THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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Winter 2015

UPCOMING EVENTS FOR WPTLA

A **January Reception** at the **Lemont Restaurant in Pittsburgh** is scheduled for **Thurs, Jan 21, 2016**. We'll welcome our Junior Members that evening.

Reptile is coming to town in **February 2016**. WPTLA will host a 1/2 day introductory seminar. Keep an eye out for more details coming soon.

March 2016 will be our **Members Only Meeting** when we'll elect the Officers and Board of Governors for the coming fiscal year. Details to be announced.

The Annual Judiciary Dinner is scheduled for **Fri, May 13, 2016**. We'll be in the new PNC Champions Club at Heinz Field.

COMEBACK AWARD DINNER

*By: David M. Landay, Esq.***

WPTLA's annual Comeback Award Dinner was held at the Duquesne Club on November 11. It was well-attended by friends and family of the Comeback Client of the Year, attorneys, business partners and others.

This year's recipient was Joseph Pasqualini. He was unanimously chosen by the committee from a slate of other well-deserving nominees.

Back in 2009, Joe, then age 20, was seriously injured by a drunk driver while walking home with his brother. According to the medical reports, Joe had been "skeletally decapitated" meaning that, although he looked fine on the outside, his skull had separated from his spine. The doctors thought that if Joe survived, he would never have a conscious thought or purposeful movement.

Joe did, in fact, survive and, given his prognosis, has flourished. Although still relegated to a wheelchair, he is able to speak with difficulty and have meaningful conversations. With additional training, in time, he hopes to walk.

Jason Schiffman, the nominating attorney, showed a moving video collage of Joe's accomplishments both before and after his devastating injuries. Joe's father, Jim, who retired from his career as a CIA officer and Army Lieutenant Colonel, gave a heartfelt speech. WPTLA made a $1,000 donation to Joe's charity of choice, the Slippery Rock Voluntary Volunteer Fire Company and Rescue Team. See their thank you letter on p. 17.

*** Dave is a WPTLA Member from the firm of David M. Landay, Attorney at Law. Email: dave@davidlanday.com*

Pictured above, from L to R: Board of Governors Member Jason Schiffman, President Larry Kelly, Joe Pasqualini, Joe's father Jim Pasqualini. Photo courtesy Martin Murphy. Additional photos on page 15.

President
Lawrence M. Kelly

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A Message from the President …

*By: Lawrence M. Kelly, Esq.***

When I was young, my father, Fred Kelly, worked for a life insurance company. He told me at the time that it was his opinion that insurance companies were the best run businesses in America.

My father did not realize how prophetic he was when he made that statement to me in the 1960's. If my father were alive today, he would have known that in 2014 State Farm Insurance Company announced a pre-tax operating profit of $3.4 billion. He would have also learned that the Allstate Insurance Company for 12 months ending June 30, 2015, announced a gross profit of $3.05 billion.

This is America, and I certainly do not begrudge capitalism or companies earning profits. However, I can still remember the Allstate commercials that began running in the 1990's that stated "they cheat you pay." In that commercial, Allstate Insurance Company would show a fabricated automobile accident and would smugly announce to the viewers that when drivers commit fraud (cheat) then you, the policyholder, are required to pay more in automobile insurance premiums. I cringe whenever I think of that commercial.

Allstate Insurance Company has not stopped perpetuating this myth. If you were to go to their website today, you would find that they have a whole section on automobile insurance fraud. In that, they specifically set forth "schemes" and "scams" whereby motorists will try to defraud the system.

I am not naïve enough to believe that there is not some fraud in the automobile insurance system. However, I have been a trial lawyer for 32 years and I can categorically tell you that I have never had a client come to my office where I thought for one second that the accident that he was explaining to me did not occur or that somehow there was fraud involved in the event.

When I read this information on Allstate Insurance Company's website, I begin to think – who cheats and who pays? When the Pennsylvania Motor Vehicle Financial Responsibility Law was placed into effect more than 30 years ago, the promise made by the insurance companies at that time was that if we can control the costs then we can reduce the premiums of our insureds. I do not know about you, but my premiums have not gone down $.10. Were the lobbyists perpetuating a fraud on our state's legislature when they lobbied to have this law put into effect?

Furthermore, I have deposition transcripts in my office where medical providers have admitted that they have earned in excess of $1 million a year doing medical/legal work for the insurance companies. When the insurance industry pays physician groups over a $1 million a year to do medical/legal work, do you think that maybe the insurance industry gets the answer they are always looking for? Again, who cheats and who pays?

If the insurance industry is not held responsible for the injuries to our clients and is not required to pay medical expenses that are incurred as a result of those injuries, then in that event, it is the American public who pays. If there is no other insurance available, then the injured party must turn to the Department of Human Services, a public benefit that is paid for by most citizens in the Commonwealth of Pennsylvania.

There is not a trial lawyer left in the Commonwealth of Pennsylvania who can say with a straight face that the propaganda put forth by the insurance companies has not affected the jury pools that decide our cases. Maybe it is time we let the general public know that State Farm Insurance Company earned $3.4 billion in 2014 and that Allstate Insurance Company, notwithstanding its claims of fraud, earned $3.05 billion in 2015. Maybe it is time we educate the public to the fact that they pay physicians over a $1 million a year to tell the juries there is nothing really wrong with the Plaintiff.

Continued on Page 3

PRESIDENT'S MESSAGE *(Continued from Page 2)*

The propaganda does not only involve the automobile insurance industry. Who remembers the medical malpractice insurance crisis that was raised in our state not so long ago? I remember a rally of doctors on the City Square in my home town where they were holding up signs that trial lawyers were chasing them out of the Commonwealth of Pennsylvania. I went to the rally myself and held up a sign at that time that said 98,000 Americans every year die in hospitals as a result of preventable errors and that physicians were not leaving our state and in fact there was an increase of 7% at that time. As you might imagine, I was not the favorite son of the medical profession in New Castle, Pennsylvania.

The study that indicated 98,000 die as a result of medical errors in hospitals was done by the Institute of Medicine in 1999. Today, the news is not better, it is four times worse. A study recently completed by the Journal of Patient Safety found that 440,000 die each year as a result of preventable medical errors. Medical errors are now the third leading cause of death in the United States. Medical errors at the present time are killing off the equivalent of the entire population of Atlanta in one year. Fifty thousand men and women died tragically in the Vietnam War. Nine times more than that die each year in hospitals.

Maybe it is time we let the public know that hospital care in our state needs to be addressed. In every closing argument that I make in a medical malpractice case I tell the jury that you will decide whether or not the medical care at issue in this case is acceptable for your community. Only you can change it.

The Journal of the American Medical Association found that it is the employers who are paying an additional $39,000.00 every time a medical error occurs resulting in a surgical site infection. Should it be the employers who bear that burden or should it be the insurance company? Forbes Magazine in a recent column, when speaking of preventable medical errors in the hospital, said that, "there is little excuse for this record of abject failure, and the misery and death of millions."

The article went on to say that, "the reason many hospital leaders fail to put a priority on safety is that we as a country have not enforced them to do so. On the contrary, we haplessly pay them for these errors. We tolerate hospital lobbyists insisting on hiding their error rates. . . . When we don't demand safety, they don't supply it."

In the upcoming months as President of the Western Pennsylvania Trial Lawyers Association, I intend to make this information available to the public in whatever method is necessary to get the real truth out. WPTLA is organizing a committee to discuss these issues. If you would like to be involved, please contact me at my office.

*** Larry is a WPTLA Member from Luxenberg Garbett Kelly & George, P.C. Email: lkelly@lgkg.com*

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 28, 2015-2016

	Article Deadline	Publication Date
Vol 28, No. 3 Spring 2016	Mar 7, 2016	Mar 21, 2016
Vol 28, No. 4 Summer 2016	Jun 6, 2016	Jun 20, 2016

In This Issue

Features

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HABITAT FOR HUMANITY

*By: Justin Joseph, Esq. ***

WPTLA members were hard at work again this fall volunteering with Habitat for Humanity of Beaver County. Erin Rudert, Laura Tocci and her husband Bill Anderson, Laurie Lacher, Jeff Kranking, and Justin Joseph worked at one of two in progress "rehab" projects underway in Beaver County. This was our second involvement with Habitat for Humanity this year at the same site. Our volunteers made a lot of progress hanging drywall, painting basement walls, tearing down a large front porch awning, and moving gravel for a driveway base.

With the help of volunteers and organizations like WPTLA, Habitat for Humanity of Beaver County has completed 22 rehab construction homes and 32 new construction homes in the last 20 years. The partnered family is required to work on this home during construction in addition to meeting income eligibility guidelines. We were lucky enough to meet and work directly with this family in the spring. The home will then be appraised and sold to the partnered family at fair market value and they pay low monthly mortgage payments.

If you are interested in joining our next project watch your email inbox as we plan on volunteering again next year. There are tasks for members of all skill levels and experience.

** *Justin is a WPTLA Member from the firm of Edgar Snyder & Associates, LLC. Email: jjoseph@edgarsnyder.com*

"I was reluctant to volunteer in the past because I don't have any appreciable "house" skills. When Laurie said the volunteers would be asked to paint interior walls, I figured this was my best chance to participate since that is one of the (very few) things I know how to do. I'm so glad I volunteered my time and a small amount of skill to help with the Habitat project. I had some general idea about how Habitat for Humanity operated before volunteering, but the representative there from Habitat explained the whole process from start to finish. It's a very worthwhile endeavor and I left feeling that the 5 hours Laurie, Laura, and I spent painting basement walls made a real difference in a family's life."

Erin Rudert

Pictured L is the house in its original condition when the project began. WPTLA volunteers have replaced windows, laid sub-flooring in the upstairs bathroom, hung dry wall, removed the porch awning and windows, and painted the basement walls. Pictured above are Member Laura Tocci and our Executive Director Laurie Lacher.

TEN COMMANDMENTS OF LAWSUITS (in no particular order)

*By: Dave Landay, Esq. ***

1. **Never** assume a business is owned by a parent corporation when it might be just a franchisee. (McDonalds restaurants, for example)

2. **Never** assume someone is an employee when he may be an independent contractor. (When in doubt, sue them both.)

3. **Never** sue a dead person. (Check a resource such as the Social Security Death Index, http://search.ancestry.com/search/db.aspx?dbid=3693)

4. **Never** assume the Prothonotary or civil clerk will transmit your complaint to the sheriff or otherwise arrange for service of the lawsuit. (You must make diligent efforts for service of process.)

5. **Never** wait until the last minute to file a lawsuit. (For obvious reasons.)

6. **Never** settle with a motorist for less than full value without considering whether there is other coverage (underinsured motorist, for example) or other potentially responsible parties.

7. **Never** assume the defendant will timely sue other potentially liable parties. (File and serve a separate Writ of Summons which can be consolidated with the original case later, if necessary.)

8. **Never** (in federal court) refrain from suing a party even if that party is timely joined. (The additional defendant can only be liable over to the original defendant, not directly to the plaintiff.)

9. **Never** accept a client's case without checking whether he has an admissible criminal record. (A jury must believe your client deserves to be compensated.)

10. **Never** allow your client to sign a general release when a more specific release will do. (A general release could waive claims for medical benefits, UIM benefits, medical malpractice, etc.)

MEMBER PICTURES & PROFILES

Name: Timothy Conboy

Firm: ConboyLaw LLC

Law School: Univ. of Pittsburgh School of Law

Year Graduated: 1982

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

Tell us something about your practice that we might not know: I handle commercial litigation cases.

Most memorable court moment: I started a jury trial on the day I was sworn in as a lawyer.

Most embarrassing (but printable) court moment: I lost my first jury trial before I was a lawyer for 24 hours.

Most memorable WPTLA moment: The Comeback Dinner every year.

Happiest/Proudest moment as a lawyer: Starting a new law firm with my brother Mark and serving as President of The Pennsylvania Association for Justice.

Best Virtue: Compassion for my clients.

Secret Vice: Sleeping in.

People might be surprised to know that: I enjoy touring old homes.

Favorite movie: The Graduate.

Last book read for pleasure, not as research for a brief or opening/closing: Rogue Lawyer by John Grisham.

My refrigerator always contains: yogurt and ice cream.

My favorite beverage is: ice tea.

My favorite restaurant is: Buon Giorno Café, Smithfield St.

If I wasn't a lawyer, I'd be: a basketball coach.

USING CORPORATE REPRESENTATIVE DEPOSITIONS IN PRACTICE

*by Max Petrunya, Esq. ***

On October 9, 2015, WPTLA had the privilege of hosting nationally renowned trial attorney Mark Kosieradzki, Esquire's 3 credit CLE program on the use of corporate representative depositions in litigation. Attorney Kosieradzki is considered the preeminent expert on the use of corporate representative depositions and the use of corporate representative depositions in practice.

The Corporate Representative 30(b)(6) deposition is the most underutilized and misunderstood discovery tool available to lawyers facing corporate adversaries. During the presentation, Attorney Kosieradzki explained how to use Corporate Representative depositions to expose unfair discovery practices of defense counsel that purposely hide documents throughout litigation. Specifically, Attorney Kosieradzki explained that using Corporate Representative document depositions allow counsel to acquire all information known to the corporation, and to uncover all documents related to the investigation of the incidents forming the basis of a plaintiff's Complaint.

Corporate Representative depositions are not restricted to the parties involved in litigation. Corporate Representative depositions can be taken of any party that may have discoverable information related to the case. Further, corporate representative depositions can be taken on multiple issues and from multiple designees for one corporation.

Attorney Kosieradzki also discussed the requirements of the attorney defending the corporate representative deposition; specifically, that the individual chosen as the corporation's representative must be fully prepared for the matters designated in the deposition notice. The corporation must provide information regarding what the organization knows about the matters of inquiry. This means that the individual designated as the corporate representative cannot simply say that they have no personal knowledge of the matters designated. In the event that the corporation fails to adequately prepare its corporate representative, sanctions can be sought before the court and further depositions from individuals who do have the knowledge to satisfy the requirements of the deposition notice can be taken.

All of the information provided by Attorney Kosieradzki at the presentation is available on his DVD, which was included with the price of registration to all attendees. WPTLA obtained additional copies of Attorney Kosieradzki's DVD, which were available for purchase for $105. Ten WPTLA members purchased the DVD.

Thanks to all of our members that attended the presentation on October 9, 2015. Thank you to all WPTLA members for your continued support of our education programs. Stay tuned for more CLE opportunities in 2016. If you have any suggestions for CLEs, please contact Max Petrunya at mpetrunya@peircelaw.com or call at (412) 281-7229.

***Max is a WPTLA Member from Robert Peirce & Associates. Email: mpetrunya@peircelaw.com*

Coming in February …

REPTILE

an Introductory Reptile Course.*

The 1/2 day program will cover such topics as:

- What is Reptile?
- What drives a juror to action?
- How do I get a venire to respond and communicate critical information?
- How can I win my case by the end of opening statement?
- Is the Reptile soundly anchored on time tested black letter law (law many of us have forgotten)?

More details will be available soon.

*** This course is for Plaintiff's lawyers only.**

BY THE RULES

*By: Mark E. Milsop, Esq.***

FEDERAL RULE CHANGES

Many of you have probably heard something about impending changes to the Federal Rules of Civil Procedure. They are now in effect as of December 1, 2015. If you have not yet had an opportunity to review the changes, I offer you the following highlights:

Rule 1 (Scope and Purpose): The underlined language has been added "They [the rules] should be construed, and administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The committee note explains that this change is meant to cause the parties to share the responsibility for using the rules in the proper way and not to increase the cost of litigation or cause delay.

Rule 4(m) (Time Limit for Service): The time for service has been reduced from 120 to 90 days. This is meant to speed up litigation, but as a practical matter, it may prove harsh to Plaintiffs who encounter an elusive defendant. The rule has not eliminated the opportunity for the Plaintiff to show cause why the case should not be dismissed if service is not completed in 90 days.

Rule 16 (Pretrial Conferences; Scheduling; Management): In Rule 16(b)(1) provision for having the conference by telephone, mail or other means is eliminated. However, the comment provides that this may still be done. The intent may be to encourage in person conferences, but the end product does not require them. Rule 16(b)(2) again attempts to eliminate delay by reducing the time to issue a scheduling order to 90 days from service or 60 days from the entry of an appearance by any defendant. The rule does allow for some flexibility subject to a good cause standard.

In cases where there is e-discovery needed, 16(b)(3) may prove significant in that it provides that a scheduling order may provide for discovery or preservation of electronically stored information in addition to the disclosure previously provided. Presumably defendants may be more rigorously probed for relevant information with this new provision. In addition the order may now direct that the parties request a conference before moving This change is carried through as a technical amendment to other portions of the Rules.

Rule 26: (Disclosures and Discovery) Rule 26(b)(1) may include the most sweeping change. It has been amended as follows (with underlines indicating new language and strikethrough indicating the deletions):

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

A change to Rule 26(c)(1)(C) will allow the Court to allocate the cost of discovery in a protective order. If this change is too frequently employed upon the request of defendants there is a potential to chill discovery. On the other hand, there are situations where discovery which may have been otherwise denied may now be granted subject to a measure of cost shifting.

Change has been made to Rule 26(d) to allow early service of requests for production of documents and other Rule 34 discovery though it will not be considered served until the Rule 26(f) conference. There is also a conforming Amendment to Rule 34.

Rules 30, 31 and 33 (Depositions and Interrogatories): Additional time for Depositions, other than the allowed 7 hours and additional interrogatories beyond the 25 now allowed will we be allowed subject to the changes to Rule 26(b)(1) outlined above.

Rule 34 (Production of Documents etc.): In addition to the conforming amendments relating to Rule 16, more stringent provisions for objections are made and require specificity, and in my opinion, more importantly, requires that the party specify whether any responsive materials are being withheld on

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BY THE RULES *(Continued from Page 7)*

the basis of the objection. The rule also allows the production of documents or data rather than the inspection. In most instances, this is merely providing for what is the current practices. A related conforming amendment appears in Rule 37.

Rule 37 (Sanctions): These amendments are well taken, they provide sanctions for the failure to preserve electronically stored evidence. The rules are stronger where there is a finding of intent. An unfortunate effect of this may be side litigation as to whether a failure to preserve was intentional.

Rule 84 (Forms): The appendix of forms is abrogated. The exception is that the forms for acceptance of service have been moved as an appendix to Rule 4.

CAVEAT: The Amendments and their Notes span 57 pages. I do not begin to claim that this article is comprehensive. Rather, I am attempting to provide highlights of the changes that I believe are most relevant to personal injury litigation. When working on a specific case, you are encouraged to consult the rules.

ORAL ARGUMENT IN THE STATE COURTS

In what I consider an unfortunate decision, the State Rules committee has completely gutted Rule 211. Rule 211 previously provided for oral argument as of right. The rule now simply provides:

> Any interested party may request oral argument on a motion. The court may require oral argument, whether or not requested by a party. The court may dispose of any motion without oral argument.

Although I can understand that oral argument may not be necessary in every case, where an issue is complex, having the ability to communicate one's position in more than one manner (i.e. written documents/briefs and oral argument) is an indispensable part of providing a party a fair opportunity to be heard. I particularly think that the proponents of this rule have missed the fact that some people understand better by reading and others by hearing. Similarly, some explain better by speaking, others by writing. In addition, where there is confusion (which is not always realized even by bright minds), oral argument can be indispensable.

"Success isn't just about what you accomplish in your life; it's about what you inspire others to do."

-- Unknown

Each year, WPTLA sponsors a Scholarship Essay Contest for high school seniors in the Western District of PA. Three winning essays are chosen by a committee as the best of those submitted. These winners are invited to attend the Annual Judiciary Dinner, where they are presented with a certificate of their achievement, along with a $1,000 scholarship award. Last year's high school students were asked to write an essay discussing their opinion in a fictional case on the issue of whether or not the State's denial of the application for Special Organization License Plate submitted by the Hands Up 4 Peace is an unconstitutional violation of the First Amendment or whether such control is permissible in light of the State's role in issuing the license plates. Below is the one of 2015's three winning essays.

Hands Up 4 Peace is a nonprofit organization that has applied to participate in the Special Organization License Plate Program. This program rewards organizations with specially designed license plates with the specific organization's logo on it. The only qualifications to apply for these license plates is that the organization must be nonprofit and their primary mission needs to be directed in serving the community through charitable actions. If these qualifications are not met, The Department of Transportation has the right to deny any application if they feel the plate is offensive in purpose in the expression of the organization's point of view. Hands Up 4 Peace has a mission designed to promote a peaceful resolution to conflict and to spread awareness of racial diversity throughout the community. The Hands Up 4 Peace organization had their application denied because the Department of Transportation concluded that this organization's plate was expressing a view point that could be deemed offensive to some individuals. The denial of this organization's application is unconstitutional and goes against the First Amendment. They meet all the qualifications the Special Organization License Plate Program requires; therefore denying their application is wrong. If all of the qualifications are met, the Department of Transportation is infringing on the organization's freedom of speech and freedom of press.

In the Texas Sons of Confederate Veterans vs. Victor T. Vandergriff case, the TSCV. applied for the special license plate, but like the Hands Up 4 Peace, their application was denied due to the possible offensive message of the plate. The Hands Up 4 Peace's logo is a drawing of two hands facing palm out while the Texas Sons of Confederate Veterans had a plate depicting an image of the confederate flag. Today in the twenty-first century, a depiction of a confederate flag could offend a lot more people than a drawing of two hands WOUld, including me. I am an African American male, and I know for a fact that the African American community would be appalled to see license plates depicting a confederate flag. Even for Caucasian individuals, one cannot help but feel awkwardness when discussing slavery, or in this case seeing a confederate flag on the back of someone's car. However, the Court of Appeals felt otherwise by favoring in the TSCV's appeal of their plate being denied by stating it constituted impermissible viewpoint discrimination and violated the First Amendment.

The Hands Up 4 Peace application for a specialized license plate was denied because the Department of Transportation concluded that the organization's logo was intended to express their own idea or viewpoint that could be defined as offensive to some people. However, the decision to deny their application because their plate demonstrates their personal view point too strongly is contradicting the ACLU v. TATA case in North Carolina. This case is also one involving specialty plates. The American Civil Liberties Union filed a suit against the Department of Motor Vehicles because North Carolina offers plates simulating a Pro-Life message but not a Pro-Choice one. If the Department of Transportation was to keep their qualifications consistent amongst all plates, then neither a Pro-Life nor a Pro-Choice message can be depicted upon a specialty plate. Both of these are strong messages that could be deemed highly offensive to those who oppose the message. The case is still currently pending, but it appears that the ACLU is going to win the case and be rewarded by the Department of Motor Vehicles allowing Pro-Choice specialty plates. Therefore, it is unconstitutional and violates the First Amendment to deny the Hands Up 4 Peace's application.

On August 9,2014, Michael Brown was shot to death by a cop in Ferguson, Missouri after robbing a convenience store. This event would spark a revolution among African Americans and controversy throughout the whole nation. Due to Michael Brown's death appearing to be the result of racism, the community became enraged by burning down buildings and vandalizing the area. After this, the people in Ferguson began to put their hands in the air to plead their innocence anytime a police officer was around to send a message of the event. The Hands Up 4 Peace's mission statement is "the promotion of peaceful conflict resolution and racial diversity awareness through community outreach and youth programs." This organization is perfectly designed to help restore the peace in Ferguson, Missouri. The world needs more charitable organizations that are more concerned with developing peace within society rather than making profit. However, this organization cannot spread their name out to the world because the Department of Transportation denied their application for a specialty plate. Still today, a tension remains between the African American community and the police force throughout the country, but particularly in Ferguson, Missouri.

The Department of Transportation should reward the Hands Up 4 Peace organization with a specialty plate so they can serve their purpose and help resolve racial diversity conflicts, like that in Ferguson. They should be allowed to participate in the

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ESSAY *(Continued from Page 9)*

Special Organization License Plate Program because they meet all the qualifications and because they would be serving a bigger purpose than some of the other organizations that have already been awarded with a specialty plate. The Texas Sons of Confederate's application was not denied despite their plate depicting an image of the confederate flag. Approving this organization's application will could do more harm than good in society by stirring up emotions in the African American community just as the shootings in Ferguson did. Seeing a license plate like this could make one think that the individual bearing the plate is a racist in today's society. Accepting the Texas Sons of Confederate Veterans application despite the qualifications needing to be met for a specialty plate deems the denial of the Hands Up 4 Peace application unconstitutional

Submitted by:
Antonio Frisina, Cathedral Prep School

TRIVIA CONTEST

Enter for a Chance to Win a $100 Visa Gift Card
Trivia Question #5

In the film, Casablanca, Humphrey Bogart used the same line four times. What was that line?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by Wednesday, January 20, 2016. Prize for this contest is a $100 Visa gift card. Winner will be drawn January 21. The correct answer to Trivia Question #5 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!)

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 #4 - **What is the largest number you can write using only 2 digits and no other mathematical symbols? 9^9**

Congratulations to Question #4 winner Tim Riley, of Conner Riley Friedman & Weichler in Erie.

COMP CORNER

*By: Thomas C. Baumann, Esq.***

Payment of Medical Bills and the Statute of Limitations

In Sloan v. WCAB (Children's Hospital of Philadelphia) 1213 C. D. 2014; 1399 C. D. 2014, the Commonwealth Court has established a bright line as to the effect of payment of medical bills on section 413 (a) and section 315 limitations. It clearly establishes that the issuance of a medical only Notice of Compensation Payable does not toll the statute of limitations for receipt of wage loss benefits.

The Claimant suffered an injury to her right elbow on April 20, 2004. That injury was accepted by a Notice of Compensation Payable describing the injury as lateral epicondylitis. She received partial disability benefits after returning to work in a modified duty position earning less than the preinjury average weekly wage.

Claimant injured her right elbow again and her right knee on December 3, 2006. At that time a Notice of Compensation Payable medical only was issued. Claimant continued modified duty work and continued to receive partial disability benefits for the 2004 injury. She stopped working on November 6, 2007 for right knee replacement surgery. She did not return to her job after the knee replacement surgery.

On May 31, 2011 the Claimant filed a Reinstatement Petition seeking total disability benefits as of November 1, 2007. The Workers Compensation Judge found the Claimant totally disabled as of November 17, 2007 for both recognized injuries. The Judge awarded payment of medical bills for both recognized injury including the knee replacement surgery the Claimant underwent.

An appeal followed to the Worker's Compensation Appeal Board. The Board found that total disability benefits could not be paid based on the 2006 work injury. It determined that Claimant must proceed within three years under section 413(a) rather than within the 500 week period for reinstatement of suspended benefits. The Board reversed the award of benefits for the 2004 work injury concluding that the medical evidence did not support disability as a result of that injury. The Board also concluded that medical benefits were properly payable under the 2006 work injury based on the NCP medical only.

Both parties appealed to the Commonwealth Court. Claimant argued that under the medical only 2006 NCP she could seek reinstatement at any time within 500 weeks of the date of the document. The employer sought to escape liability for the medical expenses related to the work injury.

The Commonwealth Court conducted an analysis of section 413 (a). It noted the three-year statute of limitations and the 500 week limitation. Finding that they must be construed together and both be given effect, it referenced Ruth Family Medical Center v. WCAB (Steinhouse), 718 A.2d 397, (Pa.Commw. 1998), where a Claim Petition was filed that led to immediate suspension since there was no wage loss and Shaffer v.WCAB (Hollenback Township), 153 PA Commonwealth 430, 621 A. 2d 1125 (Pa. Commw. 1993), which reached a similar conclusion. The Court distinguished those cases by noting that there is a difference between a judicial decision and a medical only NCP. It concluded "… Because no disability had ever been recognized by employer or established by a WCJ for the 2006 injury, disability had not been suspended when the 2006 NCP was issued. Claimant therefore could not seek to have disability benefits reinstated, and the 500 week period for reinstatement of benefits does not govern the case." Therefore, the petition was not timely under section 413(a).

The Court then conducted an analysis under the limitation period in section 315. It found the petition filed in 2011, to be out of time limitations concluding that entitlement to a disability benefit for wage loss had to be filed within three years of the date of the injury where no disability compensation was paid under the NCP.

The employer did not challenge whether under the law it was required to pay medical expenses related to the 2006 injury. Rather, it challenged the competency of the evidence presented by the Claimant on that issue. The court concluded that the evidence was competent and directed payment of medical bills related to the 2006 injury.

Sloan clearly establishes that an NCP medical only is of limited protection to the injured worker. Failure to pursue wage loss benefits within three years of the day of the injury will preclude an award of such benefits in the future. Medical bills can continue to be paid, but if the Claimant becomes disabled after the three-year period, he/she will be ineligible for wage loss benefits. Clearly, Claimants have greater protection pursuing a claim petition and obtaining a suspension of benefits.

Query - should any injured worker who has been issued a medical only NCP who returns to work with the time of injury employer at no wage loss file a claim petition to seek the greater protection of the immediate suspension? Is this even more important when someone returns to work at modified duty?

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HOT OFF THE WIRE

*By: James Tallman, Esq.***

Professional Liability/Medical Malpractice: The Third Circuit held that the notice of failure to comply with the certificate of merit ("COM") requirement prior to dismissal set forth in Pa. R.C.P. 1042.7 was substantive state law that applied to a federal court sitting in diversity jurisdiction. Schmigel v. Uchal, No. 14-3476 (3d Cir. Sept. 2, 2015).

Brian Schmigel filed suit against his gastric band surgeon, Dr. Uchal, shortly before Pennsylvania's statute of limitations for professional malpractice actions expired. The Doctor had moved to Florida, thus, Schmigel chose to initiate suit in federal court under diversity jurisdiction. The complaint failed to include a COM. Pennsylvania Rule of Civil Procedure 1042.3 requires a COM to be filed with sixty (60) days. Uchal waited and on day sixty-nine, filed a motion to dismiss. Uchal had not followed Pa. R.C.P. 1042.7, which requires the defendant to provide notice of the missing COM and provides the plaintiff with thirty (30) days to cure before the action may be dismissed. The District Court granted the motion and dismissed the claim. Because the statute of limitations had run, the dismissal put Schmigel out of court. On appeal, the Third Circuit reversed the trial court and held that the notice requirement set forth in Pa. R.C.P. 1042.7 is substantive state law under Erie and, therefore, applied to federal diversity actions.

Medical Malpractice: The Supreme Court of Pennsylvania held that whether a patient is reasonable in her belief that a physician is an agent of a medical facility for determining ostensible agency pursuant to the MCARE Act, 40 P.S. § 1303.516, is an issue for the jury. In the same case, the Pennsylvania high court also held that the trial court properly precluded a nurse expert from testifying as to causation where both nursing and physician errors were alleged to have contributed to the plaintiff's death. Green v. Pa. Hosp., No. 36 EAP 2014 (Pa. Sept. 3, 2015).

In Green, the trial court granted a nonsuit for multiple defendants at the close of plaintiff's case. The court found that the plaintiff had failed to establish ostensible agency as to one defendant. As for a nurse defendant, the trial court found that the plaintiff had not established causation. A divided Superior Court affirmed. On appeal to the Supreme Court of Pennsylvania, the court addressed two issues: (1) whether the issue of the hospital's vicarious liability for a physician based on a theory of ostensible agency should have gone to the jury, and (2) whether a nurse expert may testify as to causation against another nurse, in an action that also includes negligence claims against doctors.

Notably, in addressing the ostensible agency issue, the Pennsylvania High Court rejected the argument that Section 516 of the MCARE would be rendered meaningless and that ostensible agency would become the rule, not the exception, if the issue is presented to the jury. The court pointed to the language of 516 which provides that holding staff privileges at a hospital is not sufficient to establish vicarious liability unless "a reasonably prudent in the patient's position would be justified in the belief that the care in question was being rendered by the hospital or its agents." 40 P.S. § 1303.516. The court held that this provision is in no way undermined by letting the jury decide the issue of ostensible agency and vicarious liability. The court went on to note that in the emergency room setting is especially reasonable for a patient to believe that the emergency care he receives is rendered by the hospital or its agents. Accordingly, the court reversed the Superior Court's affirmance of the trial court's nonsuit and remanded the case.

The court, however, affirmed the Superior Court on the issue of nurse expert testimony on causation. The plaintiff argued that the MCARE Act didn't apply at all to nurse experts. Therefore, a nurse could testify as to causation even if the care and treatment at issue had been rendered by both nurses and physicians. The court did not decide the applicability of the MCARE Act to nurse experts. Instead, the court held that the trial court did not abuse its discretion when it precluded the causation testimony from the nurse expert where both nursing and physician care was at issue because it might confuse the jury.

Nursing Home Negligence/Arbitration Agreements: The Supreme Court of Pennsylvania found a nursing home arbitration agreement to be unenforceable because it incorporated the National Arbitration Forum ("NAF") and the NAF was no longer arbitrating such cases. Wert v. Manorcare of Carlisle, PA, No. 62 MAP 2014 (Pa. October 27, 2015).

The Estate of Evonne Wert instituted a civil action alleging that abuse and neglect at defendant's long-term skilled nursing facility caused Mrs. Wert's death. The nursing home filed preliminary objections asserting an arbitration agreement. The trial court overruled the preliminary objections based on the Superior Court of Pennsylvania decision in Stewart v. GGNSC-Canonsburg, L.P., 9 A.3d 215 (Pa. Super. 2010). The Superior Court in Stewart had found a similar arbitration agreement to be unenforceable because the provisions referencing NAF were integral to the contract and the NAF was no longer arbitrating nursing home cases. The Superior

Continued on Page 14

HOT OFF THE WIRE *(Continued from Page 13)*

Court also followed its decision in Stewart. The nursing home appealed to the Supreme Court of Pennsylvania. The Pennsylvania High Court rejected the appellants' numerous arguments as to why incorporating the NAF into the agreement did not render the agreement unenforceable, including a severability clause in the agreement and Section 5 of the FAA. Notably, an underpinning of the court's decision was its recognition of the "lopsided balance of power" between the less-sophisticated non-drafting party and the drafter of the agreement. Ultimately, the Pennsylvania Supreme Court held the contract provisions incorporating the NAF Code of Procedure ware integral and non-severable. Accordingly, the agreement to arbitrate was unenforceable.

Nursing Home Negligence/Arbitration Agreements: The Superior Court of Pennsylvania affirmed the trial court's refusal to compel arbitration, where the arbitration agreement had been signed by the nursing home resident's son, as power of attorney, but was found to lack the authority to enter into such an agreement. Wisler v. Manorcare of Lancaster, Pa., No. 1226 MDA 2014, 2015 PA Super 189 (Sept. 8, 2015).

The Estate of Herbert C. Wisler instituted a civil action alleging that neglect at defendant's long-term skilled nursing facility caused Mr. Wilser's death. The nursing home filed preliminary objections seeking to compel arbitration. The trial court overruled the preliminary objections. The decedent's son, H. Randall Wisler, had signed an arbitration agreement when his father was admitted to the nursing home. H. Randall Wisler told the nursing home that he had a power of attorney. Manorcare did not obtain a copy of the power of attorney and one was not produced in discovery. The Superior Court affirmed the trial court's decision. The court's decision was based on its reasoning that "if a third party relies on an agent's authority, it must ascertain the scope of that authority at the time of the reliance. The third party that fails to do so acts at its own peril." (citations omitted).

***James is a WPTLA Member from the firm of Thomas E. Crenney & Associates, LLC. Email: jtallman2002@yahoo.com*

Monday, Jan. 21, 2016 - Board Meeting and Reception at the LeMont Restaurant in Pittsburgh. We welcome our Junior Members.

Feb. 2016 - 1/2 day Reptile Seminar - Pittsburgh

Mar. 2016 - Board Meeting and Members Only Reception. We will elect the Officers and Board of Governors for the 2016-2017 fiscal year. Date and location to be announced.

Apr. 2016 - Golf, Board Meeting and Reception at the New Castle Country Club. Date to be announced.

Friday, May 13, 2016 - Annual Judiciary Dinner, to be held in the **NEW** PNC Champions Club at Heinz Field.

May 2016 - Annual Ethics Seminar & Golf Outing. Date and location to be announced.

Don't agree with what you've read? Have a different point of view?

If you have thoughts or differing opinions on articles in this issue of The Advocate, please let us know. Your response may be published in the next edition.

Also, if you would like to write an article about a practice area that you feel our members would benefit from, please submit it to Editor Erin Rudert.

Send your articles to er@ainsmanlevine.com

Photos from the Comeback Award Dinner, Nov 11, 2015

Pictured above in #1: Business Partner Don Kirwan of Forensic Human Resources, Past President Bill Goodrich, and Board of Governors Member Steve Barth.
In #2: John Lienert, Immediate Past President Chris Miller, Christina Gill Roseman, and Board of Governors Member Guido Gurrera.
In #3: Treasurer Dave Landay and Past President and Board of Governors Member Chad Bowers.
In #4: Past President Jason Matzus and Board of Governors Member Eric Purchase.
In #5: Business Partner Ron Natoli of Robson Forensic, Board of Governors Member Dave Zimmaro, and Jody Wolk of Precise, Inc.
In #6: Carl Moses, Board of Governors Member Warren Ferry, and Commissioner Robert Krebs, of the Workers' Compensation Appeal Board.
In #7: Business Partner Bill Goodman of NFP Structured Settlements, Past President Cindy Danel, Ken Arnstein, and Past President Veronica Richards.

Slippery Rock Volunteer Fire Company & Rescue Team

Slippery Rock, Pennsylvania 16057

EST. 1907

Serving You Since 1974

November 12, 2015

Laurie Lacher, Executive Director
Western Pennsylvania Trial Lawyers Association
909 Mount Royal Boulevard, Suite 102
Pittsburgh, PA 15223-1030

Dear Laurie and Western PA Trial Lawyers:

The Slippery Rock Volunteer Fire Company and Rescue Team would like to thank first the Pasqualini Family for choosing our organization to be the recipient of the $1,000 donation after Joe Pasqualini was honored with your Comeback Award. Secondly, your donating to our organization.

Our fire company was founded in 1907, with our rescue team in 1974. There was a serious accident in our area in 1974 that led the fire company members to attend Emergency Medical Technician training and purchased a used ambulance to begin providing Emergency Medical Services due to the long wait from a neighboring ambulance. We now support three advanced life support trucks.

Often more than not, we do not get acknowledgement from families after we have helped them or a loved one. As many people expressed last evening, the Pasqualini family stands above the rest with making everyone that enters their lives, feel like they are a part of the entire picture. The Pasqualini family came to our station thanking us, and as soon as Joey was well enough to come to thank us in person, he was there. The family has brought cookies to our station and been very supportive of our fire company. We have had the pleasure to watch Joey heal and make remarkable miraculous strides in his healing.

We have recently built phase one of our new fire station that houses our three ambulances. We will be putting the donation towards that loan.

Again, we cannot thank each of you and the entire Pasqualini Family for allowing our fire company to be the honored recipient of the $1,000.

Sincerely,

Chief Ken Taggart

Medical Officer Doreen Taggart

Western Pennsylvania Trial Lawyers Association
909 Mt. Royal Boulevard, Suite 102
Pittsburgh, PA 15223-1030

...Through the Grapevine

Member Francis J. Klemensic is now with Dickie McCamey & Chilcote in their Erie office. His new address is 100 State St, Ste 503, Erie, PA 16507-1457 P: 814-455-5691 F: 888-811-7144
Email: fklemensic@dmclaw.com

Member Sara J. Klein also has a new address, at P.O. Box 81266, Pittsburgh, PA 15217. P: 412-391-9011 F: 412-394-0110

Board of Governors Member Chad F. McMillen has been named a partner with the firm McMillen Urick Tocci Fouse & Jones, effective Jan 1, 2016. Congratulation Chad!

Member Gary M. Lang has a new website: www.fglmlaw.com. His new email is gml@fglmlaw.com.

Board of Governors Member James Tallman is also at a new address: 2605 Nicholson Rd, Ste 2203, Sewickley, PA 15143. P: 412-330-7625 Email: jtallman2002@yahoo.com

Past President Merle Mermelstein has moved her firm upward in the Gulf Tower. The new address is 707 Grant St, Ste 1700.

Board of Governors Member Matthew T. Logue has moved his firm, Logue Law Firm, LLC, to 500 Grant St, Ste 2900, Pittsburgh, PA 15219. P: 412-456-0600 F: 866-480-4630
Email: matt@mattlogue.com. He also has a new website: www.mattlogue.com

Member Carl Moses will be moving, effective Dec. 21. The new office of Betras Kopp & Harshman will be located at 850 W Hermitage Rd, Ste E, PO Box 1533, Hermitage, PA 16148. P: 724-342-2299
F: 724-347-1422

Congratulations to the following who were recently inducted into the Academy of Trial Lawyers of Allegheny County: **Member Michael Gianantonio**, **Member Ronald L. Hicks**, **Member Jason E. Luckasevic**, **Immediate Past President Christopher M. Miller**, and **Board of Governors Member Laura A. Phillips**.