RICCI TYRRELL JOHNSON & GREY

Quarterly Newsletter-Volume 1-May, 2014

The law firm of Ricci Tyrrell Johnson & Grey commenced operating on March 29, 2014. Our commitment as a firm is to excellence in all aspects of advocacy on behalf of our clients, in a legal climate that is changing at an astonishing rate.

The firm's Chief Executive Officer is John E. Tyrrell. Julianne Johnson is the firm's Chief Operating Officer who will assist John in carrying out the firm's mission in all facets of the firm's operations.

One of our first steps is publishing a quarterly newsletter in order to address changes in the law, developments within our firm and results in cases the firm recently handled.

We are in the process of launching the firm's website. In addition to our quarterly newsletter, our website will report and analyze significant developments including key court decisions, legislation, and noteworthy matters handled by the firm.

The current location for our Philadelphia office is Eight Penn Center, Suite 2000, 1628 John F. Kennedy Blvd., Philadelphia, PA 19103 but we will moving our Philadelphia office in mid-June to 1515 Market Street, Suite 700, Philadelphia, PA 19102. Our phone and fax numbers will remain the same. The firm also has an office in Marlton, NJ and has an expanding practice in New York.

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

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TINCHER v. OMEGAFLEX, INC:
Paradigm Shift or "More of the Same?"

On March 16, 2013 The Pennsylvania Supreme Court granted allocator in *Tincher v. OmegaFlex, Inc.*, 64 A. 3d 626 (Pa. 2013). This grant is actually the second time the Pennsylvania Supreme Court expressly pledged to answer the following question, once and for all: "whether this 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 fact, this description of the issue for the Court's decision is to some degree misleading.

Beginning in 1978, The Pennsylvania Supreme Court crafted its own version of Section 402A of the Restatement (Second) of Torts, namely *Azzarello v.Black Brothers Co., 480 Pa. 547, 391 A.2d 1020 (1978). Azzarello* and its progeny have strayed far from the original purpose of Pennsylvania product liability law; namely to allow recovery for unsafe products without requiring proof of negligence on the part of product suppliers. The *Azzarello* approach meant that juries would no longer hear a defective condition defined as one that rendered a product "unreasonably dangerous." Rather, juries would hear an instruction one Justice has described as "minimilistic" and "lacking essential guidance concerning the nature of the central concept of product defect." *Phillips v. Crickett Lighters, 576 Pa. 644, 841 A.2d 1000 (2003) (Saylor, J. concurring).*

In the ensuing years since *Azzarello*, the Pennsylvania Supreme Court has consistently segregated a manufacturer's conduct in designing a product from the product itself. As currently applied, Pennsylvania product liability law represents a clear departure from generally accepted principles of strict liability, relying instead on poorly instructed juries to evaluate the safety of a design without being permitted to engage in the risk / utility balancing at the core of any claim of defective design (such evaluation being left to the trial judge in his or her role as so-called "social policy gatekeeper").

Under the Third Restatement, sellers are liable for injury resulting from the sale of products that are "defective." A product is defective if "the foreseeable risks" it poses "could have been reduced or avoided by the adoption of a reasonable alternative design," and if "the omission of the alternative design enders the product not reasonably safe."

Members of the Pennsylvania Supreme Court have long been calling for judicial reform in the products arena. *See, e.g., Bugosh v. I.U. North America, Inc., 942 A.2d 897 (Pa. 2008); Phillips v. Crickett Lighters, 841 A.2d 1000 (Pa. 2003).* In 2008, The Supreme Court first granted allocator on the question whether to adopt the analysis of the Third Restatement, see *Bugosh v. I.U. North America, Inc., supra,* but then changed its mind and dismissed that appeal as having been "improvidently granted," *Bugosh I.U. North America, Inc., 971 A. 2d 1228 (Pa. 2009).*

Since 2009, the United States Court of Appeals for the Third Circuit has predicted that the Pennsylvania Supreme Court would ultimately adopt the Third Restatement and abandon the "antiquated" and "unworkable" *"Azzarello* - tinged" version of Restatement (Second) sec. 402A, and thus directed Federal Courts sitting in diversity cases do the same. See *Covell v. Bell Sports, Inc., 651 F.3d 357 (3d Cir. 2011); Berrier v. Simplicity Manufacturing, Inc., 563 F.3d 38 (3d Cir. 2009), cert. denied, 558 U.S. 1011, 130 S. Ct. 553, 175 L.Ed.2d 383 (2009).* This is remarkable, as the

Pennsylvania Supreme Court continued to call for the application of *Azzarello* in the wake of the *Bugosh* "retreat." See., e.g., *Reott v. Asia Trend, Inc., 55 A.3d 1088 (Pa. 2012).* The plaintiffs' bar bemoaned the demise of the *Erie* doctrine!

Equally remarkable has been the rift among Federal district court judges in diversity-based product liability cases involving the application of Pennsylvania law: certain judges refuse to apply the Third Restatement, reasoning that the *Azzarello* / 402A "pure" strict liability approach remains the law unless and until the Pennsylvania Supreme Court expressly says otherwise; other judges follow the Third Circuit prescription and apply the Third Restatement.

The Pennsylvania Supreme Court held oral argument in *Tincher* on Tuesday October 15, 2013. To the "shock" of the numerous plaintiffs' bar *amici curiae* present, Tincher's counsel conceded a consensus that *Azzarello* should be overruled, and that the "real concern" was that the Third Restatement "proof of alternative feasible safer design" requirement would be too onerous for plaintiffs and would discourage the filing of meritorious claims. Per Justice Max Baer's comments during the argument, he and justices McCaffrey and Todd apparently share that concern. The solution, argued Tincher's attorney, was to return to sec. 402A of the Restatement (Second) as applied historically, *without* the *Azzarello* trappings.

The Pennsylvania Association for Justice (also *amicus curiea* to the Court in *Tincher*) quickly filed an urgent request for re-argument, insisting that *Azzarello* is a critical bastion of justice for injured plaintiffs in Pennsylvania, and decried Tincher's counsel's arguments as the rantings of a lawyer representing the interests of a subrogating insurance company. That request was summarily denied by the Court.

A decision by the Pennsylvania Supreme Court in *Tincher* appears imminent. Possible outcomes include: *Azzarello* and progeny will be left intact in *all* product cases; the Restatement (Second) will be applicable to all product cases, *without* the trappings of *Azzarello*; *Azzarello* and progeny will be applicable to manufacturing defect cases only; the Restatement (Second) *sans* Azzarello will be applicable to design and warnings cases only; the Third Restatement will be applicable to *all* product cases; the Third Restatement will be applicable to design and warnings cases only; majority and/or plurality decisions on various issues; an equally divided Court on key issues leaving current law intact (if fewer than all justices participate in the decision); retroactive applicability or applicability to cases which "accrue" after a given date.

In any event, we will soon learn whether the Pennsylvania Supreme Court will restore a negligence-based normalcy to a jury's evaluation of design-based and perhaps other product liability claims.

Bill Ricci is co-author of the brief filed on behalf of Amici Curiae, Pennsylvania Defense Institute and International Association of Defense Counsel. He is co-chair of the Products Liability Committee of the Pennsylvania Defense Institute.

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NEW JERSEY APPELLATE DIVISION AFFIRMS GRANT OF SUMMARY JUDGMENT BASED ON APPLICATION OF STATUTE OF REPOSE

On April 3, 2014, the Superior Court of New Jersey, Appellate Division, issued its opinion in *Cherilus v. Federal Express*, 87 A.3d 269, 2014 N.J. Super. LEXIS 47 (App. Div. 2014). The *Cherilus* decision is perhaps the most complete Appellate Court opinion in New Jersey detailing the requirements for a successful defense based on the Statue of Repose. The Court affirmed the grant of Summary Judgment in favor of Columbus McKinnon Corporation entered by Judge Cobham of Essex County in 2011.

Columbus McKinnon, through its American Lifts division, manufactured a limited number of air cargo lifts which were sold to Federal Express and installed at the Federal Express warehouse at Newark Airport. The air cargo lifts were designed and manufactured strictly in accordance with Federal Express's specifications and approval. Each of the lifts was bolted into the cement foundation of the warehouse dock, and the bolts were covered with grout. Although American Lifts provided instructions for installation, it did not itself participate in the installation of the air cargo lifts. The lifts once installed were never moved and were never intended to be moved. The platforms of the lifts, pursuant to Federal Express specifications, were covered with ball bearings to match Federal Express trucks and the floor of the warehouse itself which allowed mail containers to be pushed from the floor of a truck to the platform of a cargo lift and across the warehouse floor.

Plaintiff Joseph Cherilus was injured while working on one of the air cargo lifts. The lift contained a mechanical part known as a "can-stop" that pops up from the lift platform to prevent containers from falling off the lift. When Cherilus stepped on the can stop it depressed below the level of the platform and he was struck by a mail container, seriously injuring his leg.

American Lifts was awarded Summary Judgment on all claims based on the New Jersey Statute of Repose, N.J.S.A. 2A: 14-1.1(a), with the trial court determining that American Lifts participated in the "design, planning, surveying, supervision or construction of an improvement to real property" as required by the statute. Co-defendant Linc Facility Services (LFS), the contractor responsible for maintenance at the Federal Express facility, opposed American Lifts' Motion for Summary Judgment and later appealed the Summary Judgment order after it had settled all claims with Plaintiffs.

On appeal, LFS argued that American Lifts was not entitled to the protection of the Statute of Repose since it was simply a manufacturer of a product. Prior case law has held that the Statute of Repose does **not** apply to standardized products used in construction, but rather protects "contractors, builders, planners and designers". See: *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 144 N.J. 84, 116 (1996); *Dziewiecki v. Bakula*, 180 N.J. 528, 532-33 (2004); *State v. Perini Corp.*, 425 N.J. Super 62, 80-81 (App. Div.), certif. granted, 211 N.J. 606 (2012). LFS also argued that American Lifts could not qualify for Statute of Repose protection because it was not involved in the installation or construction of the air cargo lift at the facility.

In what was a determination of an issue of first impression, the Appellate Division held that a designer/manufacturer of a unique product need not also install such product in order to invoke the protection of the Statute of Repose. The Court found that the lift was designed to be installed as an integral and permanent fixture of the property and that American Lifts qualified for Statute of

Repose protection in designing the lift to the specifications of Federal Express for a particular building. Finally, the Court held that the cargo lift was not simply a standardized product but rather was unique to the requirements of the facility in question.

As another basis for affirming Summary Judgment in favor of American Lifts, the Appellate Division also held that LFS had failed to preserve its right to seek contribution after its settlement with Plaintiffs. LFS had neither had a formal judgment entered nor discharged the common liability in its Release agreement with Plaintiffs, both of which are requirements under New Jersey's Joint Tortfeasor's Contribution Act, N.J.S.A. 2A:53A-3.

Three attorneys from Ricci Tyrrell Johnson & Grey contributed to this result for longtime client Columbus McKinnon Corporation. Richard Hollstein developed the facts in discovery necessary to pursuit of the Statute of Repose defense. Nancy Green was the principal drafter of both the Summary Judgment and Appellate briefs. John E. Tyrrell argued at both the Trial Court and Appellate Court levels.

DEFENSE VERDICT IN MARTIME SUIT IN NEW JERSEY STATE COURT ON NEGLIGENCE AND BREACH OF CONTRACT

After a 12 day trial, on February 18, 2014 the jury returned a defense verdict in the Superior Court of Cape May County in favor of **Ricci Tyrrell's** vessel owner clients. The suit involved a multi-million dollar claim for damages against five defendants by a longshoreman who was injured in an accident involving the loading of an industrial truck onto a barge resulting in serious injuries, including a broken neck. Two co-defendants settled prior to trial and a third settled after the first day of jury selection. Plaintiff claimed that the vessel owners were negligent during the loading and pre-loading process and also breached an oral contract related to the loading process.
The case was tried by James W. Johnson, Esquire
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RICCI TYRRELL JOHNSON & GREY HONORED AT ANNUAL BOBCAT COMPANY OUTSIDE COUNSEL AWARDS

Ricci Tyrrell was honored to receive an award at the Bobcat Company annual Outside Counsel Awards conducted at the Defense Research Institute's Products Liability Conference in April.

Bobcat Company is a global provider of compact equipment for the construction, landscaping, agriculture, industrial and mining markets.

The recognized result was a non-suit (Pennsylvania terminology for a directed verdict at conclusion of Plaintiff's case) in a case tried in 2013 by ***John E. Tyrrell, Esquire.*** Plaintiff's allegations related to the design for ingress and egress of a Bobcat skid-steer loader. The non-suit was awarded following preclusion of Plaintiffs' liability expert after cross-examination on qualifications. The result was upheld on post-trial motions and was not appealed.

MIDDLE DISTRICT OF LOUISIANA GRANTS MOTION FOR SUMMARY JUDGMENT IN FAVOR OF TAMKO BUILDING PRODUCTS

On March 7, 2014, in the case of *Fernandez v. TAMKO Building Products*, Civil Action No. 12-518-SDD-SCR, Hon. Shelly D. Dick, of the United States District court, Middle District of Louisiana, granted in part TAMKO's motion for summary judgment, dismissing plaintiffs' primary claim that TAMKO failed to warn users of certain grades of its

asphalt saturated felt underlayment products of an alleged propensity to tear underfoot of roofers installing that felt on steep residential roofs. What remained was a claim under Louisiana products liability law of an alleged defect in the composition or construction of the piece of felt which was said to have torn, and which was admittedly discarded before suit was filed.

Then on April 7, 2014 Judge Dick granted TAMKO's motion for reconsideration, dismissed the remaining "defect in composition or construction claim," and entered judgment in favor of TAMKO on all claims.

Asphalt saturated felt underlayment is used during the roofing process to provide a temporary moisture barrier that protects the wood deck from the elements until the shingles are installed. Once the roof is completed, the felt provides a secondary moisture barrier that protects the wood deck from moisture that may seep beneath the shingles. Roofers necessarily walk on the underlayment before and during both underlayment and shingle installation. TAMKO makes several grades of asphalt saturated felts, suitable for a variety of residential roofing applications, and sells these products to professional roofers through its dealer and distributor network.

Federal OSHA regulations require that all roofers utilize fall protection whenever working at heights 6" or greater – there are no exceptions.

In this case, Eagle Roofing Co. was hired to repair the roof of a home that had been damaged in a hailstorm. Eagle Roofing subcontracted the roofing job to Edgar Jiminez, the direct employer of plaintiff Jorge Fernandez. The roofing crew was allegedly installing TAMKO standard no. 15 grade asphalt felt underlayment at the time of the accident. As Mr. Fernandez, an experienced, professional roofer, scaled the steep gabled roof on which he was working, a portion of the felt already installed allegedly tore, Fernandez fell, and suffered catastrophic injuries. No type of fall protection was being utilized on the gabled roof.

Plaintiffs' major claim was that TAMKO's on-product label (the packaging label wrapping on every roll of TAMKO felt sold) should have contained an admonition against using No. 15 grade felt on steep roof applications. In fact, the TAMKO packaging label on all rolls of felt it sells contains a warning (with pictorial) reminding roofers to utilize fall protection at all times. Fernandez and his employer neither read nor adhered to that warning, despite their awareness of both the need for fall protection and the risk of severe injury should an unprotected roofer fall to the ground.

Plaintiff also stated a "boilerplate" claim that the felt that allegedly tore was defective in construction or composition, although neither he nor his experts made any attempt to correlate exemplar felts that were tested to the felt that had been installed on the roof (including those adjacent layers that did not tear and which likely remain on the roof to this day).

TAMKO countered that it has no duty to warn professional, sophisticated roofers about any aspects of its product, since they use various manufacturers' underlayment products on a daily basis, are aware of their physical properties, and routinely cut and tear felt into appropriate sizes for installation. In fact, all manufacturers' grade no. 15 asphalt saturated felts are commonly used on residential steep roofs. Any asphalt saturated felt can tear under a roofer's tread, depending on slope, felt fastening patterns, coefficients of friction between the felt and deck or deck and roofer's shoes. Indeed felt has to be cut and torn to size by roofers or it can't be used. Finally, asphalt saturated felt is *not* fall protection. Federal OSHA

law requires that fall protection be used and allows professional roofers and their employers various options for doing so. The *risk* of injury to roofers is not the "tear-ability" of felt; the risk is the *falling* to the ground from heights of 6' or greater, regardless of the precipitating factor.

The Court granted TAMKO's motion for summary judgment on the failure to warn claim on either of two bases: (1) under Louisiana law, TAMKO has no duty to warn a professional sophisticated product user of its products propensities or qualities, including alleged dangers; and (2) since no one at the worksite heeded or even bothered to read the fall protection warnings that were on the TAMKO rolls of felt allegedly in use, then as a matter of law they could not establish that "but for" the allegedly inadequate warning, the accident would not have occurred.

In its motion for reconsideration, TAMKO explained that in its initial motion, it had paid less attention to the remaining "composition / construction" defect claim since it was literally a "throw-away" allegation (since the felt in question had not been preserved). In fact, plaintiffs' experts admittedly made no attempt to correlate the condition of the exemplar felt pieces they did test to the condition of the torn and discarded piece (or – importantly – that of the felt from the presumably same roll that was installed on that roof, did not tear, was not discarded, and never evaluated). In response, plaintiffs' counsel argued that he could prove the "composition / construction" defect through use of the *res ipsa loquitur* doctrine.

Judge Dick reevaluated her earlier decision, commented that there was "meat on the bone" of TAMKO's second motion, and rejected plaintiffs' attempt (raised for the first time in reply to TAMKO's reconsideration motion) to apply *res ipsa loquitur* to his remaining claim as inapposite and improper.

Trial was to have begun on May 5, 2014 in Baton Rouge, La. Plaintiffs appeal to the Fifth Circuit is pending.

The lead counsel team at the firm in the Fernandez v. TAMKO case is comprised of Bill Ricci, Francis P. Burns, III and Tracie Medeiros.

DEFENSE VERDICT IN COMMERCIAL LITIGATION SUIT ALLEGING BREACH OF COVENANT NOT TO COMPETE

On April 15, 2014, the jury returned a defense verdict in the Eastern District of Pennsylvania in favor of **Ricci Tyrrell's** client after 11 trial days. The suit involved an alleged breach of a Covenant Not to Compete which was part of an agreement by which assets of an indirect subsidiary owned by defendant had been sold to Plaintiff corporation. Confidentiality agreements preclude a detailed recitation of the underlying facts. The Plaintiff alleged lost profit damages in excess of $50 million.

The case was tried by John E. Tyrrell, Esquire who was assisted by Patrick J. McStravick, Esquire and E. Michael Keating, Esquire.

HIPAA PRIVACY RULE AND DISCOVERY OF NON-PARTY MEDICAL RECORDS

The Privacy Rule found in implementing regulations under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") continues to present challenges for lawyers involved in personal injury cases on both sides of the aisle, as well as their counterparts advising "covered entities" about regulatory compliance. An issue appearing with increasing frequency involves demands for access to non-party medical records.

Under HIPAA and its implementing regulations a "covered entity" (e.g., a treating physician, hospital, or health care plan) may not disclose protected health information ("PHI") except as permitted or required by administrative regulations. 45 C.F.R. §160.101 et seq. The regulations generally restrict the ability of health care providers and third-party payers to disclose medical information without the patient's consent. *Law v. Zuckerman*, 307 F. Supp. 2d 705 (D. Md. 2004). But there are exceptions. 45 C.F.R. §164.512. One relates to and establishes parameters for disclosure in judicial and administrative proceedings. 45 C.F.R. §164.512(e)(1). Disclosure may be made, for example, in response to a court order, or a subpoena upon satisfactory assurance that reasonable efforts have been made to notify the patient of the request, or without notice to the patient if disclosure is compliant with a "qualified protective order." *Id.* The regulations "plainly contemplate that disclosure of protected information will be subject to judicial supervision." *Thomas v. 1156729 Ontario Inc.*, 2013 U.S. Dist. LEXIS 153898 *8 (E.D. Mich.). Further, HIPAA does not preempt state law that increases privacy protection by restricting the use or disclosure of information HIPAA would otherwise permit. 45 C.F.R. §160.202.

Case law has not yet explored whether a patient record may be redacted to an extent that it ceases to pose a privacy issue. PHI is defined as "individually identifiable health information." 45 C.F.R. §160.103. "Individually identifiable health information" is defined in part as a "subset of health information, including demographic information collected from an individual" that identifies the individual or is of such a nature that there is "a reasonable basis to believe the information can be used to identify the individual." 45 C.F.R. §160.103. Information that "does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is not individually identifiable health information." 45 C.F.R. §164.514(a); *also see*, 45 C.F.R. §164.502(d)(2). A HIPAA regulation also prescribes how a medical record can be effectively stripped of personal identifiers. 45 C.F.R. §164.514(b).

In Pennsylvania efforts to discover non-party medical records have come to prominence in medical malpractice cases. *Buchman v. Verazin*, 54 A.3d 956 (Pa. Super. 2012), appeal denied, 77 A.3d 1258 (Pa. 2013); *Lykes v. Yates*, 77 A.3d 27 (Pa. Super. 2013). In *Buchman* the plaintiff alleged negligent performance of a surgical procedure and sought operative reports for the same procedure done by the defendant over a five year period but "redacted for patient names/medical number." *Yakes* involved a claim of negligent post-operative care and plaintiff's demand for access to records of previous patients treated the same way. Objections ran the gamut; the discovery was said to be precluded by the HIPAA Privacy Rule, the right to privacy guaranteed by the state and federal constitutions, physician-patient privilege, and the common law right to privacy. In both cases the Superior Court found access was not warranted as a matter of state law essentially because the information sought could not be not relevant to the matters in dispute. Had the cases also involved product defect claims against a medical device used on the plaintiff and others on the same day or within a brief span of time the analysis and outcome could have been very different. In such a case, both the plaintiff and the device defendant would have a common interest in the other procedures, and the history of product performance would seem to self-evidently satisfy any relevance objection, especially under the standard applied for purposes of pre-trial discovery. *Compare, Ousterhout v. Zukowski*, 2013 U.S. Dist. LEXIS

165796 (N.D. Ill.)(in a battle between cosmetic surgeons accusing each other of professional defamation discovery of patient records was potentially relevant and permitted pursuant to a HIPAA qualified protective order). And in such a case, compliance with the HIPAA Privacy Rule would likely emerge as the first order concern.

Francis P. Burns, III is a Member of Ricci Tyrrell with an L.L.M. (Health Care Law), 2003, Health Care Institute, Widener University School of Law.

EVENLY DIVIDED PA SUPREME COURT LEAVES STANDING SUPERIOR COURT OPINION PROTECTING COMMUNICATIONS BETWEEN COUNSEL AND EXPERT WITNESSES AS WORK-PRODUCT

A three to three split of the justices of the Pennsylvania Supreme Court has left in place a Superior Court determination that communications between counsel and expert witnesses are entitled to work-product protection under Pennsylvania Rule of Civil Procedure 4003.3. The decision in *Barrick v. Holy Spirit Hosp.*, 2014 Pa. LEXIS 1111 (Pa. 2014), was issued on April 29, 2014.

In *Barrick v. Holy Spirit Hospital*, 2011 Pa. Super. 251 (2011) a full *en banc* panel of the Superior Court ruled eight to one to reverse a trial court decision to enforce a subpoena to a treating physician/expert witness requiring production of communications with counsel. A three judge panel of the Superior court initially affirmed the trial court's Order granting defendant's Motion to enforce the subpoena, however re-argument *en banc* was subsequently granted.

The Pennsylvania Supreme Court had granted appellant's Petition for Allowance of Appeal limited to a single issue: "Whether the Superior Court's interpretation of Pa. R.C.P. No. 4003.3 improperly provides absolute work product protection to all communications between a party's counsel and their trial expert". *See Barrick v. Holy Spirit Hosp. of the Sisters of the Christian Charity*, 616 Pa. 589 (2012).

Supreme Court Justice Stevens participated in the Superior Court decision being reviewed and therefore could not participate in the decision at the Supreme Court level. Justice Baer wrote an opinion in support of affirmance and Justice Saylor wrote an opinion in support of reversal. Both opinions were released on April 29, 2014. Justice Baer's opinion supports a "bright-line rule barring discovery of attorney-expert communications".

Justice Saylor's opinion, *inter alia*, expressed concern over "manipulative counsel" who could write opinions for experts or affect opinions through "modest and subtle redirection".