless war stories being told by our members and the Junior Members seemed to be truly energized about the possibility of spending their careers as trial attorneys. I was also encouraged that all of our members in attendance took the time to get to know the Junior Members, answer any questions that they had, and even offered to stay connected with them in the future.

The vitality of any organization is dependent on its plans for the future. Our Junior Members ARE the future of WPTLA. Our junior membership has been an important issue to me for quite some time. In fact, I wrote about this topic several years ago. A significant portion of that article was devoted to discussing the benefits of becoming a Junior Member. While those benefits are real and tangible, I would like to take a little time to focus on the benefits that this organization realizes by having a strong junior membership.

Junior Members are the lifeblood of our organization. They are the future trial lawyers who will be fighting for the rights of the injured. They will be battling big corporations just as we all do every single day. They are the future members, Board Members, and Presidents of the Western Pennsylvania Trial Lawyers Association. They ensure that this organization, and all that it stands for, will continue for future generations.

It goes without saying that our Junior Members are the future leaders of this organization. It also goes without saying that youth is important to the ongoing vitality of any organization because any organization that doesn't have younger members is a dying organization. I am pleased to report that we currently have twelve (12) Junior Members. Not too many years ago, we only had three (3) Junior Members. Our Past-President, Larry Kelly, deserves much of the credit for the increase in these numbers. Larry has consistently volunteered to recruit Junior Members from the University of Pittsburgh School of Law and his efforts have directly contributed to this increase in our junior membership.

However, our Junior Member program is only as strong as we make it and we need to work together to grow this number and to maximize the involvement of our Junior Members. So, if you know a law student, please encourage him/her to join our ranks. If you have a connection with a law school, please make an effort to recruit members for our organization. You can also offer to serve as a mentor for a Junior Member. As WPTLA members, we should also interview and give preference to our Junior Members for internship programs and, ultimately, associate positions at our law firms. Why wouldn't we interview and hire our Junior Members? After all, by joining WPTLA, these students and law clerks have already shown an interest in what we do! It is important that we do more than simply invite our Junior Members gratis to one event each year. Instead, we need to foster a culture that promotes encouraging our Junior Members to continue as full (*Continued on Page 8)*

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On appeal, the Cageys argued that the Commonwealth Court had improperly expanded the Supreme Court of Pennsylvania's holding in *Dean*. While the decision in *Dean* was limited to the question of whether PennDOT has an obligation to install guiderails, subsequent Commonwealth Court decisions greatly expanded the ruling to provide sovereign immunity protection in circumstances where the Commonwealth installed guiderails, but did so in an alleged negligent matter (*e.g.*, *Fagan v. Commonwealth, Dep't of Transp.,* 946 A.2d 1123 (Pa. Commw. 2006)). On the basis of this precedent, the Commonwealth Court affirmed the trial court's order granting PennDOT's motion for judgment on the pleadings, explaining that its decisions following *Dean* "represented a logical and reasonable application of principles set forth by our Supreme Court, which have gone uncontradicted by our legislature."

Mark argued on behalf of the Cageys that *Dean* was inapplicable to the facts of the Cageys' case because *Dean* only established that the Commonwealth's failure to install a guiderail does not meet the criteria for an exception to sovereign immunity under section 8522(b)(4). Section 8522(b)(4) created a single real estate exception that imposes liability for injuries caused by any and all dangerous conditions of Commonwealth realty, and the plain language of the Act waives sovereign immunity for any "dangerous condition" of Commonwealth real estate for which there would be a common law duty of care owed. The Cageys argued, on the basis of the Act, that the Commonwealth Court "erroneously extrapolated" from *Dean* that a "dangerous, defective guardrail" is legally and logically equivalent to the absence of a guardrail.

However, PennDOT's counsel urged the Court that PennDOT could not be held liable for injuries caused by the guiderail regardless of whether it was negligently designed and installed on Commonwealth real estate due to the fact that the guiderail had no "effect on the Cagey's *[sic]* ability to travel safely on the roadway." PennDOT also insisted that there is a distinction between its "general duty to keep property safe for its intended use," which extends to all Commonwealth real estate, and the "specific duty to keep property safe for vehicular travel," which would extend only to the traveled portion of the highway. Notably, PennDOT also conceded that the holding in *Dean* was "precisely that PennDOT does not have a duty to install guardrails," but argued that the "underpinning" of the *Dean* holding is that the Commonwealth does not have a duty to ensure the safety of vehicles that are careening off the roadway. (*This author would suggest that the point of a guardrail would be to corral such a known hazard as a vehicle careening off an icy highway.*)

Engaging in statutory interpretation, the Supreme Court of Pennsylvania cited its decision in *Mohamed v. Commonwealth Dep't of Transp*., 40 A.3d 1186, 1194 (Pa. 2012), which states "when the language of a statue is plain and unambiguous and conveys a clear and definite meaning," the Court must give the statue the same plain and obvious meaning. In order for liability to be imposed on PennDOT, three statutory requirements must be met. The injury must be the result of a "dangerous condition, the dangerous condition must be a condition of Commonwealth agency real estate, and the damages must be recoverable under the common law if the injury caused by a person not having available the defense of sovereign immunity." The standard of review used by the Court in sustaining a judgment on the pleadings requires the Court to determine if the law makes recovery *impossible* based on the facts of the case. The precise issue on appeal was, therefore, whether the Cageys' complaint sufficiently alleged facts that, if proven, would satisfy the statutory requirements for waiver of sovereign immunity.

The first statutory requirement is that the injuries must result from a "dangerous condition," and the term "dangerous condition" encompasses any condition that presents a danger. Based on the facts of this case, the "boxing glove" end of the guiderail that speared and penetrated the driver's side door and caused "significantly more severe injuries" to Mrs. Cagey would be considered a "dangerous condition." The Court concluded that the Cageys' factual allegations in their Complaint were sufficient to meet the threshold finding that the guiderail was a dangerous condition.

The second statutory requirement is whether the guiderail at issue is a dangerous condition of Commonwealth real estate. Since PennDOT permanently installed the guiderail along the highway, the guiderail became a fixture thereof and thus part of the land itself. Because the guiderail is *affixed* to Commonwealth real estate, it is not legally distinguishable from the land to which it is attached. The Court felt these facts established that the guiderail was a condition of the Commonwealth real estate.

The third requirement was easily met, as it is well-established that possessors of land owe a duty to protect invitees from foreseeable harm. At common law, a possessor of land is liable for harm caused by a dangerous condition that would have been discovered through the exercise of reasonable care. The Cageys pleaded that PennDOT negligently failed to "inspect, detect and correct the defective blunt end and/or 'boxing glove' terminal end treatment on the guardrail." This allegation was found to meet the third and final requirement of 42 Pa.C.S. § 8522(a).

Ultimately, the Court found that the Cageys sufficiently alleged that a "dangerous condition (*Continued on Page 5)*

TRIAL ATTORNEYS CONTINUE TO MATTER ... FROM PAGE 4

of Commonwealth agency real estate" caused their injuries and that damages would have been recoverable at common law, absent the protections of sovereign immunity. In so finding, the Supreme Court recognized that injuries and damages caused by the negligent installation or design of a guiderail may support a claim against PennDOT under the exceptions to sovereign immunity.

Mark was successful in reigning the scope of *Dean* back to what the Supreme Court intended with its original decision. Before the *Cagey* decision, the Commonwealth Court had greatly expanded the Supreme Court's decision in *Dean* to extend far beyond what the Supreme Court had originally intended. For example, in *Fagan v. Commonwealth, Dep't of Trans*., 946 A.2d 1123 (Pa. Commw. 2006), the Commonwealth Court determined that "where a guardrail existed, the failure to design it differently or the failure to maintain it were not dangerous conditions of roadways for which immunity was waived either for the Commonwealth or for local government." In what can only be described as a SAFETY CHECK, the Court has now clarified the contours of the real estate exception to sovereign immunity in the context of guiderails, which will inevitably require PennDOT to re-examine its own installation and design practices to create better and safer roads and to enhance the protection of those using Commonwealth roadways.

Asked to comment on the decision, Mark pointed out that statutory language has, in many different types of factual situations, been misread in past decisions of the Supreme Court. The current configuration of the Court has relied upon statutory construction to return to the statutes' plain meaning in many of its recent decisions overturning bad law.

As trial lawyers, we must always remember to not be afraid to challenge the present state of the law with the *appropriate* case. The *Cagey* case was the appropriate case to challenge Pennsylvania law, as evidenced by the fact that all of the Justices agreed in the outcome.

We, as a community and organization, owe thanks and congratulations to Mark for recognizing the issue presented in the Cageys' case and for having the vision, legal acumen, and willingness to take up a case that he knew would require a change in the decisional case law in order to even survive the pleadings phase of the case. Thank you, Mark, for your efforts in helping to protect the rights of injured victims in Pennsylvania.

By: Gianni Floro, Esq. of Gianni Floro, P.C.

gfloro84@comcast.net

UPCOMING EVENTS

MEMBERSHIP DINNER

Tue, Apr 9, 2019

Carmody's Grille, Pittsburgh

ANNUAL JUDICIARY DINNER

Fri, May 3, 2019

Heinz Field, Pittsburgh

26TH ETHICS & GOLF OUTING

Fri, May 24, 2019

Shannopin Country Club, Pittsburgh

CLE LUNCH 'N LEARN

Thu, Jun 6, 2019

Gulf Tower, Pittsburgh

2019-2020 KICK OFF EVENT

Tue, Aug 20, 2019

TopGolf, Bridgeville

Wed, Aug 21, 2019

2 credit CLE,

Hampton Inn, Bridgeville

PRESIDENT'S CHALLENGE 5K RUN/WALK/WHEEL EVENT

Sat, Oct 12, 2019

North Park Boathouse, Pittsburgh

Annual Membership Dinner

Tuesday, April 9, 2019

Carmody's Grille on Neville Island, Pittsburgh

(owned and operated by our very own Sean Carmody)

Elections for our Officers, Board of Governors, and LAWPAC Trustee for the 2019-2020 fiscal year at this event.

Register and pay online at wptla.org/events

initially – and that called the household vehicle exclusion, also known as the family car exclusion, into play. The second claim resulted in Ayers being permitted to stack the motorcycle and family car UIM coverages because he was no longer an occupant of the motorcycle at that time. Just moments separated those incidents, but the outcome was dramatically different.

Maybe part of the *Ayers* decision came for an underlying consideration that GEICO had already paid stacked policy limits? In my opinion, that was another important detail that would not be an issue as I went forward with the *Gallagher* case as there was a single incident at issue. Also, Brian Gallagher only had one motorcycle on his GEICO policy and Mr. Ayers had two motorcycles. That is a small detail, but again, a detail that strengthened the argument lining up in favor of striking down the household exclusion in this case.

On June 22, 2009, the Pennsylvania Supreme Court issued a plurality decision in the case of *Erie Ins. Exchange v. Baker*, 601 Pa. 355, 972 A.2d 507 (2009). Justice Saylor concurred in the result and Justice Baer dissented, joined by Justices Todd and McCaffery, with the outcome being that the household exclusion precluded the insured from recovering UIM benefits in a situation where Baker was injured while operating his motorcycle insured by Universal and sought UIM coverage from his household policy with Erie after Universal paid the UIM limits of $15,000. Baker did not waive stacking. The reasoning was the Erie should not be required to pay for an unknown risk.

Gallagher's Appeal Process

As the Gallagher case moved through the appellate process before the Pennsylvania Superior Court, the panel consisted of Judges Dubow, Moulton and Musmanno. In 2008, before reaching the Pennsylvania Supreme Court, the case of *Government Employees Insurance Company v. Ayers*, 2008 Pa. Super. 193, 955 A.2d 1025 (2008), none other that Judge Musmanno authored the dissenting opinion. The ability to have Judge Musmanno on the Superior Court panel in the *Gallagher* case was more than a detail, it was a key element which moved the case forward with a succinct and compelling concurring statement in the memorandum opinion of January 27, 2017, in *Gallagher v. GEICO Indemnity Company*, 2017 WL 394337.

As the case moved to argument before the Pennsylvania Supreme Court in April of 2018, the Pennsylvania Supreme Court had changed significantly since the *Ayers* case was decided. Once again, this development was very important to the outcome of the case. Justice Baer authored the 13-page opinion in *Gallagher*, which held that the household vehicle exclusion violates the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL).

The crux of the issue in the case is the language contained in Section 1738 of the MVFRL. That section provides that stacked UIM coverage is the default for Pennsylvania motorists and a specific waiver is required by the statute if a motorist decides to opt out of stacked UIM coverage. The arguments on behalf of Gallagher were: (1) that since Brian Gallagher elected stacking, paid an additional premium for stacking and never knowingly waived stacking, he paid for phantom stacked UIM coverage; and (2) that the household exclusion impermissibly narrowed or conflicted with the statutory language of the MVFRL. GEICO argued that the household vehicle exclusion permissibly limited the scope of the UIM coverage without violating Section 1738 of the MVFRL.

The decision of the Pennsylvania Supreme Court concentrates on the statutory language of 1738 of the MVFRL. The provision that is quoted is subsection 1738(a), which "unambiguously states that the limits of coverage for each vehicle owned by an insured 'shall be the sum of the limits for each motor vehicle as to which the injured person is an insured.' . . . This provision specifically applies 'when more than one vehicle is insured under one or more policies' providing for UM/UIM coverage." The decision goes on to note the detailed language required to be contained in the form if an insured decides to waive stacking. In reviewing the exclusionary language, which was "buried in an amendment" (another good detail), the Court found the exclusion to be inconsistent with the statutory requirements of Section 1738.

The decision does note that the decision does not raise concerns about overruling the *Ayers* case which was a 3 - 3 decision nor is there concern that the decision is permissible in light of the fact that the case of *Erie Insurance Exchange v. Baker*, *supra*, was a plurality decision. (See footnote 5 of the *Gallagher* decision.) The Baker case involved a situation where there were different insurance carriers for the motorcycle and the household vehicles.

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THE FALL OF THE "HOUSEHOLD VEHICLE EXCLUSION"... FROM PAGE 6

Impact of *Gallagher v. GEICO*

Moving forward, the clear and concise language of the *Gallagher* decision will make it difficult for insurance carriers to try to narrow the holding to cases where the same insurance carrier is involved in writing the household policies. How far back will this decision reach? That is a more difficult question to answer. However, as the ruling clearly invalidates the household exclusion, other exclusions may be called into question such as the regular use exclusion. Stay tuned for more interesting developments!

By: Joyce Novotny-Prettiman, Esq.,

of Quatrini Rafferty

jn@qrlegal.com

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES VOLUME 31, 2018-2019

Vol 31, No. 4

ARTICLE DEADLINE	May 31, 2019
TARGET PUBLICATION DATE	June 14, 2019

JUNIOR MEMBER MEET 'N GREET RECAP

The Junior Member Meet 'n Greet was a success. We gathered at Evangeline in the Distrikt Hotel in Pittsburgh, and enjoyed hors d'oeuvres and a hosted bar. This was a change-up from last year's Escape Room event, which ended in victory for one very clever team. The atmosphere was certainly more relaxing than law students are accustomed to during networking events, but that is to be expected from a group of WPTLA members.

Some Pitt Law students were in attendance, including myself, Ben Cohen and Kerven Moon. Ben attended with his father, Harry Cohen. In total, 26 WPTLA members attended, 5 of which were Junior Members.

As with every WPTLA event, there was some unexpected learning at play. For instance, I learned that Brendan Lupetin was a fellow Pitt athlete (swimmer, to be precise) and Tyler Setcavage has a rather aggressive cat that treats the plants as its own jungle. The most enlightening moment, though, was Dave Landay's education on Trial Pad. If I ever have a question about the app, I'm phoning Dave.

Altogether, the event was a not-so-surprising success. Getting to know this great group of trial lawyers only amplifies our excitement to soon join WPTLA as practicing attorneys.

By: Lindsay Offutt, of Quinn Logue

lindsay@quinnlogue.com

Annual Judiciary Dinner

Friday, May 3, 2019

UPMC Club at Heinz Field

Complete your Reservation Card and return to WPTLA, or register online at wptla.org/event.

Member sponsorships accepted through Wed, Apr 24!

Bring $15 cash to park in Gold Lot 1 along W General Robinson St.

Reservations/cancellations needed by Friday, April 26, 2019

PRESIDENT'S MESSAGE ... FROM PAGE 3

members once they graduate from law school or complete their clerkships. This can only be accomplished by developing meaningful relationships with these members.

At our recent Junior Member event, I spoke with one such member who was proud to share with me that he was hired as a summer clerk by a WPTLA member. Stories like that are so encouraging because it shows the dedication of our current members and because it gives me confidence that this organization will continue to be strong in the future.

Before I conclude this message, and because this article is about our future, I would like to insert a shameless plug for events that are in our immediate future.

On April 9, 2019, we will be having our members-only election dinner meeting at Carmody's Grille on Neville Island in Pittsburgh. At that meeting we will elect the Board of Governors, LAWPAC Trustee, and Officers of our organization for the 2019-2020 fiscal year.

On May 3, 2019, we will be returning to Heinz Field for our Annual Judiciary Dinner. I look forward to this event every year! The dinner serves to honor those members of our judiciary who either retired or attained senior status in the preceding year. At that dinner we will also be awarding scholarships to the winners of our Scholarship Essay Contest. Each year, the Scholarship Essay Committee selects a timely legal topic and provides a factual vignette as well as accompanying case law for the participants. The entrants must then use these materials to write an essay in support of the position for which they choose to advocate. We will also recognize the winner of the Daniel M. Berger Community Service Award. All of our past awardees have been such deserving recipients based upon the selfless work that they provide in serving others. Just like our prior recipients, this year's winner has an amazing story to tell! We will also present the Champion of Justice Award and we will be making a contribution to the Pittsburgh Steelwheelers from the proceeds of our annual 5k Run/Walk/Wheel. This event exemplifies the heart and purpose of a trial lawyer – helping others.

On May 24, 2019, we will be holding our 26th Annual Ethics Seminar and Golf Outing at Shannopin Country Club.

Finally, on June 6, 2019, Business Partner George Hargenrader of Thrivest Funding will speak at a Lunch 'n Learn CLE on *Litigation Funding: A Study in Process & Ethics.* The program will be held in the Gulf Tower, Pittsburgh.

Information about all of these upcoming events is available on our website. I hope to see all of you at these events!

By: Bryan Neiderhiser, Esq., of Marcus & Mack

bneiderhiser@marcusandmack.com

LUNCH 'N LEARN CLE

Thursday, June 6, 2019

Gulf Tower, 8th Floor, Grant Room
Pittsburgh

featuring

George Hargenrader,

VP of Business Development,

Thrivest Funding, LLC,

a WPTLA Business Partner

A 1 credit CLE course entitled

Litigation Funding: A Study in Process & Ethics

FHR ,LLC

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WHAT IS THE NATIONAL ACADEMY OF FORENSIC ENGINEERS, AND WHY DOES IT MATTER?

For a physician, board certification is a mark of distinction. It indicates the education that he or she has undertaken beyond the minimal standards and competency requirements in a chosen specialty. For leaders of medical institutions, board certification signifies a physician's achievement. It testifies to the mastery that the physician has shown in his or her respective field of medicine. The American Board of Physician Specialties® (ABPS) believes that board certification identifies the most qualified physicians

A similar certification is available for Forensic Engineers through the National Academy of Engineers.

The National Academy of Forensic Engineers is a charter member of the Council of Engineering Specialty Boards. By virtue of the accreditation process and requirements for Continuing Professional Development each Member, Senior Member and Fellow of the Academy is a Board Certified Diplomate in Forensic Engineering. As part of this certification process it is necessary for all Members, Senior Members and Fellows to maintain continuing professional development.

To qualify for full membership, a candidate must be a member of the National Society of Professional Engineers (NSPE) and must be a registered Professional Engineer (P.E.). The candidate must have appropriate engineering education and experience in practice, including actual experience in forensic engineering. In addition, the candidate must provide acceptable detailed references from attorneys, senior claims managers or NAFE members who are personally familiar with their forensic practice and experience.

For 35 years, the Academy has been advancing the knowledge and skills of licensed engineers who serve as consultants to the legal profession and as expert witnesses in courts of law, arbitration proceedings, and administrative adjudication proceedings.

Forensic engineering is defined by NAFE as the application of the art and science of engineering in matters related to the jurisprudence system, including alternative dispute resolution. Forensic engineering isn't limited to any one engineering discipline. Many types of legal cases, both civil and criminal, benefit from the knowledge and skill of a forensic engineer. Slips-trips-and-fall cases, accident reconstruction, structure and systems failures, fire and explosion investigations, and product failures are some of the types of cases that forensic engineers take on.

NAFE seeks to lead in the ethical practice of forensic engineering. Members are guided by the NSPE Code of Ethics and must provide objective, nonbiased reporting and testimony within the legal system. The average member has a career that spans 30 years beyond receiving the PE license and is licensed in multiple states. Currently, there are 450 full members, associate members, and affiliated members.

Most NAFE members acknowledge that they didn't enter the engineering field with thoughts of ever becoming a forensic engineer. Although expert witnesses have been retained by Attorneys for some time, the term "Forensic Engineer" did not become common until about 35 years ago. Until recently, there were no academic courses available that were directed specifically at forensic engineering. (There is currently at least one University that does offer several courses that teach forensic engineering techniques and analysis.)

My own introduction to the field occurred when, as an owner of a car rental franchise, it became necessary to go to court to attempt to obtain compensation for damages done to our rental vehicles by customers who violated various terms of the rental agreement. I subsequently became acquainted with one of the earliest forensic engineering practitioners who was doing work for our insurance company. I was fortunate in that he took me under his wing and introduced me to the field. This led to part, and eventually full-time, employment with his firm.

The skills needed are much different than those required of an engineer working in a more traditional setting. Not only do you need to be comfortable speaking in front of an audience, but sometimes it's a "hostile audience." You need a pretty thick skin, because attorneys on the opposing side are going to try to do everything they can to undermine you. You must have confidence to defend your expertise and opinions. I have had one very experienced *(Continued on Page 12)*

"Although expert witnesses have been retained by Attorneys for some time, the term 'Forensic Engineer' did not become common until about 35 years ago."

Introduction

This is the second in a series of articles addressing estates, wills and related issues for personal injury attorneys. Below is a basic outline of the steps needed to draft a simple Will. For statutory guidance, you should review Chapter 25 of the Probate, Estates and Fiduciary Code, (Probate Code) 20 Pa.C.S.§2501 et.seq.

There are many Will forms available from banks and savings and loans. If you are new to writing Wills, I recommend that you use the Wills Project Forms on the WPTLA's website. You can also use these Wills and other estate documents as a volunteer for our Wills Project.

Property That Can Pass By A Will

Keep in mind that a Will only dictates the passing of property that is owned in the Testator's name alone which does not otherwise have a legally designated beneficiary. It does not include joint accounts, in-trust for accounts of transfer on death accounts. It does not include life insurance policies or retirement plans for which beneficiaries have been designated. It does not include real estate if the deed names a remainderman. It also does not include household contents to the extent that they are used and enjoyed by both spouses.

Sample Factual Scenario

A husband and wife with minor children ask you to prepare Wills for them. With certain exceptions, a simple Will is probably sufficient. These exceptions include couples with very significant assets (property, pension plans and life insurance benefits with a combined value in excess of roughly ten million dollars or dependents with special needs. Although not all Wills are the same, most simple Wills have the same basic provisions. Everyone, by the way, should also have Durable Powers of Attorney for their financial affairs and healthcare. This will be the subject of a future article.

Step-by-Step Discussion for a Basic Will

The following discussion describes the most common sections of a basic Will for a married individual with children. As a WPTLA member, you will find a sample Will for this situation on the website in the Wills Project folder, Document No. 7.

A. Introductory Paragraph

This identifies the Testator, identifies his county of residence and definitively states that this document revokes all prior Wills and Codicils (amendments to Wills).

B. Article I - Payment of Debts and Funeral Expenses

This is no longer necessary, but it is found in most wills. Burial instructions can also be included here, but should be available to the family outside of the Will since the Will is often kept in a safety deposit box.

C. Article II - Tangible-Personal Property

It is a good practice to have a separate section for dividing up tangible personal property. Generally speaking, tangible personal property means anything as small as a ring or as large as an airplane, that is not real property and can be held or touched. It does not include property such as money or stocks and bonds which have no intrinsic and marketable value in and of themselves. Gold and silver coins, on the other hand, are tangible personal property.

This section should reference a personal property memorandum. This is a separate document provided to the Testator to list specific items of tangible personal property to be given to specific individuals. This document can be prepared by the Testator after the Will is signed and changed as circumstances require.

D. Article III - Distribution of Residue

The residue is just the remainder of the Estate after any property previously distributed in the Will. Typically, the spouses give the remainder to each other or, if not survived by a spouse, to the children in equal shares. There is usually also a provision for property passing to the descendants of a child that does not survive the Testator.

E. Article IV - Miscellaneous

This is a section to put in general provisions such as excusing the posting of bond by an Executor.

F. Article V – Taxes

A tax provision states who pays the death taxes. In a simple Will, the only death taxes will be Pennsylvania Inheritance Tax. In some Wills, all death taxes are paid out of the Estate. In other Wills, such as the simple Will referenced in this article, certain property which specifically benefits an individual beneficiary are exempted from payment by the estate and the taxes are paid by the beneficiary.

G. Article VI – Appointment of Fiduciaries

This section appoints the Executor who will manage the estate after the Testator's death. Typically, each spouse appoints the surviving spouse or, in default of the surviving spouse, an adult child.

H. Other Clauses

If there are minor children, one of the most important reasons to prepare a Will is to designate a guardian after the death of the second parent to die. Otherwise, the Court could appoint a guardian that the Testator would not have approved of.

Also, if there are minor children, there may be a Trust established in the Will for management of the minor's share of the estate until he or she *(Continued on Page 12)*

WHAT IS THE NATIONAL ACADEMY ...

FROM PAGE 10

engineer with whom I was working tell me "Never again am I going to get on a witness stand and have to face one of those Attorneys!" And he knew his subject and his analysis extremely well.

Confidence is essential when providing expert testimony. You must be able to explain things in a clear way and in a way that the other side can't twist. Attorneys are advocates for their clients and will do everything they can to raise doubts about what you have said. It's almost like sparring.

An opposing attorney is just waiting for the opportunity to rip apart your testimony during cross- examination. My toughest time on the stand came in a case involving a large auto manufacturer. Their Defense Attorney was well prepared and had been prepared by engineers from Detroit. I frankly admit on that occasion he succeeded in making me look like a dummy.

It also helps if you have some practical experience in your field. I think that my 50 years of messing around with cars as a hobby has made it easier for me to explain some of the technical aspects to a jury on a level that might be easier understood by a backyard mechanic.

As a professional engineer, one must be willing to speak truth to your client. In every case, an investigation will present things that are going to be both helpful and unhelpful to a client. You must be honest with your client and then let him or her decide how they are going to handle it. I have had to tell a client, "Your theory is provably false. Don't waste your time and money with this case."

Attorneys may be advocates for their clients, but forensic engineers must be advocates for reality. There have been many cases where I have had to tell clients information they didn't want to hear. I've had some clients respond with, "Thanks, but I'm going to find someone else." But most have used the information to structure their cases to their client's advantage.

By: David W. Kassekert, PE, Mechanical Engineer / Accident Reconstruction

Keystone Engineering Consultants, Inc.

dwkassekert@forensicexp.com

DRAFTING A SIMPLE WILL ...

FROM PAGE 11

reaches a specific age.

I. <u>Signature Pages</u>

Every Will should be a self-proved Will. A self-proved Will uses specific signature pages described in the Probate Code, 20 Pa. C.S. §3132.1. The Will is acknowledged by the Testator and witnessed by two witnesses who also sign an affidavit. This is done before a notary.

If a notary is not available because the Will has to be signed outside of the office, then the Probate Code provides alternate language where the Testator's Acknowledgment and the Witnesses' Affidavits can be taken before an attorney. The attorney then has his or her signature notarized later.

As a practice pointer, if you are having a client sign a Will in a hospital, consider taking two witnesses with you. Hospital employees are often instructed not to serve as witnesses to legal documents.

If a Will is not self-proved, then witnesses will have to be located after death to verify their signatures. If the witnesses cannot be located, then two individuals have to attest that they are familiar with the Testator's signature which appears at the end to the Will.

J. <u>Other Will Provisions</u>

Some other Will provisions which often are needed include the following:

A. Specific gifts to charity;

B. Provisions for the care of a beloved pet;

C. Reasons for omitting children or others who would otherwise be expected to inherit;

D. Specific bequests of the Testator's real property.

<u>Conclusion</u>

Drafting a simple Will is not difficult but care should be taken to express the Testator's wishes. In the Wills Project folder there are examples of Wills for many other situations.

By: Dave Landay, Esq., of David M. Landay, Attorney at Law

dave@davidlanday.com

2019 SPEED NETWORKING AND DINNER RECAP

On January 22, 2019, WPTLA hosted its very first Speed Networking Dinner for our valued business partners. The event had a nostalgic feel for our members and business partners as we returned to the Duquesne Club for speed networking and an always delicious dinner. Returning to the Duquesne Club proved to be a draw for some of our long-time members as well as encouraged our newer members to attend an event at the prestigious venue.

The event kicked off with our nine attending business partners stationed at their individual tables. Attending WPTLA members were divided into groups and made their way around the room spending three minutes and thirty seconds at each business partner table. Our fantastic business partners provided quick, but informative, mini sales pitches for the WPTLA members. Most business partners took their sales pitches a step further and offered swag such as pens, lint rollers, notepads, and even portable cell phone charges. At the conclusion of each mini sales pitch, our business partners provided WPTLA members with their business cards. If WPTLA members collected all nine business cards at the end of speed networking, that member received a complimentary drink from the bar. There were no problems in getting members to visit all nine business partner tables as the event was fast, fun, and educational.

WPTLA would like to thank the following business partners for their participation in this unique event and their continued support of WPTLA: AccentuRate; FindLaw; Finley Consulting & Investigation; Ford Business Machines; Keystone Engineering Consultants, Inc; Litmus, LLC; NFP Structured Settlements; Planet Depos; and Thrivest Funding.

By: Brittani Hassen, Esq., of Kontos Mengine Killion & Hassen

bhassen@kontosmengine.com

Pictured in #1: Dee Sherry of AccentuRate, Chris Inman, Margaret Cooney and Past President Cindy Danel.

Pictured in #2: Jaren Yevins of Litmus, LLC, Board of Governors Member Katie Killion, Russell Bopp, and Board of Governors Member Shawn Kressley.

Pictured in #3: Secretary Mark Milsop, Bill Goodman of NFP Structured Settlements, President-Elect Davd Landay, and Gerald Hutton.

Pictured in #4: Board of Governors Member Phillip Clark; Mark Melago and Charlie Georgi of FindLaw, and Past President Chris Miller.

On January 12, 2019, a small but efficient team of WPTLA volunteers visited 2434 Long Street in Greensburg, PA, for another successful Habitat for Humanity project. The members of the crew included Mike Rosenzweig, Peggy Rosenzweig, Mark Milsop, James Tallman, Bryan Neiderhiser, Greg Unatin and a few dedicated Habitat staff members.

Long Street suddenly became very narrow as our vehicles slowed to a stop beside a quaint little home at the end of the street. We stepped inside the front door. Before our eyes was the gutted interior of a home that needed the love only our team of compassionate yet largely unskilled laborers could provide. Fortunately, the work was well suited to those more comfortable with a pen than a hammer in their hand. We immediately grasped our hammers, prying nails from the worn yet still sturdy wooden boards forming the home's walls and ceilings. Little did I know this was just the prelude to a whole new experience – installing insulation in the walls of a home.

Personally, I enjoyed the fleeting sense of having the skills of a tradesman, even if for only one day. But something I really enjoyed about this Habitat project and really all Habitat projects I've had the privilege to join, is how everybody works together as a team. Each worker fills a certain role, whether it is measuring the insulation, cutting the insulation, or refilling the staple gun (this was my first experience using a staple gun…and it was amazing). And of course, we all took turns in the role with which we're most familiar: safety specialist.

We made a nice dent toward fulfilling someone's dream of a new home. While that is important enough, I cherish our Habitat days for the opportunity to get to know my colleagues in a different light. Sometimes we are even fortunate enough to meet family members of our fellow members who so generously devote their time to help others and improve the image of our organization. We have fun, we chit chat, and we generally stay away from discussing topics that have no place in the course of banter between skilled laborers. In the process we might learn more about our fellow members' lives outside the law. Inevitably, I find myself thinking "wow, that's something really cool I didn't know about Mark, or James, or Mike." Naturally, I think more deeply about the life I live not only professionally, but outside the law.

If you want a different perspective for a while, sometimes you need to break from routine and leave your comfort zone. I know I'll never feel comfortable on a construction site, but at least for one day that was exactly where I was supposed to be. I hope all of you will take this little article to heart and join us in the future. We have big plans. In 2020 we are going to build an entire house in one day, so get ready!

By: Greg Unatin, Esq.,

of Meyers Evans Lupetin & Unatin

gunatin@meyersmedmal.com

Pictured in #1: Peggy and Mike Rosenzweig, President Bryan Neiderhiser, Board of Governors Member James Tallman, Board of Governors Member Greg Unatin, and Secretary Mark Milsop.

In #2: President Bryan Neiderhiser and Secretary Mark Milsop, with Board of Governors Member James Tallman executing a photo bomb.

In #3: Secretary Mark Milsop and Mike Rosenzweig working hard.

In #4: President Bryan Neiderhiser working with insulation.

In #5: Board of Governors Member James Tallman happy to be there!

OUR BUSINESS PARTNERS

Stephen Covey said in the book "The Seven Habits of Highly Effective People" that business relationships are only good if they are "win/win."

Our business partners at WPTLA have played a major role in our financial stability as an organization. Their participation in our business partner program allows us to pursue our objectives as an organization to provide open access to the Courts and to provide our clients with fair and equitable jurors to decide their cases.

To continue to pursue those objectives, however, we need to make the business relationship a "win/win." These business partners provide valuable services to us and our clients. I have used each and every one of our business partners in our practice, and I can say without hesitation that they have been excellent. They have provided timely services and reports and have done so at reasonable costs to our firm and our clients.

It is incumbent upon all of our members to utilize the services of our business partners when given the opportunity. If we do not support them, then it will become difficult for them to continue to support us. Our business partners realize that we utilize the services of other professionals in an effort to pursue our cases. In speaking with our business partners, they do not expect that we utilize their services each and every time that a need arises. Instead, they only ask that they be given their fair share of the services that we contract out.

If they continue to provide valuable and professional services, then in that event, we owe them the opportunity to work with us and our clients. Many of our business partners have been loyal and have been partners of WPTLA since the inception of the program. Let's make sure moving forward that this business relationship continues to be fruitful for all parties involved. As Stephen Covey would say, let's make it a "win/win."

By: Larry Kelly, Esq., of

Luxenberg Garbett Kelly & George, P.C.

lkelly@lgkg.com

WILLS CLINIC CALL TO ACTION

If you are looking to give back to your community through legal service, please consider donating a small amount of time to serve through WPTLA's Wills Clinic.

OPERATION BETTER BLOCK

Contact our Executive Director Laurie Lacher (laurie@wptla.org) for more information on how to volunteer. Contact Committee Chair Greg Unatin (gunatin@meyersmedmal.com) to find out what is involved.

The time commitment is minimal and no prior experience with wills or estate planning is required. All necessary forms are provided, as is work space in which to meet the clients.

Jacqueline Conyers, a Wills Project Client, says the experience has made her life better because her will is "something I don't have to worry about."

Lorraine Mills, who "did not have the money for an attorney ... can rest now that an important part of dying is taken care of."

Darrel Strong, who "had been thinking about it for some time now," acted "when the opportunity came about" and "can sleep much better" now.

**Please Support our Business Partners,
as they support WPTLA.**

AccentuRate
Dee Sherry
412-334-5465
dee@accenturate.com

Alliance Medical Legal Consulting
Varsha Desai
267-644-1000
vdesai@alliancemedicallegal.com

FindLaw
Charlie Georgi or Mark Melago
charles.georgi@tr.com
mark.melago@thomsonreuters.com

Finley Consulting & Investigations
Chris Finley
412-364-8034
cfinley@finleyinvestigations.com

Ford Business Machines
John Roseto
724-707-4885
jroseto@buyfbm.com
Johnathan Garlow
jgarlow@buyfbm.com

Forensic Human Resources
Matt Hanak
412-720-1158
matt@forensichr.net

Keystone Engineering
Dave Kassekert
866-344-7606
dwkassekert@forensicexp.com

Litmus, LLC
Jared Yevins
412-741-5451
intake@litmusllc.com

NFP Structured Settlmenets
Bill Goodman
412-263-2228
WGoodman@nfp.com

Planet Depos
Cindy Miklos
888-433-3767
cindy.miklos@planetdepos.com

Thrivest Funding
George Hargenrader
412-513-7919
ghargenrader@thrivest.com

SCOPE OF DISCOVERY IN MEDICAL MALPRACTICE CASES

Judge Alan Hertzberg recently issued an interesting decision on the scope of discovery in medical malpractice cases in *Leadbitter v. Keystone Anesthesia et al,*, GD 16-010700 (Allegheny County November 26, 2018). There, the plaintiffs had instituted suit against St. Clair Hospital and Carmen Petraglia, MD. The Complaint included allegations of corporate negligence regarding the credentialing of Defendant Petraglia.

Plaintiff sought production of Defendant Petraglia's credentialing file. St. Clair Hospital claimed that the file was protected under the Peer Review Protection Act, 63 P.S. 425.4. Judge Hertzberg rejected the claim of peer review protection citing the Pennsylvania Supreme Court's recent decision in *Reginelli v. Boggs*, 181 A.3d 293 (Pa. 2018). Hence, because the credentialing file was created for the Dr. Petraglia's "continued membership" on the medical staff, "it could not be clearer that it was not protected."

The case also raised a second issue, slightly more novel, as to whether or not results of an inquiry into the National Practitioner Data Bank were discoverable. Judge Hertzberg reasoned that because the Supreme Court does not find these kinds of documents privileged, they were discoverable.

The *Leadbitter* decision is currently on appeal to the Superior Court at 1414 WDA 2018.

SUPERIOR COURT RECOGNIZES LIMITED SCOPE OF WORK-PRODUCT PRIVILEGE

The Pennsylvania Superior Court, in a decision by Judge Panella, recognized the limited scope of the work product privilege in *McIlamil v Archdiocese of Philadelphia*, 189 A.3d 1100, 2018 PA Super 157 (2018). The *McIlamil* case arose out of the sexual abuse of a minor. During discovery, the plaintiffs sought discovery of a private investigator's notes of witness interviews. The controversy centered on the work product privilege as embodied in Rule 4003.3 which provides in pertinent part:

> The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

The defense argued that because the investigator was retained by the attorney to perform the investigation, the investigator's work product should be entitled the broader protection of the limitations on disclosure of attorney work product. The Court declined the defendant's invitation to expand the attorney work product privilege to an investigator retained by the attorney. The court reasoned that the investigator was a mere agent.

The Court also noted that the traditional basis for the privilege had been to "shield the mental processes of an attorney." *McIlamil*, 189 A.3d at 1108 citing *T.M. v. Elwyn, Inc.*, 2008 PA Super 113, 950 A.2d 1050, 1062 (Pa. Super. 2008).

It may also be of interest to note that the court found that the discovery order by the trial court on this issue was appealable as a collateral order.

By: Mark Milsop, Esq., of Berger and Green

mmilsop@bergerandgreen.com

Save the Date!

2019-2020 Kick Off Event

Tues, Aug 20	**Wed, Aug 21**
Golf Games & Dinner	*CLE & Breakfast*
TopGolf, Bridgeville	Hampton Inn, Bridgeville

Discounted guest rooms available at Hampton Inn for Aug 20.

Commonwealth Court Continues to Apply *Whitfield* to Reinstatement Petitions

A recent Commonwealth Court decision follows the court's trend in reinstating benefits for post-Protz reinstatement petitions as of the date the Claimant files his petition. It continued to avoid the void ab initio argument in a direct manner.

In *Womack v. WCAB (Philadelphia Parking Authority),* No. 14 C.D. 2018, a three-judge panel in an unreported decision remanded a case for further consideration on the issue of whether the Claimant continued to be disabled.

Womack suffered in a work injury on June 15, 2011. On September 10, 2013, the Claimant underwent an Impairment Rating Evaluation where he was found to be 14% impaired. A Notice of Change of Disability Status was issued. No challenge was filed at that time. On September 18, 2015, the Commonwealth Court issued its decision in *Protz v. WCAB (Derry Area School District)* 124 A.3d, 406 (Pa. Cmwlth. 2015) (Protz I). Plaintiff sought a reinstatement based on that decision on January 21, 2016. The IRE in 2013 had been performed under the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment. Said usage was specifically found unconstitutional in *Protz I*. The judge ordered reinstatement of Claimant's total disability benefits, effective the date of the initial IRE.

Employer timely appealed to the Appeal Board. In a 5 to 1 decision, the Board affirmed the workers' compensation judge decision. However, the Board reinstated benefits only as a June 20, 2017, the date *Protz II* was decided. Claimant followed with an appeal to the Commonwealth Court.

Commonwealth Court identified the issue as whether total disability status should have been reinstated as of the date of the unconstitutional IRE or the date as found by the Appeal Board.

The court undertook an analysis of the relevant case law that has developed since *Protz I* and *II*. It looked at both reported and unreported decisions. The analysis came down as to whether *Whitfield v. WCAB (Tenet Health System Hahnemann LLC)* 188 A.3d 599 (Pa. Cmwlth. 2018) controlled or *Dana Holding Corporation v. WCAB (Smuck),* 195 A.3d 635 (Pa. Cmwlth. 2018).

The Court noted in its decision that the Employer was relying on *Whitfield* arguing that the earliest his benefits could be reinstated would be as of the date the Claimant filed his petition. In *Whitfield*, Claimant litigated the validity of the IRE and modification in 2009. Claimant sought a statement of benefits in November 2015, shortly after *Protz I* was decided. The Court found that the Claimant could seek modification of the disability status as the petition had filed within three (3) years from last payment. While noting that Whitfield Court did not address the issue of retroactivity, it did find that Claimant's status could be changed as of the date of the filing of her petition. In *Dana Holding*, the IRE was performed June 20, 2014. The impairment rating came back at less than 50% and benefits were modified. The Claimant immediately challenged that modification. The Commonwealth Court issued a decision in *Protz I* prior to the judge entering a decision in *Dana Holding*. At that point, the judge allowed a new IRE using the Fourth Edition of the Guides. The judge modified benefits on that basis. Claimant filed an appeal to the Board during which time the Supreme Court decided *Protz II*. The Board reinstated benefits as of the date of the IRE.

The Employer appealed to the Commonwealth Court arguing that the period of benefits the Claimant received from the date of the IRE through the date of *Protz II*, should be credited against the 500 weeks. The Court rejected this argument effectively putting the Claimant back on benefits as of the date of the IRE.

The Court ultimately decided that the facts in *Womack* were distinguishable from *Dana Holding* and consistent more so with *Whitfield*. Womack did not challenge the conversion to partial disability at the time the decision was initially made. Claimant only challenged the conversion after *Protz I* had been issued.

The Court makes a curious error in its analysis of the procedural status in *Womack*. It states on page 10 of the slip opinion "Here, Claimant filed his review petition within three years from the date of the last payment of compensation." That statement clearly conflicts with the decision's earlier recitation of the procedural history noting benefits were only converted to partial disability as of September 10, 2013. Therefore, Claimant continued to receive wage loss benefits at the time the reinstatement petition was filed. The procedural circumstances seem to fall in between the procedural histories noted in *Whitfield* and *Dana Holding* and in fact one could argue that *Womack* more closely approximates the facts in *Dana Holding*. The Court's error here is certainly disconcerting and Claimant's counsel should be prepared to point this fact out if this case is used to support arguments *(Continued on Page 25)*

***Brewington, et. al. v. The School District of Philadelphia, et. al.,* No. 23 EAP 2017 (December 28, 2018, Supreme Court of Pennsylvania), ----A.3d ---- (Pa. 2018)**

Pennsylvania Supreme Court holds that lack of padding on the gym wall of a public school falls within the real property exclusion of the Political Subdivision Tort Claims Act

On May 9, 2012, nine-year-old Jarrett Brewington, ("minor"), participated in a relay race during gym class at his elementary school. While the minor was running, he tripped and fell, causing him to propel into the wall at the end of the gym, striking his head and losing consciousness. At the time of this incident, there was no padding covering the gym wall, which was made of concrete. As a result of this incident, the minor was diagnosed with a concussion, was forced to miss school for more than a month and continued to experience post-traumatic headaches.

On November 19, 2013, Jarrett's mother filed a personal injury lawsuit against the elementary school and the school district (collectively the "school") alleging that the incident occurred because of the school's failure to install padded safety mats to cushion the wall. The school filed a motion for summary judgement on the basis of immunity under the Political Subdivision Tort Claims Act ("Act"), 42 Pa.C.S. §§8541 et seq. The trial court granted the school's motion finding the minor's action did not satisfy the real property exclusion of the Act. Relying on the Commonwealth Court's opinion in *Rieger v. Altoona Area School District*, the trial court concluded that safety mats are personalty—not realty —and, thus, do not fall within the real property exception to governmental immunity under the Act.

On appeal, in a unanimous published opinion, the Commonwealth Court reversed the trial court's decision. *Brewington v. City of Philadelphia*, 149 A.3d 901 (Pa. Commonwealth. 2016). The Commonwealth Court reaffirmed its decision in *Singer v. School District of Philadelphia*, overruled *Rieger*, and reversed the trial court's grant of summary judgment, concluding that, because the minor's claims concerned an injury caused by real property—i.e., the concrete gym wall—the real property exception to governmental immunity applied regardless of the fact that the Complaint alleged it was personalty (the protective mat) that would have prevented the minor's injury.

The Supreme Court granted allocatur to examine whether the negligence alleged in this case concerned real property; whether the Commonwealth Court had impermissibly broadened the real property exception to the Act; and whether the minor's claim of a defect in the real property is more properly construed as a claim of negligent supervision, which would not satisfy the real property exception.

While cognizant that exceptions to governmental immunity must be narrowly construed, the Supreme Court found that the plain language of the Act and the allegations of fact set forth in the Complaint satisfied the real property exception. Specifically, the Court found that the minor pled negligence regarding the "care" of real property, through the assertion that the school negligently failed to apply padding to the concrete gym walls. Moreover, the Court agreed that the unpadded concrete wall constituted real property in the school's possession. In coming to this conclusion, the Court found that the real property exception, by its express definitional terms, includes a failure to provide safety features in situations where such a duty otherwise exists.

Because the minor's damages would have been recoverable at common law absent the protections of governmental immunity, and because the Complaint sufficiently alleged that a local agency negligently failed to act regarding the care, custody, or control of real property in the agency's possession, the Supreme Court held that governmental immunity did not apply and the school may be held liable for the minor's damages caused by the negligent failure to affix mats to the gym walls. In addition, the Supreme Court also held that a claim for negligent supervision against an employee such as the gym teacher in this case would not act as a bar to the application of the real property exception.

Based on the foregoing, the Supreme Court affirmed the opinion of the Commonwealth Court reversing summary judgment and the case was remanded to the trial court for further proceedings.

***John Stapas v. Giant Eagle, Inc., et. al.,* No. 23 EAP 2017 (December 28, 2018, Supreme Court of Pennsylvania), ----A.3d ---- (Pa. 2018)**

Pennsylvania Supreme Court holds that post-trial relief cannot be granted if the basis for the post-trial motion arose during the trial proceedings and the party seeking relief did not raise a contemporaneous objection

(Continued on Page 22)

On July 18, 2007, John Stapas ("Stapas") was inside a GetGo and speaking with a friend who was an on-duty employee. At this time, Brandon McCallister, a person who had been banned from that GetGo, entered the store. McCallister, who appeared intoxicated, started arguing with GetGo staff about his ban and a fight ensued. Stapas, in an effort to assist two female GetGo employees, inserted himself into the situation. McCallister initiated a physical fight with Stapas and during the fight, McCallister pulled out a gun, and shot Stapas four times.

On November 10, 2009, Stapas filed a complaint asserting negligence claims against Giant Eagle. The case proceeded to a five-day jury trial. During the trial, Stapas did not present evidence on, or make any claim for, future wage loss. However, in his closing argument, Stapas's counsel did mention a potential future lost wages claim. At the conclusion of the case, the trial judge charged the jury that if Giant Eagle was found liable its damages should compensate for all physical and financial injuries Stapas sustained as a result of the incident. The trial court did not specifically instruct on past and future wage loss and instructed the jury to return its verdict in a single lump sum. The jury was handed a verdict slip which, contained, *inter alia,* an interrogatory that provided five (5) categories of damages: scarring; wage loss; past and future medial expenses; past, present and future pain and suffering; and loss of life's pleasures. Giant Eagle's counsel did not object to the trial court's instructions on damages, did not request an instruction on past and future wage loss and did not object to the verdict slip.

The jury returned a verdict of $2.86 million dollars. Even though the jury was not instructed to, they filled out the damages interrogatory by handwriting an amount next to each of the categories of damages. When the jury returned the verdict slip, the trial court's tipstaff read the itemized damages, including the amount for wage loss, $1.3 million, and the total award of $2.86 million. Counsel for Giant Eagle did not object. Immediately after the verdict, the trial court polled the jury, confirmed that counsel had no further questions or objections, and dismissed the jury.

"The Supreme Court determined that by not objecting to the verdict, Giant Eagle deprived the trial court of the opportunity to efficiently correct a trial error."

On November 26, 2014, Giant Eagle filed a motion for post-trial relief, requesting a new trial, JNOV, or remittitur. Prior to a ruling by the trial court on the motion, Giant Eagle filed a notice of appeal in the Superior Court. Although the trial court did not have an opportunity to rule on Giant Eagle's post-trial motion, it filed an opinion with the Superior Court expressing its view that Giant Eagle had waived its objections to the jury's calculation of the verdict. The trial court explained that the parties jointly drafted and agreed to the jury verdict slip, the trial court gave the verdict form to the jury without objection, and Giant Eagle did not object to the jury's verdict before the trial court dismissed the jury.

On appeal, a unanimous panel of the Superior Court vacated the judgment and remanded for a new trial on damages. *Stapas v. Giant Eagle, Inc.,* 153 A.3d 353 (Pa. Super. 2016). The Superior Court disagreed with the trial court that Giant Eagle had waived its argument for failing to object before the jury was dismissed. Because Giant Eagle's post-trial claim was framed as a challenge to the sufficiency and weight of the evidence, the Superior Court concluded Giant Eagle properly preserved its right to seek a new trial by filing a timely post-trial motion contending the verdict was against the weight of the evidence.

The Supreme Court granted allocatur to consider whether Giant Eagle waived its challenge to the damages award by not objecting before the jury was discharged and whether the Superior Court's decision conflicted with the Supreme Court's prior decisions in *Dilliplaine v. Lehigh Valley Trust Co.*, 322 A.2d 114 (Pa. 1974), and *Straub v. Cherne Industries*, 880 A.2d 561 (Pa. 2005).

After its analysis, the Supreme Court concluded that Giant Eagle had waived its challenge to the jury's verdict by failing to object to the verdict before the trial court dismissed the jury. Under *Dilliplaine* and Pa. R.C.P. 227.1(b), the Court concluded that post-trial relief could not be granted if the basis for the post-trial motion arose during the trial proceedings and the party seeking relief did not raise a contemporaneous objection. In the instant case, Giant Eagle was challenging the jury's ability to award damages for future lost wages even though Stapas did not introduce any evidence of future wage loss and the trial court did not instruct the jury on the definition of "wage loss." The Court found that *(Continued on Page 23)*

Giant Eagle had multiple opportunities to preserve this ground for post-trial relief during the trial court proceedings but failed to do so.

The Supreme Court determined that by not objecting to the verdict, Giant Eagle deprived the trial court of the opportunity to efficiently correct a trial error. Furthermore, raising the issue for the first time in a post-trial motion was deemed to be an inefficient use of judicial resources, which the Supreme Court in *Dilliplaine* had sought to eliminate through the contemporaneous objection requirement. In addition, the Court was not persuaded by Giant Eagle's characterization of its challenge to the verdict as a "weight of the evidence" challenge. On the contrary, the Court found that Giant Eagle's position was that the jury could not award damages for future lost wages as a matter of law because there was no evidence presented by Stapas on this issue. Therefore, the Court concluded that Giant Eagle's challenge to the verdict was not a challenge to the weight of the evidence and thus its failure to object to the jury instructions, damages interrogatory, and jury verdict waived the grounds raised in its post-trial motion.

The Supreme Court reversed the Superior Court's order granting Giant Eagle a new trial on damages and reinstated the jury's verdict.

Mader v. Duquesne Light Company, 2018 Pa. Super. 323 (November 30, 2018)

Pennsylvania Superior Court addressed several medical expense and wage loss evidentiary issues following the grant of a new trial on damages

This case arose out of a September 21, 2012, incident where Steve Mader ("Mader") was electrocuted by non-insulated power lines that came in contact with the top of his ladder while he was carrying it at a customer's home. As a result of the incident, Mader sustained severe burns to his arms and feet, which resulted in multiple surgeries, including the amputation of both feet at the middle of the arch.

In April of 2013, Mader filed a lawsuit against Duquesne Light as the owner of the electric power lines he contacted with his ladder. At the conclusion of the trial in this matter, the jury returned a verdict allocating 60% negligence against Duquesne Light and forty percent 40% negligence against Mader. The jury awarded Mader $500,000.00 in compensatory damages ($444,525.56 for past medical expenses and $55,474.44 for future medical expenses). However, the jury did not award Mader anything for past, present, and future pain and suffering, embarrassment, humiliation, loss of enjoyment of life and scarring. The jury also did not award Mader anything for past lost earnings or future lost earning capacity.

Mader filed a motion for post-trial relief requesting a new trial limited to the issue of damages. Duquesne Light's responsive brief acknowledged Mader was entitled to a new trial on damages for past pain and suffering but it denied that he was entitled to a new trial on damages for future pain and suffering or for past or future lost earnings. The trial court granted Mader's request for a new trial as to <u>all damages</u> submitted to the jury. Duquesne Light appealed the trial court's decision to the Superior Court of Pennsylvania.

On appeal, the Superior Court was presented with four (4) issues, all pertaining to the jury's itemized award of damages. In its first issue, Duquesne Light argued that the trial court abused its discretion in granting Mader a new trial for past medical expenses because the jury awarded the exact amount that the parties had stipulated to. The Superior Court noted that stipulations between the parties as to the amount of recoverable medical expenses are binding upon the court as well as upon the parties reaching such a stipulation. Thus, the Court ruled that an award of stipulated medical expenses was supported by the record and could not be overturned by the trial court for any reason.

In its second issue, Duquesne Light argued that the trial court abused its discretion in granting Mader a new trial on future medical expenses where the jury had awarded $55,474.44. The Superior Court found that the jury had been presented with competing expert opinion testimony on this issue. Duquesne Light presented testimony indicating that Mader's injuries were healing well, that he required minimal ongoing care, and that his future medical expenses would amount to anywhere between $42,646.65 and $50,483.67. Conversely, Mader presented evidence that he would need extensive ongoing care, with expenses in the amount of $2,183,486.00. The Superior Court held that the jury's award for future medical expenses was reasonable, even though it was closer to the projections offered by Duquesne Light. The Court noted that the jury had, as permitted by law, resolved the conflicts in the testimony and found Duquesne Light's evidence *(Continued on Page 24)*

on future medical expenses to be more credible. As such, the Superior Court found that the trial court's granting of a new trial based upon the alleged inadequacy of the future medical expenses award was an abuse of discretion.

In its third issue, Duquesne Light argued that the trial court abused its discretion in granting Mader a new trial on past lost earnings and future lost earning capacity because the jury's decision not to award any damages for these categories was supported by the evidence. The Superior Court found that since the experts of both parties testified as to Mader's inability to perform his job following the accident and because there was uncontested evidence that his masonry business suffered financial losses following the incident, the trial court had correctly determined that the jury's failure to award any lost wages to Mader justified a new trial in this particular category of damages. While the Superior Court found that an alleged failure on the part of Mader to seek alternative employment following the incident could justify a lower award for wage loss, such evidence did not support a finding by the jury that Mader should not be awarded any wage losses at all.

In its fourth and final issue, Duquesne Light argued that the trial court abused its discretion by granting Mader a new trial on pain and suffering, embarrassment, humiliation, and loss of enjoyment of life after the date that his wounds healed. The Superior Court did not agree, finding ample evidence of record to support the trial court's conclusion that Mader was entitled to some award of damages for past, present, and future pain and suffering, embarrassment, humiliation loss of life's enjoyment and disfigurement.

Based upon the foregoing, the Superior Court reversed the trial court's grant of a new trial on damages related to past medical expenses and future medical expenses and affirmed the grant of a new trial on damages related to past lost wages, future lost earning capacity, past, present, and future pain and suffering, embarrassment humiliation, loss of life's enjoyment and disfigurement.

Leight v. UPMC et. al., 2018 Pa. Super. 359 (December 31, 2018)

Superior Court rules that the cause of action provision in the Mental Health Procedures Act does not apply to voluntary outpatient treatment of a mentally ill person

On March 8, 2012, Kathryn Leight was one of several people injured when John Shick ("Shick") entered Western Psychiatric Institute and Clinic with a loaded weapon and opened fire. As a result of this incident Kathryn and her husband (hereinafter "Leights") filed a Complaint against a number of Defendants including: UPMC; University of Pittsburgh Physicians; and University of Pittsburgh of the Commonwealth System of Higher Education (collectively referred to as "UPMC entities") for the injuries Kathryn sustained in the shooting. The cause of action against the UPMC entities alleged gross negligence based upon the alleged breach of duties the entities owed under the Mental Health Procedures Act ("MHPA"). Specifically, the Leights alleged that, although the shooter had increasingly violent encounters at UPMC prior to the shooting and had been treated for both schizophrenia and medication non-compliance, the medical providers at UPMC had failed to file commitment papers and had, instead, terminated their relationship with him.

The UPMC entities filed Preliminary Objections asserting that there was no duty to warn or to protect Kathryn Leight from the shooter under the MHPA. On May 27, 2014, the trial court dismissed the claims, finding that the MHPA did not apply to voluntary outpatient treatment.

On appeal, the Superior Court affirmed the trial court's dismissal of the claims. The Court analyzed the statutory language of the MHPA finding that a plain reading of the statute demonstrated that while a plaintiff may maintain a cause of action where the parties treating or examining a patient under the MHPA have acted with gross negligence, the MHPA only applied to involuntary inpatient or outpatient treatment, and voluntary inpatient treatment of mentally ill persons. *See* 50 P.S. §7103. Therefore, the Superior Court concluded that the immunity and cause of action provisions under §7114 of the MHPA did not apply to voluntary outpatient treatment.

(Continued on Page 25)

"The Superior Court noted that stipulations between the parties as to the amount of recoverable medical expenses are binding upon the court as well as upon the parties reaching such a stipulation."

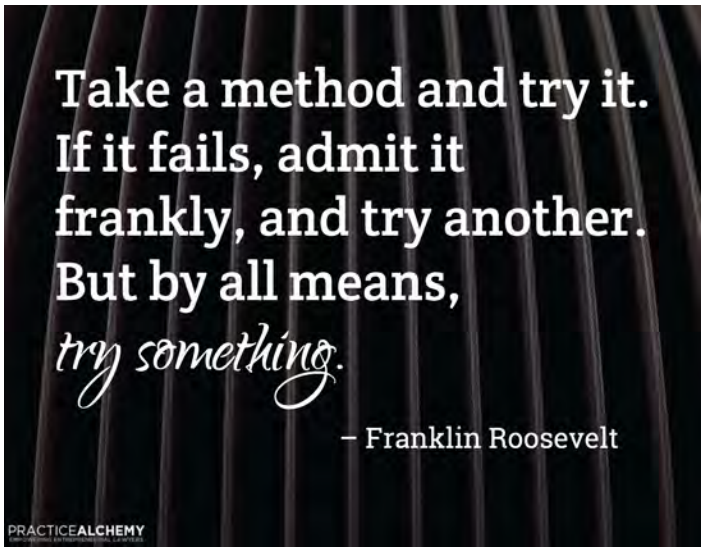
COMP CORNER FROM PAGE 20

that *Dana Holding* does not apply to future cases.

This is a reminder that the Amicus Committee of the Pennsylvania Association of Justice is looking to support practitioners pursuing these issues at the appellate level. Contact can be made to the Amicus Committee on the PAJ website.

By: Tom Baumann, Esq., of Abes Baumann, P.C.

tcb@abesbaumann.com



HOT OFF THE WIRE FROM PAGE 24

Applying their analysis to the Leights' Complaint, the Court found that the allegations did not aver that the UPMC entities were negligent in their examination or treatment of Shick while he was an involuntary inpatient or outpatient, or a voluntary inpatient at any facility. Instead, the Leights attempted to expand the scope of the MHPA by asserting that treatment decisions on a voluntary outpatient basis established a duty upon the UPMC entities to protect Kathryn Leight from Shick. However, the Superior Court concluded that because the physicians never started the process for seeking an emergency examination, no decision was ever made as to whether Shick should be involuntarily examined and receive involuntary treatment. The Court stated that it could not conclude that the mere thought or consideration of initiating an involuntary examination during voluntary outpatient treatment falls within the explicit scope of the MHPA.

Accordingly, the Superior Court concluded the Leights could not sustain a cause of action under the MHPA and the trial court had properly granted the preliminary objections.

By: Shawn David Kressley, Esq.,

of Delvecchio & Miller, LLC

shawn@dmlawpgh.com

SHANNOPIN COUNTRY CLUB

26th Annual Ethics Seminar & Golf Outing

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1 Ethics Credit CLE, featuring Past President Larry Kelly, speaking on *Ethics Update 2019.*

Includes breakfast buffet.

Golf with cart and dinner buffet. Discounted foursome prices available for WPTLA members.

Registration information available very soon!

Every year our organization sponsors several outreach programs designed to highlight the impact of the Rule of Law on our daily lives. One of our finest outreach programs is the annual Essay Contest. Each school district in our area is invited to submit an essay addressing a specific legal problem. Our Essay Committee endeavors to present an issue which is both current and illustrative of the tense interplay between our rights and our social responsibilities.

This year's problem arose from an actual case which is still pending in the 9th Circuit.

FACTUAL BACKGROUND

Kennedy v. Bremerton School District , 880 F.3d 1097 (9th Cir. 2018)

Plaintiff was employed as a football coach by the Defendant School District. Plaintiff is a practicing Christian. The school district is religiously diverse to include families practicing Judaism, Islam, Buddhism, Hinduism and Zoroastrianism.

Kennedy's religious beliefs require him to give thanks through prayer at the end of every game. Since he is giving thanks for the efforts made by his football team, his beliefs require him to give thanks on the football field where the competition took place. Thus, after the game had concluded and the coaches and players had met at midfield and shaken hands, Plaintiff felt compelled to "take a knee" at the 50 yard line and offer a brief prayer of thanksgiving. This was done in full view of his players as well as players, coaches and fans of the opposing team. Eventually, these "silent prayers" developed into "short motivational speeches" given to the players. These messages contained religious content. During this time, the Plaintiff was wearing clothing bearing the school colors and logo.

After learning of this, the School District warned against continuing this. The District offered Kennedy a series of accommodations which included allowing the Plaintiff to offer a short prayer at the 50 yard line after the stadium had emptied. After initially agreeing, Kennedy insisted on praying at midfield immediately following the game.

Warnings were followed by repeated violations. Kennedy was then placed on administrative leave. He filed suit against the School District seeking injunctive relief.

TOPIC QUESTION: WAS THE SCHOOL DISTRICT JUSTIFIED IN PLACING KENNEDY ON ADMINISTRATIVE LEAVE FOR EXERCISING WHAT HE CLAIMED WERE HIS SINCERE RELIGIOUS BELIEFS?

By: Charles W. Garbett, Esq., of Luxenberg Garbett Kelly & George, P.C.

cgarbett@lgkl.com

I. The School District was justified in placing Kennedy on administrative leave

In *Kennedy v. Bremerton School District,* the plaintiff was rightfully put on administrative leave by the school district because he promoted religion while acting in his official capacity as a representative of the school in spite of being offered reasonable accommodations by the school district to practice his religion.

II. Federal laws provide guidance for the school district

In this case, Federal law, which always takes precedence over state law, provides guidelines for how employers and employees should treat religious freedom. While a person's right to practice their religion is guaranteed by the First Amendment, other considerations apply in specific instances where an employer-employee relationship exists as understood under the Civil Rights Act of 1964, and particularly where students are involved, as directed by the Establishment Clause.

a. Title VII of the Civil Rights Act of 1964 requires employers, including schools, to reasonably accommodate the religious practices of an employee, unless doing so would create an undue hardship on the employer

Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion. It generally *(Continued on Page 28)*

applies to employers with 15 or more employees, including federal, state, and local governments. Under this Act, employers must accommodate an employee's sincerely held religious beliefs or practices, unless doing so would cause an undue hardship.

In *Kennedy v. Bremerton School District,* the school district cannot discriminate against Kennedy for practicing his religion. Instead, the employer must offer reasonable accommodation for Kennedy to practice his religion.

b. The US. Constitution's Establishment Clause prevents employees from advocating a particular belief system in front of students

However, while Title VII of the Civil Rights Act of 1964 bars the employer from discriminating against the employee based on their religion, the Establishment Clause in the U.S. Constitution places restrictions on a school employee. The Establishment Clause under the First Amendment prohibits the government from making any law "respecting the establishment of religion." This includes any actions that may unduly prefer one religion over another or even over non-religion. This Clause clearly comes into play in this case because Kennedy is an employee of the school, which is a government office. The U.S. Department of Education offers further enlightenment of the issue.

As stated by the U.S. Department of Education, "When acting in their official capacities as representatives of the state, teachers, school administrators, and other school employees are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively participating in such activity with students." In addition, they cannot engage in personal prayer while in the presence of students because students may perceive such activity as promoting religion. While the U.S. Department of Education's guidance on this matter is not law, it is policy that is directly aligned with the Establishment Clause and should also be considered.

III. Kennedy's actions constituted promoting religion and were unconstitutional

The facts of the case show that Kennedy promoted religion in front of students. He prayed openly in front of students right after the football game had concluded by kneeling at the fifty-yard line of the field. He also prayed out loud, eventually developing these prayers into longer, more involved motivational speeches that were directly targeting students and football players. The messages were all religious in nature.

a. Kennedy was acting as a representative of the government

During Kennedy's prayers and religious motivational speeches, he was clearly acting as a representative of the state. He was currently employed by the school district. He was carrying out his job duties as assigned to him by the school, i.e. coaching.football, while promoting religion. He was also wearing clothes that could be argued to be considered a work uniform, which in this case bore the school colors and logo.

b. Kennedy s actions continued in spite of warnings and reasonable accommodations made under Title VII

The school district made reasonable accommodations for Kennedy to practice his religion in a capacity that would not contradict the Establishment Clause. The school district offered to allow Kennedy the use of the football field after the game had concluded and the field was emptied of students. This shows that the school met its burden under Title VII of the Civil Rights Act of 1964.

Iv. There is precedence showing that the school district's actions were justified

The courts have looked at numerous cases where there has been a need to balance religious freedom and freedom of speech with the Establishment Clause where employer and employees are concerned. These previous cases can offer insight into this case.

a. Reasonable accommodation eliminates the conflict between employment requirements and religious beliefs.

Courts have held that Title VII does not require the employer to satisfy all of the individual's requests; it only needs to eliminate the conflict with the individual's religious beliefs. In *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), the U.S. Supreme Court held that Title VII does not require an employer to grant the employee a particular or specific accommodation they request since any reasonable accommodation by the employer is sufficient to meet the accommodation obligation. Thus, the employee may not be entitled to "the most beneficial accommodation." *(Continued on Page 29)*

TRIVIA CONTEST

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

Trivia Question #18

What common office supply item is named for the Asian "abaca" fiber used to make them?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by June 1, 2019. Prize for this contest is a $100 Visa gift card. Winner will be drawn the week of June 3, 2019. The correct answer to Trivia Question #18 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 #17 – **Approximately 15% of school-age kids do this activity today, but in the 1960s and 1970s, about half of school-age kids were doing the same activity daily. Answer: Walk to school.**

Congratulations to Question #17 winner Russell Bopp, of Marcus & Mack.

SCHOLARSHIP ESSAY CONTEST FROM PAGE 28

In the case of Kennedy, the school district's offered accommodation varied only slightly from his original desire to pray on the field at the fifty-yard line. The school allowed him to carry out all of his religious activities in a delayed time frame.

Kennedy's actions go beyond simply wearing clothing that could be interpreted to promote religion. Kennedy actively and orally promoted religion directly to students, leaving no room for interpretation.

V. Kennedy's leave of absence was justified

The facts of the case and the federal law guidelines make it clear that Kennedy's leave of absence was justified. Kennedy's actions constituted promoting religion and continued in spite of offered reasonable accommodation by the school district.

Essay written by Hunter Evans of Claysburg Kimmel High School,

Claysburg, PA

Have you considered running for a seat on WPTLA's Board of Governors? If so, you should know that there are attendance requirements that accompany those positions. These are as follows:

1. Minimal participation shall be defined as being in attendance of at least 50% of the scheduled Board meetings **and** of at least three (3) of eight (8) WPTLA Signature Events over a two (2) year period.

2. As there generally are seven (7) Board meetings between August and May of each year, Board of Governors members are required to attend seven (7) Board meetings over a two (2) year period running from August to May of the following year. Attendance via telephone is sufficient to satisfy this requirement. Attorneys who physically attend a Board Meeting are recommended to attend the dinner following the meeting, but are not required to do so.

3. WPTLA Signature Events consist of the President's Challenge 5K Run/Walk/Wheel, the annual Judiciary Dinner, the Comeback Award Dinner and the Ethics Seminar/Golf Outing. Members of the Board of Governors are required to attend at least three (3) of eight (8) WPTLA Signature Events over a two (2) year period running from August to May of the following year.

4. It shall be the responsibility of the Executive Director to maintain attendance records, and to advise members of the Board of Governors periodically of their record of attendance. Any discrepancies in the attendance records must be brought to the attention of the Executive Director in a timely fashion.

5. If a member of the Board of Governors suffers from an illness, family issues, or a work schedule which prohibits him or her from fulfilling the participation requirements, that individual may correspond directly to the Executive Director and President, with appropriate proof, who in their absolute discretion may determine whether a particular individual is temporarily excused from fulfilling the aforedescribed attendance requirements.

6. Any individual may be removed from the Board of Governors for failure to satisfy these attendance requirements and in the event of such removal will be promptly notified in writing by the Executive Director.

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Through the Grapevine....

Presidents Club and Board of Governors Member Max Petrunya has opened his own firm: Max Petrunya, P.C. Max can be found at 5 Bayard Rd, Unit 917, Pittsburgh 15213. His phone is 412-720-3497 and email is maxpetrunyapc@gmail.com

Young Lawyer J.J. Bolock has landed at Goldberg Kamin & Garvin, 437 Grant St, Frick Bldg, Suite 1806, Pittsburgh 15219. P: 412-281-1119 Email: jj.bolock@gmail.com

Past President Jon Mack has stepped into retirement, and is now Of Counsel with Marcus & Mack. Enjoy, Jon!

Russell Bopp, of Marcus & Mack, welcomes his second child with wife Brittany. Harper Bopp arrived on March 21 at 6 lbs 3 oz, 20 inches, and joins big brother Rowan at home.

Katelyn Edwards, of Robert Peirce & Associates, also welcomes a new baby with her husband. Hunter Allen Edwards was born on March 20, weighing in at 7 lbs 15 oz.

Congratulations to both sets of parents!