RICCI TYRRELL JOHNSON & GREY

Quarterly Newsletter-Volume 2 - Fall, 2014

We are proud to issue the second installment of our quarterly newsletter as part of our ongoing efforts to address changes in the law, developments within our firm and results in cases the firm recently handled.

Since publishing our first newsletter in May, our firm moved its Philadelphia office to a new, larger location and we launched the firm's website at www.rtjglaw.com. As of June 27, 2014, our Philadelphia office is now located at 1515 Market Street, Suite 700, Philadelphia, PA 19102. Our phone and fax numbers remain the same.

We are happy to announce that Fran Grey and Rebecca Leonard are now members of the New York Bar. John Tyrrell has become a member of the Pennsylvania Defense Institute. Bill Ricci has been reappointed for 2015 to the Pennsylvania Defense Institute Board of Directors, and as co-chair of the products liability committee. The firm has also made several hirings in its first few months of existence and continued growth is definitely in our future.

We are also proud to announce that an article authored by Bill Ricci was published in the August issue of **COUNTER**POINT, an official publication of the Pennsylvania Defense Institute, regarding *Tincher v OmegaFlex, Inc.*, 64 A. 3d 626 (Pa. 2013), where the Pennsylvania Supreme Court granted allocator on the question of "whether the court should replace the strict liability analysis of sec. 402A of the Second Restatement with the analysis of the Third Restatement... [and] whether, if the court were to adopt the Third Restatement, that holding should be applied prospectively or retroactively".

In September, Bill Ricci and Rebecca Leonard participated in teaching the Temple Law School LLM in Trial Advocacy sessions on liability expert and direct cross examination in complex civil and products cases. The Temple Law School LLM in Trial Advocacy is a one-of-a-kind intense 2-year degreed Masters in Law program, eligible to practicing attorneys with at least 5 years experience in litigation. Participants this year hail from 22 different jurisdictions nationwide. Since 2004, Bill Ricci has been an adjunct faculty member, and lectures on various topics including: Developing the defense of a complex product liability case; Opening Statements; Expert Cross-examination; Closing Arguments; and Mediation. He is scheduled later this month to host a "fireside chat" for the students on all topics germane to trial.

On Thursday, November 13 and Friday, November 14, 2015, Bill Ricci will be participating as a faculty member and mock witness in the "Deposition Boot Camp Program" being presented in Philadelphia by the Federation of Defense and Corporate Counsel. Bill is a member and co-chair of several committees in that organization and has been a frequent lecturer and publisher in the FDCC Quarterly.

Finally, Francis P. Burns III has been appointed to serve as a member of the Pennsylvania Supreme Court Civil Procedural Rules Committee. The Committee assists the Court in the preparation, revision, publication and administration of the rules of civil procedure for Courts of Common Pleas except matters relating to Orphan's Court and Family Court divisions of those courts.

In this issue of the Ricci Tyrrell Johnson & Grey newsletter, we will cover:

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UNANIMOUS JURY VERDICT IN BUCKS COUNTY COURT OF COMMON PLEAS IN FAVOR OF TARGET CORPORATION

On September 9, 2014, a jury verdict was entered in favor of defendants, including Target Corporation, in *Susan Haines v. Target Corporation, et al.*, docket number 2010-06993. The incident occurred at the Target Store located in Langhorne in the aisle where boxed Closetmaid closet storage units were sold. The Closetmaid products were displayed on a shelving unit with the first shelf approximately 7.5 inches from the ground, the second shelf approximately 19 inches from the ground and the third shelf about 55 inches from the ground. Plaintiff placed two boxes of Closetmaid product into her cart, and as she attempted to slide a third matching box from the shelf, she claims the bottom of the box broke allowing the contents to fall out and onto her foot. Plaintiff sued Target and Closetmaid as a result.

Plaintiff's liability claim was rebutted not only by her own trial testimony, but by testimony elicited from a Target store executive and an in-house expert from Closetmaid. Plaintiff admitted she did not notice any issues, including issues with safety, while in the aisle, Nothing was wrong with the display. Nothing was wrong with the boxes on the shelves. Plaintiff therefore had no proof of actual notice of an alleged dangerous condition. With regard to constructive notice of an alleged dangerous condition, plaintiff likewise failed in her proof. The Target executive testified that the display was set in accordance with what is called a plan-o-gram, or blueprint of a display. There were no issues reported about the Closetmaid display or any product thereon on the date of the incident. Target therefore had no notice of issues with guest safety. The in-house expert from Closetmaid bolstered the evidence from Target's executive when she testified that upon testing of the Closetmaid boxes, she could not replicate the issue about which plaintiff complained, namely the bottom flap of the box spontaneously opening without manipulation. Without proof of notice of a dangerous condition, the jury found that Target and Closetmaid were not negligent.

Unable to establish a breach of duty, the jury was not asked to determine damages. In defending the damages aspect of the case, however, the defense podiatrist focused on plaintiff's long history of issues with her foot, including a surgery and a number of intermittent traumatic accidents to the foot, and concluded plaintiff had longstanding degenerative and arthritic changes associated with her hallux limitus condition (limited movement of the big toe), that any inflammation of the nerves had resolved, that the facilitis (condition producing heel and foot pain) could not be correlated to the Target incident, that the incident at Target resulted only in transient pain and that there were no lasting ill effects from the incident at Target.

The lead trial counsel at the firm on the Haines matter was Francis J. Grey, Jr. Mr. Grey is a founding member of Ricci Tyrrell Johnson & Grey and has tried more than 35 product and premises actions to verdict, including multiple catastrophic injury cases locally and in jurisdictions across Pennsylvania, New York and New Jersey, and in more than 20 other States. He has represented large hotels, franchises and retail stores throughout Pennsylvania and New Jersey in a variety of premises liability matters including claims involving premises safety, merchandise display safety and allegations of pharmaceutical negligence.

RICCI TYRRELL JOHNSON & GREY
Quarterly Newsletter-Volume 2 - Fall, 2014

Chapman v. Terex Corporation – MIDDLE DISTRICT OF PENNSYLVANIA GRANTS MOTION FOR SUMMARY JUDGMENT OF TEREX CORPORATION

On September 9, 2014, the United States District Court for the Middle District of Pennsylvania confirmed the notion that accidents can happen, without liability, when it granted summary judgment for Ricci Tyrrell's client, Terex Corporation, in the case of *Chapman v. Terex Corporation,* Civil Action No. 3:13-CV-0885.

Plaintiff was injured in a workplace incident that occurred at a jobsite located on State Route 6 in Tunkhannock Township, Pennsylvania when a Terex employee slipped and fell off a ladder affixed to a Terex Bid-Well 3600 Bridge Paver, and landed on plaintiff.

At the time of the incident, Terex's employee was at the jobsite commissioning a new machine, which consists of orienting and training the crew. Plaintiff was an operating engineer for Fahs Construction and was at the jobsite preparing for a deck pour. When asked a question about a control on the machine, Terex's employee climbed the vertical ladder affixed to the machine in order to answer the question.

When climbing the ladder and approximately 7-8 feet above the ground, Terex's employee slipped and fell. He testified he was reaching for the next rung, his hand came off and he found himself with both hands in the air and his "fanny taking [him] in the other direction." No one knows what caused him to fall. When he fell, his back hit plaintiff in the face. Both men were injured.

Plaintiff's complaint alleged his injuries were caused by the negligence of Terex and its employee. In its motion for summary judgment, Terex asserted it could not be held liable because it neither owed nor breached any duty to plaintiff. The Honorable Richard P. Conaboy granted summary judgment and concluded that plaintiff did not provide sufficient evidence for a jury to find liability on the part of Terex Corporation.

After an extensive discussion of the arguments in favor of and against imposing a duty on Terex Corporation, the Court held that "[a]ssuming Defendant had a duty to exercise the care of a reasonable man in climbing the ladder so as to avoid injury to anyone standing at or near the base of the ladder, we agree that Plaintiff has shown no evidence of a breach of that duty...To the extent Plaintiff is asserting [Defendant] had a duty to refrain from climbing the ladder when Plaintiff was standing at its base or had a duty to warn Plaintiff not to stand at the base, we would find such an assertion similarly unsupported."

The court went on to explain that "[b]ecause facts show that Plaintiff was standing at or near the base of the ladder of his own volition for the purpose of waiting his turn to climb the ladder and no evidence or authority suggests this presented an unreasonable risk to Plaintiff, we find no basis to conclude Defendant had a duty to warn Plaintiff not to stand there."

Finally, the Court rejected Plaintiff's assertion that the doctrine of *res ipsa loquitor* applies as plaintiff presented no evidence which suggests that Terex's employee did not exercise caution when climbing the ladder, that he engaged in any unsafe practice, or that Terex participated in creating a dangerous condition. A fall "is a familiar phenomenon in human experience attributable to losing one's balance, t[r]ipping or myriad of other common causes not involving tortious conduct." *Citing Aceto v. Legg,* No. 9060, 1990 WL 254934 (Mass. App. Div. Nov. 8, 1990).

In the absence of evidence suggesting that

Plaintiff's injuries were caused by a lack of due care on the part of the Defendant, Judge Conaboy held no reasonable juror could find that defendant is liable for the harm suffered by Plaintiff. "The fact that [Terex's employee] fell is insufficient to defeat summary judgment...it is axiomatic that the mere occurrence of an accident is not evidence of negligence." *Citing Amon v. Shemanka,* 214 A.2d 238, 239 (Pa. 1965) ("[T]he mere happening of an accident or injury does not establish negligence nor raise an inference or a presumption of negligence nor make out a prima facie case of negligence.")(citations omitted).

Accidents happen.

Francis J. Grey, Jr. was lead counsel, assisted by Tracie Bock Medeiros, Patrick J. McStravick, and Francis P. Burns III

YOU DON'T HAVE TO BE A CRIMINAL TO BE ARRESTED
BY JAMES W. JOHNSON

When you listen to or watch the news, and when you hear the word "arrest", you most often think of the police arresting a person accused of a crime. Criminal acts are wrongs against society.

In the maritime world, like we see here in Philadelphia, vessels come and go. While in port, the vessel, like a shopper in a store, orders supplies, tools etc. from local maritime providers and just like a shopper in Macy's, a vessel has to pay for what it receives. Also, like a shopper who tries to leave a store with goods not paid for, vessels sometimes try to get away without paying for services or goods.

Federal maritime law provides a way a vessel supplier can prevent a vessel from leaving port without paying. Instead of calling the police or store security, a supplier can file a lawsuit in federal court against the vessel itself (called "*in rem*") and have the U.S. Marshal arrest the vessel and prevent it from leaving port.

46 U.S. Code §31342 entitled "Establishing Maritime Liens" provides that anyone providing "necessaries" to a vessel pursuant to the request of the owner or a person authorized by the owner has a maritime lien on the vessel, and may bring an action against the vessel to enforce a lien. This vessel lien is triggered when a provider supplies "necessaries" to the vessel and necessaries can include services, goods and machinery, spare parts, etc. which are used and necessary to keep the ship in navigation. These also include such things as fuel, food, dockage, insurance premiums, etc.

In addition, the law provides that the price charged for these necessaries must be reasonable. For example, a company is called in to repair a pump on the vessel and the service provider charges $1,000 for the repair. However, if other providers in the port provide like and similar services for $500, then most likely a court will find that the $1,000 charge is unreasonable.

Recently, James Johnson was called upon to represent five clients who had provided various "necessaries" to a vessel in the port. The vessel would not pay these vendors for the services and goods provided. As a result, Mr. Johnson had to prepare five Complaints and all other necessary paperwork to file with the District Court in Philadelphia. Mr. Johnson met with a federal judge who signed the appropriate orders which allowed the U.S. Marshal to serve the complaints on the Master of the vessel. Like the arrest of an accused shoplifter, the vessel was "arrested" by the U.S.

Marshal. In order to minimize the expenses of maintaining "custody of the vessel" in the hands of the U.S. Marshal, the Court ordered a substitute custodian appointed to stand in for the U.S. Marshal at a much reduced cost.

Finally, after several months of litigation our clients were paid for their services and the Court "released" the vessel from its "arrest" and it was free to sail.

While the shore side police intervene when someone refuses to pay for goods and tries to get away, when a vessel fails to pay for goods and services, the maritime vessel suppliers have their "police", the U.S Marshal and the federal court system to protect their rights and ensure they receive just compensation.

James W. Johnson is a founding member of Ricci Tyrrell Johnson & Grey and has over 35 years of experience handling maritime litigation. Mr. Johnson has extensive experience with U.S. Coast Guard administrative proceedings and investigations as well as regulatory issues governing the professional licensing of state and federal pilots in Pennsylvania and Delaware.

CHALLENGING PLAINTIFFS' CHOICE OF VENUE THROUGH MULTIPLE AVENUES OF ATTACK – BY JOHN TYRRELL

Like many defense trial firms, our clients are often subjected to forum shopping by plaintiff's counsel looking to shoehorn cases into friendly state court jurisdictions like Philadelphia and Allegheny Counties in Pennsylvania, Essex and Hudson Counties in New Jersey and similar venues in other states. These prejudicial choices of venue can be attacked in multiple ways, and the circumstances of each case and every available tactic must be considered.

Obviously, removal of a case to federal court must be evaluated. Three often overlooked issues should be considered when discussing removal and federal court jurisdiction in general. First, plaintiffs often join local state defendants to a lawsuit in a specific effort to preclude removal. It is necessary in such circumstances to consider the concept of fraudulent joinder. Joinder of a party in a suit is fraudulent when "there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment". *In re: Brisco*, 448 F.3d 201, 216 (3d Cir. 2006), *citing Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 32 (3d Cir. 1985). One of the more common attempts by plaintiffs in this area is joinder of an employer as a defendant even though the employer is immune under workers compensation exclusivity principles. *See: Cook v. Pep-Boys-Mannie, Moe & Jack, Inc.*, 641 F. Supp. 43 (E.D. Pa. 1985). If a defendant can show another defendant was joined fraudulently, the court can ignore the presence of the other defendant and permit removal.

Consideration should also be given as to whether removal to federal court is possible under Supplemental Jurisdiction principles pursuant to 28 U.S.C. §1367 which permits a court, with exceptions, which has original jurisdiction over claims, to accept other claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution".

Being in federal court is not **always** preferable and if a plaintiff brings suit there, and federal jurisdiction

can be challenged, there are a number of reasons why a defendant might do so. First, the particular federal court vicinage might routinely permit broad, sweeping discovery in plaintiffs' interests, and that might be very predictable if the vicinage generally utilizes the same Magistrate Judges to make discovery rulings. The electronic discovery rules in federal court may also dictate a state court preference in certain cases. Finally, there are circumstances where an intermediate state appellate court has ruled on an issue but federal district courts, and even the governing Court of Appeals, have nevertheless predicted that if confronted with the issue, the state Supreme Court would rule otherwise. In such a situation, the comparable rulings of the state and federal courts may dictate preference. This has been the case for multiple years in Pennsylvania where state courts continue to apply the *Restatement (Second) of Torts Section 402A* in products liability cases while the Third Circuit has predicted that the Pennsylvania Supreme Court would adopt the *Restatement (Third): Products Liability* if faced with the issue.

Challenging plaintiffs' chosen venue in state court can also be accomplished by attempting to have the case moved from one state county to another. These are two methods for doing so: improper venue and inconvenient venue or *forum non conveniens*. Improper venue challenges are generally statutory or rule-based and often dictated by conceptions of due process. In Pennsylvania, for instance, a corporate defendant may be sued: (1) in the county of its registered office or principal place of business; (2) a county where it regularly conducts business; (3) the county where the cause of action arose; (4) a county where a transaction or occurrence took place out of which the cause of action arose; or (5) a county where property...which is the subject matter of the action is located.... *Pa. R. Civ. P. 2179(a)*. A challenge to proper venue in Pennsylvania often stems from contesting whether a corporate defendant "regularly conducts business" in the county and in that regard a defendant's contacts with the county "must be essential to or in direct furtherance of corporate objectives, rather than being incidental acts". *Purcell v. Bryn Mawr Hospital*, 525 Pa. 237, 242 (1990).

A *forum non conveniens* challenge in Pennsylvania has been an uphill battle since the Pennsylvania Supreme Court's decision in *Cheeseman v. Lethal Exterminator, Inc.*, 549 Pa. 200 (1997). In *Cheeseman*, the Court held that a plaintiff's choice of forum was entitled to "great deference" and that a defendant can only prevail on a *forum non conveniens* motion if it can demonstrate that either "(1) the plaintiff's choice of forum was designed to harass the defendant, even at an inconvenience to plaintiff himself, or (2) that the trial in the chosen forum is oppressive because trial in another county would provide easier access to witnesses or other sources of proof or to the ability to conduct a view of the premises involved in the dispute". *Id.* This year, however, the Pennsylvania Supreme Court decided *Bratic v. Rubendell*, 2014 Pa. LEXIS 2093 (Pa. Aug. 18, 2014). In *Bratic*, while the Court reaffirmed the *Cheeseman* standard it offered defendants greater hope toward meeting the standard. The *Bratic* Court wrote that, "the showing of oppression needed for a judge to excercise discretion in favor of granting a *forum non conveniens* motion is not as severe as suggested by the Superior Court's post-*Cheeseman* cases. Mere inconvenience remains insufficient, but there is no burden to show near-draconian consequences". *Id. at* *22.

Challenging personal jurisdiction over a defendant is another method of attacking plaintiff's chosen forum. This issue has resulted in nationally recognized case law from New Jersey in recent years concerning foreign product manufacturers. In *J. McIntyre Machinery, Limited v. Nicastro*, ___

U.S. ___, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011), the United States Supreme Court overruled the New Jersey Supreme Court's fundamentally liberal approach toward finding that personal jurisdiction exists in such circumstances based on fact-sensitive determinations of whether a defendant "purposely availed itself of this jurisdiction and c[ould] be hailed into court...in New Jersey to address a personal injury complaint". *Cruz v. Robinson Engineering Corporation*, 253 N.J. Super. 66 (App. Div.) *certif. denied*, 130 N.J. 9 (1992).

All available challenges to plaintiff's selected forum should be considered in all cases toward serving the client's best interest. Apparently non-removable cases may actually be removable; federal courts are often a better choice but not always; both subject matter and personal jurisdiction should be evaluated; and both improper and inconvenient venues should be challenged.

John E. Tyrrell is Managing Member of Ricci Tyrrell Johnson & Grey. Mr. Tyrrell defends cases for his clients across multiple jurisdictions. In the last few years, Mr. Tyrrell has presided over practice teams which have successfully established fraudulent joinder permitting removal to federal court; had multiple state court matters transferred on both improper and inconvenient venue grounds; and obtained summary judgment for lack of personal jurisdiction over a defendant.

PLAINTIFF ABSOLVED OF PROVING NOTICE? . . . A LOOK INTO HOW THE COURTS OF NEW JERSEY HAVE APPLIED THE MODE OF OPERATION DOCTRINE IN 2014

BY REBECCA LEONARD

New Jersey's Mode of Operation Doctrine serves as a limited and case specific exception to the general law of premises liability and alleviates a plaintiff's need to prove actual or constructive notice of a dangerous condition when "as a matter of probability, a dangerous condition is likely to occur as the result of the nature of the business, the property's condition, or a demonstrable pattern of conduct or incidents." *Nisivoccia v. Glass Gardens, Inc.*, 175 N.J. 559, 563, 818 A.2d 314 (2003). The doctrine, however, does not apply merely because a store operates a certain type of business – "just because a business is a fast-food restaurant or has self-service facilities does not prompt mode-of-operation liability." *Prioleau v. Kentucky Fried Chicken, Inc.*, 434 N.J. Super. 558, 579, 85 A.3d 1015 (2014).

Most recently in *Lebrio v. Pier Shops at Caesar's*, 2014 N.J. Super. Unpub. LEXIS 2319, a plaintiff slipped and fell on a clear liquid while walking on the second floor of the shops at Caesar's in Atlantic City in an area where patrons typically congregate to watch the fountain show, referred to as a "common area" by the court. A cup, lid and straw were found on the floor near where plaintiff fell. The third floor housed a food court, and food court patrons were not restricted to remaining in that area with food or drinks. Although plaintiff did not see any liquid on the floor prior to her fall, there was no dispute that a clear liquid was on the floor. On these facts, the trial court denied defendant's motions for summary judgment, involuntary dismissal and directed verdict, and instructed the jury on the Mode of Operation Doctrine. The decisions were upheld by the Superior Court Appellate Division, as it found plaintiff had "demonstrated the nature of The Pier Shops' business as a public shopping mall that included a food court, and that the mall had a policy of permitting patrons to walk around its common areas with drinks" and therefore "the requisite nexus to trigger the application of the doctrine" was proven. *Id.*, at 16.

The Superior Court in Essex County refused to charge the jury as to the Mode of Operation Doctrine in *Berry v. Shoprite*, 2014 N.J. Super. Unpub. LEXIS 1549. As plaintiff was walking through the dairy aisle, she slipped and fell on cleaning liquid that had leaked out of a broken bottle found on the floor, hidden by display boxes.

Plaintiff was unable to state the cause or the duration of the liquid condition. Surveillance video, however, showed the substance on the ground for at least eight minutes. The court held that the mode of operation doctrine was inapplicable because plaintiff failed to come forth with any evidence that Shoprite "implemented a mode of operation that creates a reasonable possibility that customers will be injured as a result of the nature of the business, the property's condition, or a demonstrable pattern of conduct or incident." *Id.*, at 10. The court went on to say that "Allowing mode of operation to be applied in this case will create a slippery slope and set an unwanted precedent – according plaintiffs an inference of negligence while imposing on defendants the obligation to come forward with rebutting proof that it had taken prudent and reasonable steps to avoid the potential hazard in, slip and fall cases occurring in businesses that allow customers to cart items around the premises. Furthermore, applying mode of operation to the case at hand places an unrealistic burden on occupants or owners of businesses, like the Defendant, constantly to examine and observe every customer's cart." *Id.*, at 10-11.

The appellate court similarly held it was error to charge a jury on Mode of Operation where plaintiff slipped and fell at a KFC on an evening when it was pouring rain. *Prioleau*, 434 N.J. Super. 558. As plaintiff walked to the bathroom, after entering the restaurant, she slipped, slid and fell, "like she was on ice," claiming the spill could have been a combination of grease and water. The Appellate Court stated that "defendants' business as a 'fast-food operation' has no relationship to plaintiff's fall. There is no link between the manner in which the business was conducted and the alleged hazard plaintiff slipped on or its source. No testimony showed the alleged wet/greasy floor was the result of a patron's spilled drink or dropped food. Further, there was no evidence the restaurant's floor was ill-kept, strewn with debris or laden with overflowing trash." *Id.* at 578-579. Yes, KFC uses oil to prepare food. Yes, spills may occur in the kitchen. But there was no evidence identifying the source or substance of spill with certainty. There were no facts ultimately to implicate customer conduct in the operation of the business, which is the rationale underlying application of the mode-of-operation doctrine. *Id.* at 580.

When defending a retail establishment in a premises liability action, it is important to understand when the court will alleviate a plaintiff of her burden of proving notice and when it will shift the burden to your client of proving prudent and reasonable steps to avoid the potential hazard.

Rebecca Leonard is a Member of Ricci Tyrrell Johnson & Grey. Ms. Leonard concentrates her practice on product liability defense in the industrial equipment industry, as well as premises liability litigation.

COVERAGE ALERTS
BY FRANCIS P. BURNS III

State and federal appellate court decisions reported here discuss (1) an Insured's options when offered a defense under a reservation of rights, (2) an Insured's right to assign a statutory

bad faith claim to a third-party claimant, and (3) discretionary dismissal of coverage actions in federal court.

Reservation of Rights. A divided panel of the Superior Court has announced a new paradigm, expressly modeled on a Florida case [*Taylor v Safeco Insurance Co.*, 361 So.2d 743 (Fla. Ct. App. 1978)], for enforcing rights and obligations under a liability policy when a defense is offered under a reservation of rights. *Babcock & Wilcox v. American Nuclear Insurers*, 76 A.3d 1 (Pa. Super. 2013)(Olson, J. Concurring and Dissenting).

If the Insured accepts the defense under a reservation it remains unqualifiedly bound to a consent to settle provision and insurer control of the litigation. If the Insured elects to settle without the carrier's consent, it may recover the settlement amount from the insurer only upon clear and convincing proof of bad faith on the part of the insurer in failing to settle. For good measure the court suggested failure to settle may be bad faith even absent an excess verdict. Alternatively, the Insured may decline a qualified defense, control the litigation, and settle the case on terms it believes best without waiver of the right to seek reimbursement under the policy for the settlement sum and defense costs, without the requirement to prove bad faith, to extent the expenditures are reasonable, non-collusive and linked to a covered claim.

On its facts, the case involved only a demand for reimbursement of a settlement. B&W paid $80,000,000 to resolve hundreds of radioactive emissions exposure claims apparently defended for years under a reservation and at a cost exceeding $40,000,000. Following the unsuccessful defense of eight test claims tried to a single jury, and after a motion for new trial was granted, the Insureds settled all pending claims without the carrier's consent. The Superior Court remanded for a new trial with jury instructions in accord with its novel statement of the law and geared to further clarity as to whether a qualified defense had been accepted.

The Pennsylvania Supreme Court has granted an appeal limited to a single question: Does a policy holder forfeit its right to insurance coverage by settling an underlying and covered claim without its insurer's consent, where the insurer is defending subject to a reservation of rights to disclaim coverage, the settlement is at arm's length, is fair and is reasonable, and the insurer has failed to offer any amounts in settlement? *Babcock & Wilcox v. American Nuclear Insurers*, 84 A.3d 699 (Pa. January 24, 2014).

Assignment of Bad Faith Claims. The Pennsylvania Supreme Court has accepted a certified question of law submitted by the Third Circuit: Can an insured tortfeasor assign his or her bad faith claim against an insurer, under *42 Pa.C.S.A. §8371*, to an injured third party? *Allstate Property and Casualty Insurance Company v. Wolfe*, 90 A.3d 699 (Pa. 04/24/2014). The question is one of several on appeal in *Wolfe v. Allstate Property and Casualty Insurance Company*, 877 F.Supp.2d 228 (M.D.Pa. 2012).

Wolfe involves a motor vehicle policy. Allstate's insured was inebriated when he rear-ended the vehicle operated by Mr. Wolfe; consequently, the lawsuit sought compensatory and punitive damages. The entire case could have been settled for less than $25,000 – the limits were $50,000, but the adjuster refused to deviate from a $1,200 offer or take into account the Insured's exposure to punitive damages. The case tried to verdict. The jury awarded $15,000 in compensatory and $50,000 in punitive damages. Allstate paid the compensatory award but refused to make any payment for excluded punitive damages. Allstate's Insured assigned his rights, claims and causes of action arising out of the insurer's alleged failure to properly defend and indemnify him.

A jury found Allstate acted in bad faith and awarded damages equal to the punitive award in the underlying action. On appeal, Allstate has argued the claim is one for un-liquidated tort damages that cannot be assigned and, therefore, Wolfe lacked standing to sue for bad faith. Allstate has also argued it had no duty to protect its Insured against punitive damages during settlement talks or pay the award. No Pennsylvania precedent has addressed how exposure to punitive damages plays into a carrier's duty to conduct settlement negotiations – an issue that will be reached on appeal only if Mr. Wolfe is found to have standing to sue.

Federal Declaratory Judgment Actions. With increasing frequency district courts in Pennsylvania have declined to exercise discretionary jurisdiction under the federal Declaratory Judgment Act in coverage actions based exclusively on state law. *Rox-Ann Riefer v. Westport Insurance Corporation*, 943 F.Supp.2d 629 (M.D.Pa. 2013)(collecting cases). Dismissals have been ordered on motion as well as the unbidden initiative of the court itself. The trend has been building since 2000 when the Third Circuit observed: "The desire of insurance companies and their insureds to receive declarations in federal court on matters of purely state law has no special call on the federal forum." *State Auto Insurance Companies v. Summy*, 234 F.3d 131, 136 (3d Cir. 2000).

The Third Circuit spoke again to the issue in April. *Rox-Ann Riefer v. Westport Insurance Corporation*, 751 F.3d 129 (3d Cir. 2014). Ms. Riefer sued her lawyer for malpractice. His E&O carrier denied coverage for lack of timely notice under a claims-made policy. Liability was admitted and the malpractice suit went to trial on damages. Judgment was entered for more than $4,000,000. As assignee of her lawyer's rights under the policy Reifer filed a state court action for declaratory relief arguing there should be a notice-prejudice rule for professional liability policies issued to lawyers, and the court should declare Westport obliged to pay the judgment. Westport removed the coverage case and seven months later a magistrate judge filed a thirty-nine page report recommending dismissal of Reifer's action for failure to state a claim. Another seven months passed before the district court rejected the recommendation, *sua sponte* declined to exercise discretionary jurisdiction, dismissed the action without prejudice, and remanded the case.

On appeal, Westport argued, unsuccessfully, that professional liability had been established, the suit in reality sought money damages, and the court had no discretion to decline exercise of diversity jurisdiction. Following a lengthy and scholarly analysis describing a non-exhaustive eight-factor test to guide the exercise of discretion, the Third Circuit ultimately affirmed "because Riefer raises issues of state law peculiarly within the purview of the Pennsylvania court system which are better decided by that system."

The result hardly invites insurers to seek coverage declarations in federal court, and the non-exclusive eight-factor test is not an easy algorithm for predicting how a district court is likely to exercise discretion. *Riefer* does make clear that "sound" exercise of discretion involves weighing all the prescribed factors. What also can be said with confidence is the gate to federal court has narrowed. Particularly vulnerable to discretionary dismissal are cases where a parallel state court action is pending, an arguably unsettled issue of state law is involved, or coverage turns on application of a policy exclusion. Also see, *Summy, supra.*

Francis P. Burns III has over 30 years experience defending product liability actions and all dimensions of insurance coverage including coverage opinions,

declaratory judgment actions and bad faith. In 2003 Mr. Burns completed work on a Master of Laws in Health Law to supplement his practice interest in health care insurance coverage, HIPAA privacy regulations, and fraud and abuse laws applicable to federal benefit programs. He was appointed effective June 30, 2014 to serve a three year term as a member of the Pennsylvania Supreme Court Civil Procedure Rules Committee.

OSHA REPORTS: THE ARGUMENT FOR ADMISSION - BY SEAN CORGAN

You have been sued. The Complaint details a workplace accident involving an injured machine operator. This is your first notice of the accident, and there are countless questions as to what happened and why. Pursuant to a Freedom of Information Act request to the local area OSHA office, records are received and you learn there were multiple safety violations and those violations were the cause of the accident. Sound familiar?

You want to make the best use of these records but the reality is that OSHA records are hearsay and under federal law an OSHA inspector is not required to appear to testify at a deposition or trial in a private action. How will you get the factual observations and citations admitted at trial?

I. The Public Records Exception

Although hearsay is generally inadmissible, an exception has been codified for public records.[1] A report from a public office can be admissible if it is created pursuant to a legal duty or contains factual findings from an authorized investigation, and the opposing party fails to demonstrate it is untrustworthy.[2] Courts have been divided as to whether the public record exception applies only to facts or the fact-finding report as a whole, including any conclusions or opinions.[3]

The Supreme Court of the United States addressed that issue in *Beech Aircraft Corp v. Rainey*, 488 U.S. 153 (1988). During a naval training exercise two pilots, Lieutenant Commander Rainey and Ensign Knowlton, died when their training aircraft lost control during "touch and go exercises," crashed, and burned.[4] In a suit sounding in product liability, a dispute arose over the admission of a Judge Advocate General's investigation report.[5] The report, which included "findings of fact," "opinions," and "recommendations" was admitted into evidence, almost in its entirety."[6] A panel of Eleventh Circuit judges subsequently reversed on grounds that the "evaluative conclusions or opinions" contained in the report should have been excluded.[7]

The Supreme Court abolished the distinction between facts and factually based opinions or conclusions as they pertain to investigatory reports, noting that "a common definition of 'finding of fact' is a "conclusion by way of reasonable inference from the evidence."[8] Looking at Federal Rules of Evidence 803(8) itself, the Court reasoned that it "does not state that 'factual findings' are admissible, but says rather that '*reports*...setting forth...factual findings' are admissible."[9] As further justification for admitting "factual conclusions" contained in the report, the Court cited the Advisory Committee's notes, stating that "solution as to [an evaluative report's] admissibility is clearly stated" in the rule. Admissibility is presumed but there is "ample provision for escape if sufficient negative factors are present."[10] But the burden of production as to those negative factors is for the party opposing admission. And for OSHA reports, the negative factors identified are not typically present.

Since *Rainey*, OSHA reports and citations have

been routinely admitted in federal district courts.[11] *Massello v. Stanley Works, Inc.*, elaborated on the criteria used in determining an OSHA report's trustworthiness.[12] Plaintiff in *Massello* moved to exclude an OSHA report and its conclusions that the decedent's employer committed violations by providing employees with broken equipment.[13] After acknowledging that the report "fit easily within [the public records] exception," [14] the court explained that the OSHA report could still be excluded if it was found to be untrustworthy.[15] But the *Massello* court was not overly concerned with the fact that the report did not include "sworn statements, cross examination or other proceedings in an adjudicatory venue. The court instead found the OSHA investigator's conclusions that the employer put its employees at risk trustworthy because they were "based principally on the admission of the store manager—which she repeated, under oath, at her deposition...where she *was* subject to cross-examination."[16]

The Courts nonetheless remain sensitive about the trustworthiness issue and an OSHA report's potential to be prejudicial. For example, in *Staley v. Bridgestone/ Firestone, Inc.*, the District Court admitted an OSHA report under the public records exception.[17] The plaintiffs asserted that the OSHA investigation report, which concluded the decedent caused his accident by failing to follow the mandated safety procedures, was inadmissible hearsay and unduly prejudicial.[18] The Tenth Circuit affirmed the District Court, however, because it had properly redacted the potentially untrustworthy portions of the OSHA report before admitting it into evidence pursuant to Rule 803(8).[19] The implication from *Staley* is that the Circuit Court of Appeals would have come down differently had the trial court not made redactions to the potentially untrustworthy portions.

Although demonstrably wary of the trustworthiness requirement, some state courts occasionally admit OSHA reports as public records.[20] There is not surprisingly very little law in Pennsylvania governing the admissibility of an OSHA report as a public record. Pennsylvania has not adopted 803(8). Admissibility is instead governed by statute, 42 Pa. Cons. Stat. §6104, which allows an authenticated record of governmental action to be (a) evidence of a fact that the action was taken and (b) evidence of facts contained in the governmental record, provided the facts were recorded pursuant to an official duty and neither the sources of information nor other circumstances indicate that the record is untrustworthy. [21] If an OSHA record can be authenticated, the record and the facts within it may be admissible at trial.[22] The Department of Labor may certify and authenticate OSHA investigation records for a fee.[23]

I. Business Records

While most often analyzed under the public records exception to hearsay, at least one court has ruled an OSHA investigation report admissible under Fed. R. Evid. 803(6), the business records exception to the rule against hearsay.[24]

Plaintiff in *Rodriguez v. Modern Handling Equip. of NJ* was struck by a forklift he had just been using.[25] The defendant maintenance company fixed only one forklift used by plaintiff's employer and contended that plaintiff was using a forklift other than the one it fixed.[26] In support of its summary judgment motion, it offered a "heavily redacted" OSHA investigation report and plaintiff objected to it as hearsay.[27] The District Court stated that the report was undeniably authenticated: a custodian at the Tarrytown OSHA office authenticated the records and certified that they were prepared in the regular course of business.[28] Before ruling that the OSHA report was admissible as a business record, the *Rodriguez* court cautioned that each hearsay statement contained within the OSHA report must fall under another exception in order for that portion

of the report to be admissible.[29] If statements to the author are included in the OSHA report, each must be deemed an exception before it can be admitted.[30]

II. Expert Testimony

Some jurisdictions, including Pennsylvania, also admit OSHA reports and testimony as to their contents through experts.[31] In *McManamon v. Washko*, plaintiff was working on a pavement project marked with posted "Warning Road Work Signs."[32] Wearing an orange helmet and reflective vest, plaintiff was badly injured when she was struck by a car driven by defendant.[33] An OSHA investigation followed, culminating in a report.[34] At trial plaintiff's accident reconstruction expert relied on the OSHA report in arriving at the conclusion that plaintiff's employer had properly set up the pavement project and was not negligent. [35] The defense objected on the grounds that OSHA report was inadmissible hearsay and not generally relied upon by experts in the field.[36] The plaintiffs, citing Pa. R.E. 702, countered that OSHA reports are customarily relied upon by experts in the practice of accident reconstruction.[37] Though ultimately the *McManamon* court did not broadly hold OSHA reports admissible via Rule 702 because the issue was not properly preserved for review on appeal, it saw the defense objection as meritless.[38] The court stated:

> [The expert fully explained how he had used the OSHA report in this context. Initially, [defendant's] pleadings alleged negligence on the part of [plaintiff's] employer, not contributory negligence of [plaintiff]. When [defendants] raised [plaintiff's] alleged contributory negligence as a claim in the case, [defendants] did not abandon their contentions that the accident had been caused by the negligence of [plaintiff's] employer. Therefore, OSHA's findings regarding compliance of the work zone were relevant to the expert's opinion of fault.[39]

The court also cited the trial court's reasoning with approval:

> We find the challenged testimony regarding OSHA's investigation and findings to clearly fall within the bounds of this exception and find no error in allowing it. The OSHA findings can be considered the type customarily relied upon by experts in the field of accident reconstruction. [Defendants] had the opportunity to cross-examine, and, for that matter, to submit their own challenge at trial to the OSHA report. We, therefore, dismiss this argument as being without merit.[40]

III. CONCLUSION

For product liability defendants, OSHA investigations offer early insight into the cause of a workplace accident, and establish a starting point for litigation discovery. Obtaining OSHA reports via the Freedom of Information Act is relatively simple. Getting the OSHA reports, including the conclusions drawn from the facts discovered in the investigation, admitted at trial is less straight-forward. Despite the favorable case law discussed above, courts will exercise caution admitting an

OSHA report, especially when its admission involves conclusions that bear on the ultimate issue. It is of critical importance therefore to obtain the OSHA records early, and to incorporate the narrative reports, photographs, statements and notices into depositions and fact discovery, and share them with experts. Courts will be less likely to find prejudice and/or untrustworthiness when the OSHA reports have been discussed and referred to and relied upon by many of the witnesses prepared to testify at trial.

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[1] *See* Fed.R.Evid. 803(8). *See also* Pa.R.E. 902; 42 Pa. Cons. Stat.§§ 6103, 6104; Ohio Rev. Code. Ann. §803(8) (LexisNexis 2014); N.C. Gcn. Stat §8C-803(8) (2014).

[2] *See* Fed. R. Evid. 803(8); Pa. Cons. Stat. §6104. *See also Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988).

[3] See 488 U.S. at 161-62.

[4] *Id.* at 156

[5] *Id.* at 156-57

[6] 488 U.S. at 158-59

[7] *Id.* at 160

[8] *Id.* at 163-64

[9] *Id.* at 164

[10] *Beech Aircraft Corp.*, 488 U. S. at 166-67, n.11. The Advisory Committee suggested four "negative factors" it thought would demonstrate the untrustworthiness of a public record: 1. The timeliness of the investigation; 2. The investigator's skill or experience, 3. Whether a hearing was held, and 4. Possible bias when reports are prepared with a view to possible litigation. *See* advisory committee's notes on Fed. R. Evid. 803(8). These factors are also discussed in *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299 (11th Cir. 1989).

[11] *Staley v. Bridgestone/Firestone, Inc.*, 106 F.3d 1504 (10th Cir. 1997); *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299 (11th Cir. 1989); *Parker v. Allentown, Inc.*, 891 F. Supp.2d 773 (D. Md. 2012); *Masello v. Stanley Works, Inc.*, 825 F. Supp.2d 308 (D. N.H. 2011); *Coates v. A C & S, Inc.*, 844 F. Supp. 1126 (E.D. La. 1994); *Masemer v. Delmarva Power & Light Co.*, 723 F. Supp. 1019 (D. Del. 1989); *Haymore v. Thew Shovel Co.*, 446 S.E.2d 865 (N.C. Ct. App. 1994). *See also Blocher v. DeBartolo Props. Mgmt.*, 760 N.E.2d 229,234 (Ind. Ct. App. 2001)(stating that the court does not need to decide if testimony regarding OSHA violations was impermissible because both parties elicited essentially the same testimony); *Staskal v. Wausau Gen. Ins. Co.*, 706 N.W.2d 311, 319 (Wis. Ct. App.2005) (excluding the report only because this particular report was remarkably untrustworthy). *But see Ohio Cas. Ins. Co. v. D&J Distrib. & Mfg.*, 6th Dist. Lucas Co., 2009-Ohio-3806 (no abuse of discretion excluding unauthenticated citation but allowing testimony and cross-examination regarding the OSHA citations because witnesses gave conflicting statements as to knowledge of hazards); *Brundridge v. Fluor Fed. Svcs., Inc.*, 191 P.3d 879 (Wash. 2008) (OSHA report inadmissible under state evidence rule where unredacted portions contained 'residue of judgment' necessarily stemming from picking one witness' version of facts over another).

[12] *Massello v. Stanley Works, Inc.*, 825 F. Supp.2d 308, 311 (D. N.H. 2011). The decedent, an employee of the Christmas Tree Shop, was standing on a broken stool while restocking products during his overnight shift. The broken stool collapsed, causing him to fall and hit his head. Plaintiff brought suit against the manufacturer and distributor of the stool, alleging a defective design and failure to warn.

[13] *Id.* at 312.

[14] *Id.* at 315

[15] *Id.* at 315-16.

[16] *Massello*, 825 F. Supp.2d at 316.

[17] *Staley*, 106 F.3d at 1513. The plaintiffs—surviving family members and the decedent's estate—brought a products liability suit against a tire manufacturer when the decedent died while installing tires on a road grader.

[18] *Id.* at 1513.

[19] *Id.* While the *Staley* court did not specify what portions the lower court redacted, it is suspected that it was those portions of the OSHA report which spoke to the ultimate issue of liability for causing the accident.

[20] *Haymore v. Thew Shovel, Co.*, 446 S.E.2d 865 (N.C. Ct. App. 1994). *See also Staskal v. Wausau Gen. Ins. Co.*, 706 N.W.2d 311,319 (Wis. Ct. App. 2005) (holding that where an OSHA report contained a factual error and evidence of an amendment resulting from a settlement, the report was too untrustworthy to admit because its author was not available for cross examination).

[21] 42 Pa. Cons. Stat.§6104 (2014)

[22] Under 42 Pa. Cons. Stat.§6104, an official record must be authenticated as provided in 42 Pa. Cons. Stat. §6103. With respect to authentication of a federal government record, Rule 902 states, in pertinent part: "The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents that Are Sealed and Signed. A document that bears:

(A) A seal purporting to be that of the United States…a political subdivision…or a department, agency, or officer of any entity named above, and
(B) A signature purporting to be an execution or attestation.

(4) Certified Copies of Public Records. A copy of an official record—or a copy of a document that was recorded or filed in a public office as authorized by law—if the copy is certified as correct by:
(A) the custodian or another person authorized to make the certification; or
(B) a certificate that complies with Rule 901(1), (2), or (3), a statute or a rule prescribed by the Supreme Court

[23] *See* 29 C.F.R. 70.40; 29 C.F.R. 2201.7(g).
[24] *Rodriguez v. Modern Handling Equip. of NJ, Inc.*, 604 F. Supp.2d 612, 623(S.D.N.Y. 2009)
[25] *Id.* at 614, 617.
[26] *Id.* at 622.
[27] *Id.* at 618.
[28] *Id.* at 622.
[29] 604 F. Supp.2d at 622.
[30] *Id.*
[31] *Hannah v. Gregg, Bland & Berry*, 840 So. 2d 839 (Ala. 2002); *McManamon v. Washko*, 906 A.2d 1259 (Pa. Super. Ct. 2006).
[32] 906 A.2d at 1263.
[33] *Id.* at 1264.
[34] *Id.*
[35] *Id.* at 1273.
[36] *Id.*
[37] *Id.* at 1272-73.
[38] *Id.* at 1276.
[39] *Id.* at 1275.
[40] *Id.* at 1275-76.