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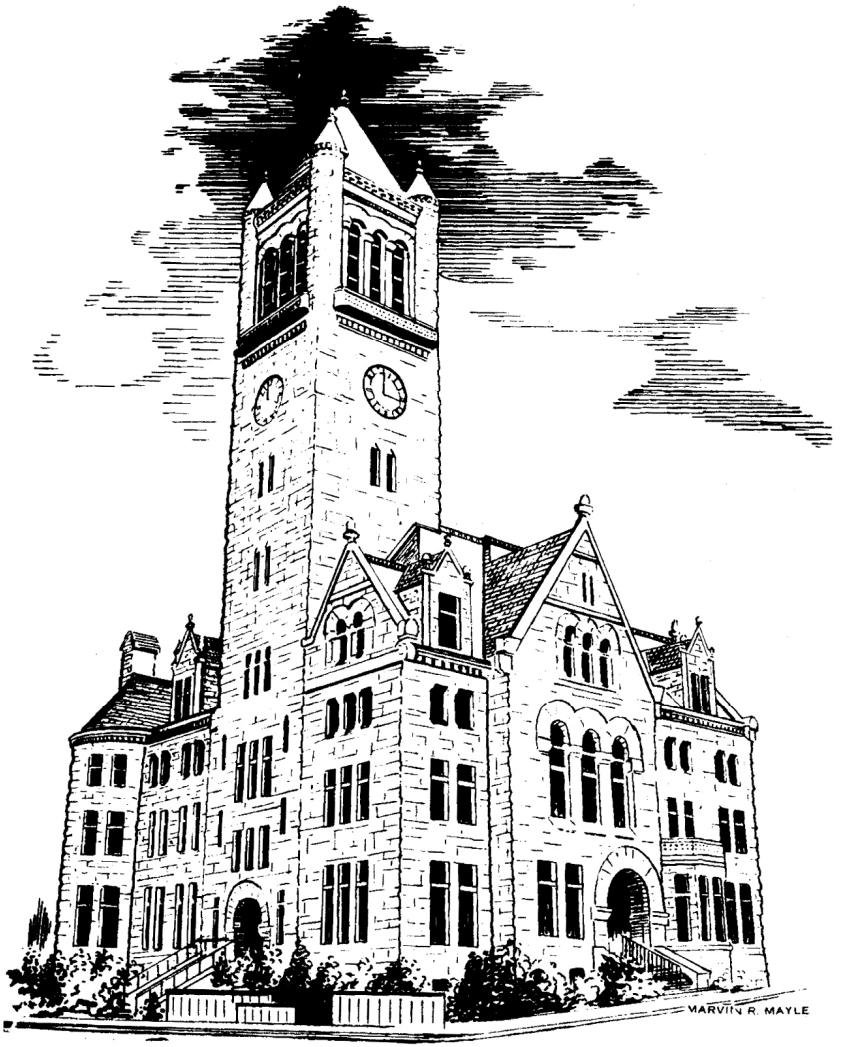

FAYETTE LEGAL JOURNAL

The FAYETTE LEGAL JOURNAL is published weekly by the Fayette County Bar Association, 45 East Main Street, Suite 100, Uniontown, Pennsylvania 15401, 724-437-7994. Legal advertisements should be submitted online at www.fcbar.org no later than 12:00 noon on Friday for publication the following Saturday. No date of publication is promised, however. Legal notices are published exactly as submitted by the advertiser.

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ESTATE NOTICES

Notice is hereby given that letters testamentary or of administration have been granted to the following estates. All persons indebted to said estates are required to make payment, and those having claims or demands to present the same without delay to the administrators or executors named.

Third Publication

MADGE APRIL ADAMS, a/k/a MADGE A. ADAMS, late of Perryopolis, Fayette County, PA (3)
Executrix: Amanda L. Vargo
c/o Zebley Mehalov & White, P.C.
18 Mill Street Square
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Attorney: Mark M. Mehalov

ARNOLD S. BITTINGER, a/k/a ARNOLD BITTINGER, late of Georges Township, Fayette County, PA (3)
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96 East Main Street
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WILLIAM C. BREWER, a/k/a BILL BREWER, late of Washington County, Fayette County, PA (3)
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316 South Fifth Street
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EARL HALL, a/k/a EARL D. HALL, SR., late of Bullskin Township, Fayette County, PA (3)
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Second Publication

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First Publication

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Uniontown, PA 15401
Attorney: Melinda Deal Dellarose

LEGAL NOTICES

*** NO LEGAL NOTICES ***

JUDICIAL OPINION

IN THE COURT OF COMMON PLEAS OF FAYETTE·COUNTY, PENNSYLVANIA

CIVIL ACTION

PARRISH T. GEORGE, Administrator for the ESTATE OF PARRISH R. GEORGE	:
Plaintiff,	:
v.	:
GUSTAVO A. PALMAR, SUPERIOR FORD, INC., AND SUPERIOR FORD LINCOLN MERCURY OF MORGANTOWN, INC.,	:
	: NO. 125 OF 2013, G.D.
Defendants.	: Honorable Senior Judge Thomas P. Creany

OPINION AND ORDER

Creany, SJ. April 12th, 2021

This comes before the Court on several Motions filed by the parties in these proceedings. The Court's consideration of these Motions is outlined below.

STATEMENT OF THE CASE

On November 2, 2011, Gustavo Palmar (hereinafter "Palmar"), the President of Defendant Superior Ford and majority owner of the Defendant Superior Ford Lincoln Mercury of Morgantown, Inc. (collectively referred to hereinafter as "Superior Ford"), arrived at the company's dealership in Morgantown, West Virginia, at 8:30 a.m. After working a full day, Palmar and his wife, Andrea Palmar, went out to dinner at approximately 5:00 p.m. Palmar was driving a company vehicle with dealer plates and dealer registration owned by Superior Ford.

At dinner, Palmar had one glass of wine. After dinner, Palmar and his wife attended a charity event suppm1ed by his business partner and hosted by a customer of Superior Ford. Palmar testified that he had two or three alcoholic beverages at the fundraiser. Palmar and his wife left the charity event by 8:30 p.m. and went to their home in Uniontown, Pennsylvania. A short time later, Palmar and his wife left their home in the same company vehicle to pick up their daughter Lauren.

After picking up their daughter at the Uniontown Mall around 9:15 p.m., Palmar and his wife stopped at a Sheetz store near the mall. When they left Sheetz, Palmar

drove east on Fayette Street in the city of Uniontown which had a posted speed limit of35 m.p.h. There is deposition testimony from the driver of one of the vehicles travelling behind Palmer that as he approached the intersection of Fayette and Beeson Streets, Palmar was in the right-turn-only lane on Fayette Street, requiring him to make a right tum onto Beeson Street. {1}

At this point, 19-year-old Parrish George (hereinafter "Decedent"), was riding his bicycle down Beeson Street approaching Fayette Street. Decedent entered the intersection and made a right tum onto Fayette Street. Palmar, did not make a right tum onto Beeson Street; instead he continued on Fayette Street and proceeded through the intersection. At approximately 9:44 p.m., Palmar struck Decedent on Fayette Street, dragging him and his bicycle underneath the vehicle for approximately 93 feet. Defendant did not bring his vehicle to a stop until a point about 175 feet from the intersection with Beeson Street. Decedent was subsequently pronounced dead at 10:17 p.m. at Uniontown Hospital from injuries caused by the collision.

According to Palmar, he did not see Decedent prior to the accident. He stated that he saw something that he thought was an object bang his vehicle. Palmar's wife, who deposition testimony indicated may have been turned around talking to her daughter at the time of the impact, thought they hit a dog, while Palmar's daughter, who was in the back seat, was able to see Decedent on his bicycle prior to the collision and then as his bicyc1e slid under the vehicle.

Captain David Rutter, a certified accident reconstructionist with the Uniontown Police Department, investigated the accident. After speaking with Palmar, he believed that Palmar may have been intoxicated, but not to the level that impaired him. As a result of his investigation, Captain Rutter came to the following conclusion:

> [Palmar] was charged with DUI, but the DUI had absolutely nothing to do with this crash. This crash had to do with there wasn't enough time. [Decedent] slid out in front of him, out into his lane of travel. [Palmar] had a green light, [Decedent] slid out into his lane of travel, and [Palmar] just did not have enough time.

Tom Kolencik, a Lieutenant with the Uniontown Police Department, testified that he arrived at the accident scene at 9:46 p.m., approximately two minutes after the accident. He believed that Decedent was already dead at the scene. He spoke with Palmar and indicated in his report that Palmar had glassy eyes and an odor of alcohol emanating from his person. Ultimately, Lieutenant Kolencik agreed with Captain Rutter's conclusions on Palmar's culpability for the accident.

{1} Palmar's daughter, Lauren, who was in the back seat of the vehicle at the time of the accident, stated that they were not in the right-turn-only lane.

DISCUSSION

I. Defendant's Motion to Reconsider the Order of January 13, 2021 Vacating the prior Order to Bifurcate.

This Court will first address the issue of bifurcation. Pursuant to Pennsylvania Rule of Civil Procedure 224, bifurcation is an issue left to the discretion of the Court. Factors to consider are judicial economy and prejudice to the parties. After careful consideration of these factors, we find that bifurcation would not be the most judicious use of time since if proceedings were bifurcated much of what would be presented in the liability phase of the trial would be duplicated in the damages portion if Palmar's comparative negligence were found to exceed that of Decedent. We also can see no prejudice to either party in denying bifurcation. Thus, after review, this Court declines to reverse its Order of January 13, 2021 which vacated the prior Order to Bifurcate.

It is hereby ORDERED and DECREED that this matter will proceed on Liability and Damages.

II. Plaintiff Filed the Following Motions in Limine:

A. Plaintiff's Motion in Limine to Limit the testimony of Dr. Frederick W. Fochtman, PH.D.

Plaintiff Objects to the report of Dr. Frederick W. Fochtman in which he suggested that Palmar's alcohol consumption played no role in the accident because the accident happened so quickly that Palmar would not have been able to react quickly enough to avoid the crash, even if he had a blood alcohol concentration under the legal limit for operating a motor vehicle in Pennsylvania.

In considering this Motion, the Court looks to Pennsylvania Rule of Evidence 702 (c) which deals with the testimony of experts. Pursuant to this Rule, expert witness testimony must be grounded in methods and practices generally accepted in the relevant scientific or medical community. The Superior Court of Pennsylvania provides us with further guidance in Anne Snizavich vs. Rohm and Haas Company, 83 A.3d 191 (Pa. Super. 2013). In that case the Court held that while expert witnesses may provide opinion testimony, to be admissible the testimony "... must be based on more than mere personal belief, and must be supported by reference to facts, testimony, or empirical data." Id. At 195. Here there is conflicting evidence as to whether or not and at what point Palmar should have seen Decedent prior to impact, inasmuch as his daughter did. To express the opinion he docs, Dr. Fochtman has to reach a conclusion as to where and when Palmar could or should have seen Decedent. As such he takes a decision as to contested circumstances out of the hands of the trier of fact.

The suggestion that Defendant's impairment had "no impact" on his ability to avoid the subject accident seems not only to be based on his conclusions as to contested facts, but also to be contrary to generally accepted beliefs in the scientific and medical community. Further, Dr. Fochtman's contention that alcohol consumption had no impact on the ability of Defendant to react while driving flies in the face of common sense.

It is hereby ORDERED and DECREED that Dr. Frederick W. Fochtman, Ph.D. is PROHIBITED from Testifying about his belief that Palmar's blood alcohol concentration had no impact on his ability to react while driving, absent a Daubert Hearing.

B. Plaintiff's Motion in Limine to Preclude Opinion Testimony of Police Officers and to Limit Their Testimony to Personal Observation

Pennsylvania law provides that an investigating law enforcement officer is not competent to render opinion testimony as to the cause of a motor vehicle accident because the officer was not present at the time of the accident and has no firsthand knowledge of the accident. Reed vs. Hutchinson, 480 A.2d 1096 (Pa. Super. 1984). It follows that in general the officers' conclusions would be mere speculation. However, Captain Rutter is a certified accident reconstructionist and as such may express opinions. Nonetheless they will be limited to those expressed in any expert report he has prepared which was shared with Plaintiff and they must not violate the limitations placed on the testimony of Dr. Fochtman above.

It is Hereby ORDERED and DECREED that Lieutenant Kolencik and Captain Rutter of the Uniontown Police Department may only testify to facts they observed and may not testify to their opinions as to cause, although Captain Rutter may express opinions within the field of accident reconstruction provided he complies with the directives above.

C. Plaintiff's Motion in Limine to Exclude Evidence that Defendant was not charged criminally in the death of Parrish George

Plaintiff asks the Court to determine the admissibility of the fact that, but for a charge of driving under the influence, Defendant Palmar was not charged criminally in this matter. Defendant is seeking to introduce this testimony to show that Palmar is not responsible for the death. This is inadmissible as an improper statement of opinion. The question of whether Palmar's actions or lack thereof played any role in causing the death of Parrish George is the ultimate issue of this suit and is best left to the finder of fact.

It is hereby ORDERED and DECREED that any evidence that Defendant Palmar was not charged criminally because he was not culpable for the death is INADMISSIBLE as an improper expression of opinion on the ultimate issue.

D. Plaintiff's Motion in Limine to Exclude Evidence of the contents of the back pack worn by Parrish George

To be admissible, evidence must be relevant. This Court does not see any relevance to the items in the back pack worn by Parrish George at the time of the accident. Even if the items could be deemed relevant, the prejudicial nature of such items, particularly the pistol which has no connection to the issues in this case but nonetheless could be inflammatory, far exceeds any probative value they may have.

It is hereby ORDERED and DECREED that evidence of the contents of the back pack worn by Parrish George at the time of the accident are not relevant. Further, evi-

dence of such items would be more prejudicial than probative and thus, is EXCLUDED from testimony.

E. Plaintiffs Motion in Limine to Exclude all Evidence and Testimony Related to the Trace Amounts of Ethanol and THC in the Body of Parrish R. George

In cases of operating a bicycle, to raise the issue of ingestion of alcohol or other substances there must be evidence of "unfitness to drive a bicycle." Coughlin vs. Massaquoi, l70 A. 3d 399 (Pa. 2017). Evidence of intoxication is not enough. Manja Livingston vs. Greyhound Lines, Inc., 208 A.39 1122 (Pa. Super. 2019) goes further to state that evidence of a victim's intoxication is only admissible if it tends to show the absolute inability to perform the activity at hand. In contrast to the testimony and circumstances surrounding Defendant Palmer's driving, which will be discussed hereafter, there have been no facts alleged as to Decedent that tend to show that he was in any way incapable of operating a bicycle, much less that he was unfit to perform the activity. Certainly one can argue that Decedent was reckless in the manner in which he operated his bicycle, but nothing establishes the nexus between the trace amounts of alcohol and THC in his system and this conduct.

It is hereby ORDERED and DECREED that Plaintiff's Motion in Limine to Exclude all Evidence and Testimony related to the trace amounts of Ethanol and THC in the Body of Parrish R. George is GRANTED.

F. Plaintiffs Motion in Limine to Exclude Police Reports

The parties have stipulated that neither side will read from, nor offer into evidence as an exhibit, any police report(s) in this matter. The parties have further agreed, however, that officers may be questioned about the information contained in the report(s).

G. Plaintiffs Motion in Limine to Exclude Evidence of Father, Parrish T. George's Criminal Record

The Court finds that any evidence offered about the criminal record of Parrish T. George, the father of decedent, Parrish R. George, is irrelevant. If one were to argue, as Defendant has, that there is some tenuous relevance since it shows family dynamics, nonetheless such evidence would be far more prejudicial than probative.

It is hereby ORDERED and DECREED that Plaintiffs Motion to Exclude Evidence of Father, Parrish T. George's Criminal Record is GRANTED. Such evidence will not be admitted.

H. Plaintiff's Motion in Limine to Exclude Evidence of the failure of Parrish R. George to wear a Bicycle Helmet at the Time of the Accident

This Motion has been withdrawn by Plaintiff on stipulation by Defendant that it will not elicit testimony on this point.

II. Defendant filed the following Motions in Limine

A. Defendant's Motion to Exclude Expert Witness Cyril H. Wecht, M.D., J.D. Pursuant to PA. R.C.P. 212.2

This Motion is seeking to exclude Dr. Cyril H. Wecht's supplemental report wherein he opines that Parrish R. George would have suffered pre-impact anxiety and two (2) to three (3) minutes of pain and suffering, and he also expresses an opinion in the field of accident reconstruction.

It is established in Pennsylvania Law that damages for pain and suffering are only recoverable after the time of injury. Nye vs. Commonwealth of Pennsylvania Department of Transportation, 480 A.2d 318 (Pa. Super. 1984). However, we conclude that Nye did not hold that pre-impact anxiety is not compensable. Rather, the Court held that while there are Federal precedents that permit such an award, no Pennsylvania precedent at that point explicitly recognized this as a compensable element of damages. However, the Court held that "the estate may recover damages for 'pre impact fright' only upon proof that Karen suffered physical harm prior to the impact as a result of her fear of impending death." Id. At 324. Thus the court implied that this element may well be compensable, but no evidence of the same was proffered, so that issue has not been decided. Further, that case is distinguishable from the case at bar. Here the evidence will show the way Parrish R. George laid his bike down prior to impact which establishes that he was conscious of his jeopardy and was taking maneuvers to avoid the collision. This buttresses Dr. Wecht's opinion, and it is then in the province of the jury to decide whether Decedent suffered anxiety prior to the impact that resulted in physical harm and whether Plaintiff should be awarded damages to compensate for that. Thus, this part of Dr. Wecht's report is admissible.

However, any claim by Dr. Wecht that Parrish R. George experienced pain and suffering for two (2) to three (3) minutes following impact is inadmissible absent a Daubert hearing as this is at odds with the testimony of witnesses as to when Decedent appeared to be deceased and thus does not seem to be something generally accepted in the medical community. Likewise, although Dr. Wecht's credentials as a pathologist are well-known and well-respected, he is not a recognized expert in accident scene reconstruction and any testimony given by him in this regard would be beyond the scope of his expertise and inadmissible absent a Daubert hearing.

It is Hereby ORDERED and DECREED that Dr. Cyril H. Wecht may offer testimony concerning Pre-Impact Anxiety. Dr. Wecht may not offer any testimony that Decedent underwent pain and suffering for two or three minutes after the impact with Palmar's car, nor may he offer any testimony on accident reconstruction absent a Daubert hearing.

B. Defendant's Motion in Limine to Exclude the Nighttime Visibility Study

Defendants contend that the Nighttime Visibility Study videos do not accurately depict circumstances substantially similar to the case at hand and as such are irrelevant and inadmissible. After thorough review, the Court finds that the Nighttime Visibility Study does not purport to be an actual reenactment of the events in question, but simply

a representation of visibility at the time of the accident. Defendant is free to point out differences between the study and conditions at the time of the accident. Thus, the probative value outweighs any potential prejudice.

It is hereby ORDERED and DECREED that Defendant's Motion to Exclude the Nighttime Visibility Study is DENIED and the same is ADMISSIBLE.

C. Defendant's Motion in Limine to Exclude Evidence of Defendant's Consumption of Alcohol

Although the same motion as to the victim was granted because there was no showing he was "absolutely" impaired, Defendant Palmar was above the legal blood alcohol concentration threshold for operating a motor vehicle in Pennsylvania. Additionally, Defendant failed to see victim's bicycle as the driver of the car while his daughter, from her position in the rear seat of the car, did see victim's bicycle prior to and at the point of impact. In addition, Palmar dragged Decedent and his bicycle under his car for some 93 feet and he travelled in excess of 100 feet and maybe as much as 175 feet following impact before he brought his vehicle to a stop. Furthermore, Plaintiffs witness Dr. Wecht opined in his report that this showed impairment.

It is hereby ORDERED and DECREED that Defendant's Motion to Exclude Evidence of Defendant's Consumption of Alcohol is DENIBD and evidence of the same is ADMISSIBLE.

D. Defendant's Motion in Limine to Exclude Defendant's Thoughts and Perceptions

Many of Decedent George's thoughts and perceptions can be logically attributed to him through objective evidence. For example, evidence shows that Parrish R. George took steps to try to avoid the impact, so he was obviously aware of his predicament. Other thoughts and perceptions, such as the allegation that Decedent saw it was dear to cross Fayette Street from Beeson Avenue and that he concluded that Defendant Palmar was making a right tum are not logically attributed to Decedent through objective evidence.

It is hereby ORDERED and DECREED that any possible thoughts and perceptions which may be attributed to the Victim through objective evidence are ADMISSIBLE and evidence which is not attributed to the Victim through objective evidence are NOT ADMISSIBLE. Before any witness expresses an opinion as to what Decedent was likely thinking at any time during the course of the accident an offer of proof must be made and the admissibility of the prospective testimony will be addressed at sidebar.

E. Defendant's Motion in Limine to Exclude Evidence of Defendant's Criminal Record

In several instances prior to this accident Defendant Palmar was charged with crimes, to include some that may qualify as crimen falsi. However the records reflect that some of these charges are irrelevant and others were resolved when Mr. Palmar was placed into the Alternative Restorative Disposition Program. Reference to charges resolved via ARD is prohibited since an ARD disposition is not a conviction under the law. Additionally, even if there would have been convictions on these charges, they are

not relevant to the case at bar and any inquiry therein would be more prejudicial than probative.

It is hereby ORDERED and DECREED that Defendant's Motion in Limine to Exclude Evidence of Defendant's Criminal Record is GRANTED and evidence of the same is NOT ADMISSIBLE.

F. Defendant's Motion in Limine to Exclude Evidence of any Alleged Cover-up

There have been some allegations that there was a "cover-up" because the police failed to question some potential witnesses and failed to take other investigative steps. This Court finds that the proper methods of conducting a police investigation are within the discretion of the police officers in charge of the case.

Thus, Plaintiff will not be permitted to allege that there was a cover-up; however, Plaintiff is free to cross-examine witnesses about the thoroughness of the investigation and about any faults or flaws in the investigation.

It is hereby ORDERED and DECREED that testimony alleging a police cover-up in this matter is INADMISSIBLE. However, exploration of perceived faults and flaws or lack of thoroughness in the investigation are proper matters for cross-examination.

G. Defendant's Motion in Limine to Exclude Evidence of Loss of Monetary Contribution

Due to the facts and circumstances and ages of the parties, the Plaintiff- Survivors may testify as to what they believed Decedent's financial contribution to them might have been. The weight of this evidence will be properly assessed by the Jury.

It is hereby ORDERED and DECREED that Plaintiff may offer testimony supporting their belief regarding Decedent's potential future financial contributions.

H. Defendant's Motion regarding Insurance

This Motion has been conceded by all parties.

FINAL ORDER

This 12th day of April, 2021, the Foregoing Orders and Decrees on the issue of bifurcation as well as the admissibility of evidence presented in the Motions in Limine of the parties are hereby integrated and ORDERED and DECREED as referenced in the above OPINION and ORDER.

BY THE COURT,
TIMOTHY P. CREANY, SJ
SENIOR JUDGE

ATTEST:
Prothonotary

LUNCH & LEARN SERIES

The Fayette County Bar Association's next presentation in its Lunch & Learn Series will be:

- Date: **Wednesday, April 21st** from 12:00 p.m. to 1:30 p.m.
- Location: Courtroom No. 1 of the Fayette County Courthouse
- Discussion topics: **Sheriff's Sales**
- Presenters: Anne N. John, Esquire, and Charles O. Zebley, Esquire

CLE Credit
1.5 hours of Substantive CLE credit for the program. The fees are as follows:

Members of the FCBA
- No charge for attendance without CLE Credit
- $10 fee for attendance with CLE Credit

Attorneys admitted to practice in Pennsylvania after January 1, 2016
- No charge for attendance with CLE Credit

Non-members of the FCBA
- $10 fee for attendance without CLE Credit
- $40 fee for attendance with CLE Credit

** All fees to be paid at the door **

A light lunch will be provided.

RSVP
If interested in attending, please call Cindy at the Bar office at 724-437-7994 or by email to cindy@fcbar.org on or before Monday, April 19th.

LUNCH & LEARN SERIES

The Fayette County Bar Association's next presentation in its Lunch & Learn Series will be:

- Date: **Tuesday, May 11th** from 12:00 p.m. to 2:00 p.m.
- Location: Courtroom No. 1 of the Fayette County Courthouse
- Discussion topics: **PACFile for Attorneys**
- Presenters: Dave McDonald, Administrative Office of Pennsylvania Courts

CLE Credit
2.0 hours of Substantive CLE credit for the program. The fees are as follows:

Members of the FCBA
- No charge for attendance without CLE Credit
- $10 fee for attendance with CLE Credit

Attorneys admitted to practice in Pennsylvania after January 1, 2016
- No charge for attendance with CLE Credit

Non-members of the FCBA
- $10 fee for attendance without CLE Credit
- $40 fee for attendance with CLE Credit

** All fees to be paid at the door **

A light lunch will be provided.

RSVP
If interested in attending, please call Cindy at the Bar office at 724-437-7994 or by email to cindy@fcbar.org on or before Monday, May 10th.