Ricci Tyrrell Johnson & Grey

Ricci Tyrrell Johnson & Grey's laterals. Standing, left to right: John E. Tyrrell, Francis J. Grey Jr., William J. Ricci and Monica V. Pennisi Marsico. Seated: Francis P. Burns III.
Not pictured: James Johnson. Photo credit: *Nanette Kardaszeski / The Legal Intelligencer*

Quarterly Newsletter

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We are proud to state that the formation of Ricci, Tyrrell was named one of the top 10 Lateral Moves in 2014 by The Legal Intelligencer.

Our third installment of our quarterly newsletter finds us in the midst of construction as we increase the size of our Philadelphia office through acquisition of adjoining space.

Like all Pennsylvania products liability lawyers, we are also in the midst of confronting the Pennsylvania Supreme Court's decision in Tincher v. Omega Flex, Inc., 104 A.3d 328 (2014). Ricci Tyrrell has been at the forefront of early litigation battles over the proper interpretation of *Tincher* and our lawyers have also been leading voices in the community on the issues raised by *Tincher*. For the November 25, 2014 issue of *The Legal Intelligencer*, Bill Ricci was interviewed for an article regarding the *Tincher* decision entitled "Products Liability Cases in PA Face an Uncertain Road". For the January 27, 2015 issue, Mr. Ricci co-authored an article for *The Legal Intelligencer* entitled "A Practical Defense Perspective on the *Tincher* Ruling". Copies of both articles are on our firm's website. On December 14, 2014, Mr. Ricci participated in a continuing legal education luncheon program for the Philadelphia Association of Defense Counsel (PADC) entitled "*TIncher* At First Blush" which was a review of the decision and discussion of the many unanswered questions left by the decision.

In January, Mr. Ricci participated in a seminar at the law firm of Feldman, Shepherd entitled "A Whole New World: Product Liability Law in Pennsylvania after *Tincher*". He also participated in a webinar for the Pennsylvania Defense Institute (PDI) entitled "Maximizing *Tincher* v. Omega Flex, Inc., A Practical Guide for Defense Attorneys". Mr. Ricci has an upcoming article regarding practical implications of the *Tincher* decision, in the April Issue of PDI's publication, Counterpoint. Ricci Tyrrell as a firm conducted a day-long continuing legal education seminar addressing *Tincher* on February 27, 2015.

Francis P. Burns III will address the Association of Equipment Manufacturers (AEM) in April. Mr. Burns' presentation is entitled "In-Field Incident Investigations."

John E. Tyrrell was selected to the shortlist for the Finance Monthly 2015 Law Awards in the category of Sports Law-USA. The Sixth Annual Finance Monthly Law Awards recognize law firms and legal professionals who, over the past 12 months, have consistently excelled in all aspects of their work and set new standards of client service. Mr. Tyrrell is a frequent presenter on Sports Law subjects and has been invited to make a presentation at the annual outing of the Lackawanna Pro Bono in June. Mr. Tyrrell will address "Ethical Considerations Affecting Claims of Confidentiality in Litigation Involving Professional and College Sports Teams."

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Ricci Tyrrell Johnson & Grey
ATTORNEYS AT LAW

SUMMARY JUDGMENT AWARDED IN CATASTROPHIC INJURY LIQUOR LIABILITY SUIT

Several defendants represented by Ricci Tyrrell were awarded Summary Judgment on all claims in *Bade v. Picone, et al.,* Schuylkill County, Civil Action No. S-129-2012 by Order dated February 2, 2015.

Plaintiff suffered catastrophic injuries when he was struck as a pedestrian by an allegedly intoxicated driver. Plaintiff sought recovery on a variety of theories against the alleged partners of a restaurant where the driver was employed and individuals present at a gathering at a private residence prior to the incident. Plaintiff alleged that the minor driver had either consumed alcohol at the restaurant or that alcohol from the restaurant had made its way to the private residence and been consumed there by the driver.

The Court's decision displayed an enlightened and accurate understanding of the rules of civil procedure governing Summary Judgment motions in Pennsylvania. Under Pa.R.Civ.P. 1035.2, Summary Judgment can be awarded on either of two bases:

(1) Whenever there is no genuine issue of any material fact as to a necessary element of the cause of action and defense which could be established by additional discovery or expert report; or

(2) If, after completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would (3) require the issues to be submitted to a jury.

Plaintiff took over 40 depositions and opposed Summary Judgment, despite no evidence of the source of the alcohol consumed by the driver, based almost entirely on challenges to the credibility of defendants' witnesses. In doing so, plaintiff cited to the "*Nanty Glo* Rule" in Pennsylvania which provides that Summary Judgment may not be awarded to a party based solely on the oral testimony of its own witnesses. *See Nanty-Glo v. American Surety Co.*, 309 Pa. 236 (1932). The Court in the *Bade* action (Domalakes, J.) correctly noted that the *Nanty-Glo* Rule only applies to a Summary Judgment Motion under Pa.R.Civ.P. 1035.2(1) and that a Motion under Section (2) of the Rule should still be granted in the absence of evidence of a *prima facie* case.

John E. Tyrrell is lead counsel on the Bade case and presented oral argument in favor of Summary Judgment. Patrick McStravick and Richard Hollstein participated in drafting the successful briefs.

THE VIABILITY OF COLLATERAL ESTOPPEL IN THE ABSENCE OF EXPLANATION BY THE COURT

BY MONICA V. PENNISI MARSICO

A collateral estoppel argument raised by a plaintiff requires careful analysis of the prior order or decision at issue to effectively challenge application of the doctrine. In *Warnick*

v. NMC-Wollard, Inc., et al., 512 F. Supp. 2d 318 (M.D. Pa. (2007), the District Court for the Western District of Pennsylvania considered summary judgment motions filed by defendants, NMC and Hobart, in a product liability action based in part on plaintiff's inability to identify the manufacturer of the belt loader on which he was injured while at work. *Id.* at 319. Plaintiff, an airport employee, sustained a right thumb injury while attempting to step from the ground onto the running board of a belt loader that is used to transfer baggage to and from an aircraft on a mechanized conveyor belt. *Id.* at 320. Plaintiff claimed that the belt loader was defectively designed because it required users to negotiate a high step in the absence of a handrail. *Id.*

At his deposition, plaintiff was able only to identify the type of belt loader on which he was injured and that it bore the name "Wollard," which name was associated with various companies at different periods in time. *Id.* at 320. While the parties disagreed as to the defendants' corporate structure and its involvement in manufacturing belt loaders, the defendant moved for summary judgment on the basis that the belt loaders it manufactured were not unreasonably dangerous; and because plaintiff was unable to prove causation without definitive evidence of the identity of the subject manufacturer. *Id.* at 321-22.

In opposition to the motion, plaintiff submitted an expert report to establish defect. *Id*. Supp. at 321. Plaintiff also argued that Hobart was collaterally estopped from challenging his claims because the common pleas court previously denied dispositive motions Hobart filed in two prior cases in which different plaintiffs asserted design-defect claims due to belt-loader related injuries. *Id.* at 323. Both motions were denied "in a one page Order devoid of reasoning or analysis." *Id.* at 321.

Collateral estoppel or issue preclusion applies when: "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action." *Dam Things from Denmark v. Russ Berrie & Co., Inc.*, 290 F.3d 548, 559 n.15 (3d Cir. 2002); *Raytech Corp. v. White*, 54 F.3d 187, 190 (3d Cir. 1995). The *Warnick* Court determined that application of these criteria patently resulted in a finding that Hobart was not collaterally estopped from raising its defenses. 512 F. Supp. 2nd at 323.

Interlocutory orders, such as denials of summary judgment, are not final or "sufficiently firm to be accorded conclusive effect," and therefore not given collateral estoppel effect in Pennsylvania. *Id.* The *Warnick* Court noted that the summary denials of Hobart's prior dispositive motions could not provide the requisite justification for invoking the doctrine in the subject action. *Id.* at 323 (citing *Safeguard Mutual Ins. Co. v. Williams*, 463 Pa. 567, 345 A.2d 664, 669-70 (1975) ("an order entered without an opinion or other explanation cannot provide justification" for invocation of the collateral estoppel doctrine.).

The Court reasoned that the lack of explanation in the prior orders made it essentially impossible "to know which arguments the [common pleas court] rejected, which it accepted, and which it simply failed to reach." *Warnick*, 512 F. Supp. 2d at 324. As such, the ground on which those decisions were based could not be ascertained, and the Court declined to give the orders preclusive effect. *Id.* The Court ultimately granted the defendants' summary judgment motion on its merits. *Id.* at 337-38. *See also: Delmont Mech. Serv. v. Kenver Corp.*, 450 Pa. Super. 666, 671 n.3, 677 A.2d 1241 (1996) (finding that previous denials of summary judgment did not preclude a dispositive ruling when the prior proceedings did not address the validity of a mechanic's lien or actual notice of the lien and one opinion "was without opinion").

The Pennsylvania Superior Court addressed the same issue in the context of preliminary objections in *Krosnowski v. Ward*, 836 A.2d 143 (Pa. Super. 2003). In that case, the Court considered an order sustaining the defendants' preliminary objections as to venue and transferring consolidated medical malpractice cases to Montgomery County. *Id.* at 145. On appeal, plaintiff argued that multiple decisions by various common pleas judges have "repeatedly ruled" that Abington Memorial Hospital, which is affiliated with CHOP in Philadelphia and with Philadelphia County medical schools, is subject to venue in Philadelphia County; therefore, the collateral estoppel doctrine prevented relitigation of the issue in the subject case. *Id.* at 147. In her brief, plaintiff identified numerous cases in which the Court of Common Pleas entered orders sustaining preliminary objections on this issue. *Id.* at 148. The Superior Court noted, however, that the cases "were not accompanied by any opinion explaining the reasons for their entry." *Id.*

The *Krosnowski* Court initially determined that an order overruling preliminary objections "can hardly constitute" a final judgment on the merits necessary for collateral estoppel. *Id* at 148. Moreover, collateral estoppel does not apply when an order is entered without an explanation or opinion. *Id.* The Court also pointed out that the Supreme Court of Pennsylvania previously ruled that venue issues must be decided on a case-by-case basis, which was evident by the parties' acknowledgement that Philadelphia County trial courts "have ruled both ways" on this issue and with regard to this particular hospital. *Id*. (citing *Purcell v. Bryn Mawr Hosp.*, 525 Pa. 237, 246, 579 A.2d 1282 (1990)). The court therefore rejected plaintiff's collateral estoppel argument. *Id.*

At least one other jurisdiction has also determined that a prior dispositive order without a written opinion would not serve to bar relitigation of the issue in a pending action. *See: In re United Mine Workers Emp. Benefit Plans Litig.*, 782 F. Supp. 658, 672 (D.D.C. Cir. 1992) (finding difficulty analyzing the preclusive effective of a two-paragraph order granting summary judgment as to the enforceability of a contribution clause in a union pension trust and refusing to "speculate about the basis of [the district court's] decision"); *Connors v. Tanoma Mining Co., Inc.*, 953 F.2d 682 (D.D.C. Cir. 1992) ("if the basis of [a prior] decision is unclear, and it is thus uncertain whether the issue was actually and necessarily decided in that litigation, then relitigation of the issue is not precluded."). *But see: Surgical Orthomedics, Inc. v. Brown Rudnick LLP*, 2013 U.S. Dist. LEXIS 87418, at *5 (D.N.J. June 21, 2013) (determining that a Texas court's granting of a defendant law firm's motion to dismiss a legal malpractice action due to a New York forum selection clause in a one page order with no written opinion was insufficient to overcome collateral estoppel on that issue).

Summary denials of preliminary objections and dispositive motions with no accompanying opinion explaining the court's rationale are a frequent occurrence in Philadelphia County and elsewhere. Thus, it is necessary in any case in which a collateral estoppel argument is raised to analyze the substance of the prior order or decision in order to refute invocation of the doctrine.

Monica V. Pennisi Marsico is a Member of Ricci Tyrrell Johnson & Grey and focuses her practice on the areas of automotive products liability and premises liability.

DANGEROUS DEATH DAMAGES

BY BRIAN J. SCANLON

In Pennsylvania Wrongful Death actions, determining the "value" a family member brought to the family unit can be difficult, if not impossible. The Pennsylvania standard jury instruction for Wrongful Death actions allow a plaintiff to be awarded a "sum that will fairly and accurately compensate her family for the monetary value of the services, society, and comfort that she would have given to the family had she lived, including such elements as work around the home, provision of physical comforts and services, and provision of society and comfort." Courts have interpreted this instruction to allow a jury to place a monetary value on the companionship and society a decedent gave her family.

The Pennsylvania Superior Court greatly expanded the definition of services to include the grief a family member feels as a result of the loss of a loved one. The case, *Rettger v. UPMC Shadyside*, opened the door for Plaintiffs to seek compensation for "profound emotional and psychological loss suffered upon the death of a parent or a child…" *Rettger v. UPMC Shadyside*, 991 A.2d 915, 933 (Pa. Super. 2010), appeal denied 609 Pa. 698 (2011). Despite being the first Court to acknowledge such a broad and undefinable means of recovery, the panel stated that the case *Machado v. Kunkel* 804 A.2d 1238 (Pa. Super. 2002))clearly extended the term services to the profound emotional and psychological loss suffered upon the death of a parent or a child in a negligence claim. What the Court may not have realized is that the words "profound" "emotional" and "psychological" do not appear anywhere in the text of the *Machado* decision.

The Court, in *Machado*, was concerned with the definition of "services". A child may recover in a wrongful death action for the loss of companionship, comfort, society and guidance of a parent. One spouse has the legal right to the company, affection, and assistance of and to sexual relations with the other. All of these rights were recognized by the Court in *Machado*. However, the Court, in *Machado*, never mentions the psychological loss and pain felt by a family upon the death of a loved one.

The problem created by the Court's decision in *Rettger* is that juries may now wade into an even murkier pool when deciding the value of a Wrongful Death action. The Court's decision shifts the focus from the value a decedent brought to a family to the emotional wounds a family feels at the moment of an untimely death. A jury may now turn their attention to the family members themselves and the pain and hurt caused by the loss of a loved one. The Court, in *Rettger*, actually quoted the decedent's mother's testimony describing her understandable grief as support of a jury's wrongful death award. The Court stated, "Mrs. Rettger's loss far exceeded the value of her son's yard work." *Rettger*, 991 A.2d 915. The Court did not seem to analyze the value of the decedent's companionship.

A major concern for defendants is that "profound emotional and psychological loss" is difficult to quantify. However, a greater fear should be the knowledge that the untimely death of a loved one always causes extreme pain and loss. There is little doubt that a child's death will devastate a loving parent and that this testimony can be powerful. Damages are awardable for lost society, contact and services. Based on *Rettger,* emotional loss fits into those categories.

Brian J. Scanlon is an Associate with Ricci Tyrrell Johnson & Grey and concentrates his practice on product liability defense in the industrial equipment industry, as well as premises liability litigation.

A JURY VIEW?

BY ALYSSA A. BROOKLAND

You're sitting in a chair, one of the straight, stiff wooden chairs where if you move one inch to the left to stretch your back, the courtroom will be filled with the sound of your creaking chair and all eyes will be on you. So you patiently sit, motionless, trying your best to take as detailed notes as you can about all of the testimony you're listening to. There's a forklift that you know. There's a man who said he was operating the forklift the way he always has; carefully, with expertise. There's a man sitting at a long table with his attorney, pleading that the forklift was poorly designed because, if it had just had mirrors on the sides, he wouldn't have been crushed as he walked behind the forklift—the operator would have (should have!) seen him. And then there are experts. All these experts spewing numbers, measurements, industry standards. Some are saying mirrors would have prevented this accident. Others disagree; they say mirrors aren't necessary at all. So you're sitting there, taking your notes, trying not to shift in your creaky wooden chair, and thinking how much easier this would be—how straightforward it might seem – if you and the 11 other men and women on this jury could just take an hour to go sit in that operator's seat in the forklift and see for yourselves – without numbers, measurements, or experts telling you opposite conclusions – what can you see?

What would that operator likely have seen? Should mirrors have been on that forklift or was it defective not to have them?

This is a question in the courts of Pennsylvania without an easy or definitive answer, particularly as the question relates to viewing a specific product, like a forklift or a car. The more traditional idea of a jury view is where a jury is given the opportunity to go to the scene of an accident, in order to gain a personal understanding by seeing the landscape or the intersection in question as to how that accident may have occurred. Should the defendant driver, for example, have been able to see that the light was yellow and safely stop before entering the intersection, or did the incline of the hill approaching that light prevent her, or any reasonable driver, from doing so?

It is undisputed in this Commonwealth that a trial court has the discretion to allow a jury view. *Wood v. E.I. du Pont de Nemours & Co*., 829 A.2d 707, 715 (Pa. Super. 2003). *See also Lobozzo v. Adam Eidemiller, Inc*., 263 A.2d 432, 435 (Pa. 1970); *Mastrocola v. SEPTA*, 2006 Phila. Ct. Com. Pl. LEXIS 458, at *29 (Pa. C.P.2006) (*rev'd* on other grounds); Pa.R.C.P. 219. And why shouldn't a trial court allow the jury to utilize such an obvious and necessarily subjective tool, because "[a]lthough a picture can be worth a thousand words, a personal view is, arguably, priceless." *Mastrocola*, 2006 Phila. Ct. Com. Pl. LEXIS, at * 31. A jury view allows for jurors both to listen to testimony and expert opinions, and take into account their own observations. *See Lobozzo v. Adam Eidemiller, Inc*., 263 A.2d 432, 436 (Pa. 1970) (explaining that the jury "may, and indeed should, test the believability of testimony concerning observable, physical facts against the knowledge they gained while on the view, and, if the testimony conflicts with that which they know from their own observation, they cannot be asked to disregard their own knowledge.").

Yet some courts are wary to allow a jury view, particularly in cases involving a product that could be shown to the jury through use of photographs or video. The trial judge does not want to clog up the court's time or the dockets by leaving the courtroom for a half day to allow for what could be seen as a field trip, where demonstrative evidence in court and expert testimony could provide the same overall picture and understanding to the jury. But can it? Particularly in a case of the nature described above, involving a forklift and a forklift operator's visibility on that particular model, the best

defense may come from the jury having the ability and the court's permission to sit right where the operator sat and see for themselves what the operator would have seen at the time of the accident. That understanding is critical, and something that cannot be gained from testimony about measurements and industry standards coming from the witness stand. The argument for allowing this type of jury view, then, is that it could in fact *save* time: it removes the time during trial it would take to attempt to explain to the jury, through the use of measurements and photographs, what frankly would be much easier to see and consider in person.

A jury view of the subject product could take place outside of or in the vicinity of the courthouse, upon logistics approved by the Court. In essence, it is just a form of demonstrative evidence that, in a products liability case, may be required to take place off the premises of the courthouse simply due to the size of the product in question. Just as the trial court has full discretion to allow a jury view, so too does it have discretion with regard to the admissibility of demonstrative evidence. *Harsh v. Petroll*, 840 A.2d 404, 421 (Pa. Commw. Ct. 2003) (*citing Leonard v. Nichols Homeshield, Inc*., 557 A.2d 743, 745 (Pa. Super. 1989)). This evidence should be admitted if its probative value outweighs its potential to improperly influence the jury. *Leonard*, 557 A.2d at 745.

See also Jackson v. Spagnola, 503 A.2d 944 (Pa. Super. 1986); *Pascale v. Hechinger Co*., 627 A.2d 750, 755 (Pa. Super. 1993).

For demonstrative evidence, or a recreation of such evidence, conditions must be sufficiently close to the accident at issue to ensure that the probative value of the demonstration outweighs its potentially prejudicial effect. *Leonard, supra; Pascale, supra*. Even videotaped reenactments have been allowed where the effect will be to aid the jury's understanding and where any differences in the video portrayal and the actual accident were explained to the jury. *See Russo v. Mazda Motor Corp*., 1992 U.S. Dist. LEXIS 16169, at * 10 (E.D. Pa. Oct. 19, 1992) (involving a products liability action where a filmed reenactment of the startup of a vehicle in a case involving a plaintiff-driver who started a stick shift without depressing the clutch was permitted, so long as any differences between the actual accident and the reenactment were clearly and repeatedly explained).

Defense attorneys should continue to make requests, by way of a motion to the court, for a jury view. For a case like the forklift example above, where the chief and essential determination of what a forklift operator could and should have seen given the forklift's design is at the crux of the defense, allowing those twelve jurors to sit in that forklift operator's seat would certainly be priceless, and could very well be the difference between a seven figure award or a defense verdict.

Alyssa A. Brookland is a former Associate of Ricci Tyrrell Johnson & Grey.

COVERAGE CORNER – *The Multiple Trigger Theory* *Reimbursement of a Settlement Payment* *Diversity Jurisdiction*

BY FRANCIS P. BURNS III

Multiple Trigger. The "multiple trigger" theory for determining when an injury occurs has been adopted in Pennsylvania but to date only in cases involving latent diseases, like asbestosis or mesothelioma. At the close of 2014 the Pennsylvania Supreme Court refused to hear an appeal in a case in which the lower courts refused to apply the "multiple trigger" theory at the urging of an excess carrier to a matter

involving claims for bodily injury and property damage resulting from a gasoline leak at a gas station. *Titeflex Corp. v. National Union Fire Insurance Co*., 88 A.3d 970 (Pa. Super. 2014), appeal denied, 2014 Pa. LEXIS 3353 (Pa., 12/16/2014). The consequence was affirmance of an Order declaring the excess carrier obliged to defend unresolved cross-claims following a global settlement of the plaintiffs' claims that exhausted the primary limits of coverage.

In the Spring of 1998 gasoline leaked onto neighboring properties. Many neighbors filed suit against the station owner, Titeflex, and other manufacturers and installers of products at the gas station. The gas station filed cross-claims against *Titeflex* and others. The cross-claims sought compensation for damage to the business property, loss of gasoline, and environmental clean-up costs. *Titeflex* was insured by Kemper Insurance under a primary CGL policy for the August 1, 1997 to August 1, 1998 policy period (and subsequent years). National Union provided excess coverage.

National Union argued that because some of the settled claims involved property damage and bodily injury that should be allocated to years other than the 1997 to 1998 policy period *Titeflex* had not exhausted the primary coverage for that year. For example, National Union pointed to a minor plaintiff who received a portion of the settlement but was born in 2000, several years after the 1997-1998 primary policy expired. National Union argued it was impossible for the claimant to have suffered bodily injury during the 1997-1998 policy term and the settlement payment representing his claim could not be allocated to that policy. Titeflex countered that the child, born and diagnosed with autism, suffered personal injury allegedly resulting from his mother's exposure to the leak.

The trial court found it inconsequential that the effects of the spill spanned multiple years and generated multiple claims; it was a single occurrence subject to the per occurrence limit for all claims arising out of the spill. The Superior Court agreed that even if some alleged injuries did not "manifest" themselves until years later, as in the case of the child diagnosed with autism, only the policy in effect for the year of the "occurrence" (spill) was implicated because the "multiple trigger" theory applies only to latent disease injuries and "does not apply in this case."

Reimbursement of a Settlement Payment. In *American Western Home Insurance Company v. Donnelly Distribution, Inc*., 2015 U.S. Dist. LEXIS 14357 (E.D.Pa. 2015) an insurer was granted summary judgment on its claim for reimbursement of a settlement paid under a reservation of rights. American Western assumed Donnelly's defense in a slip and fall case and filed a coverage action seeking a declaration that it owed no duty to defend or indemnify the insured. With cross-motions for summary judgment pending, the underlying action was settled for $150,000, of which $125,000 was paid by American Western on behalf of Donnelly. Soon thereafter the district court ruled the carrier owed a duty to defend and indemnify. American Western appealed and the Third Circuit reversed. American Western then filed a second action against Donnelly seeking reimbursement of the money it contributed to settle the underlying suit.

The policy did not explicitly allow for reimbursement so the carrier pleaded an unjust enrichment theory. Donnelly countered that a voluntarily payment foreclosed equitable reimbursement. The district court held the voluntary payment rule did not apply because American Western was litigating its liability when the settlement was paid, the payment was not made under a mistake of law, American Western clearly communicated its dispute about any obligation under the policy, the settlement amount was reasonable, and Donnelly was aware of the settlement and voiced no objection to resolving the case. While the settlement

benefited American Western, it also benefited Donnelly. A trial could have led to a verdict greater than the settlement in a case where it was ultimately decided American Western owed no duty to defend or indemnify Donnelly. Although Donnelly would have been required to pay nothing had a trial ended in its favor, it was equally plausible that the settlement saved defense costs and greater costs to Donnelly through a higher verdict against it.

The district court was also persuaded to its decision by other features particular to the case before it. When the settlement was paid, American Western had already lost a motion for summary judgment on the duty to defend and indemnify, but the ruling was quickly vacated in favor of additional briefing. After the settlement was paid, the district court again granted summary judgment in favor of Donnelly and that was the ruling overturned on appeal. Thus, "American Western could hardly be faulted for settling given this court's ruling, a ruling which this court again reached [after settlement] at the summary judgment stage." The district court also noted the Third Circuit was aware that a settlement had been reached in the underlying litigation and its decision specifically referred to the "duty to indemnify Donnelly for any amount due pursuant to the settlement of the Underlying Action." Thus, the district court found it incompatible with a finding of no duty to indemnify to rule that there was no right of reimbursement: "If such a distinction existed, it would provide an incentive for the insurer to not settle, hoping that it owed no duty to indemnify, or stall on litigating and paying a settlement, hoping that its duties would be clarified before it made any payments."

Diversity Jurisdiction – *Amount in Controversy*. After a dispute over coverage under a professional liability policy a law firm filed suit in state court for breach of contract and bad faith. The carrier filed a notice of removal. In its complaint, the law firm pleaded it would limit the sum of any award for all damages sought at an "amount not to exceed $74,999.99, which limitation on damages shall bind plaintiff, so that any decision or verdict in favor of plaintiff...shall be the subject of molding and reduction to a figure close[s]t to the sum of $75,000, without reaching or exceeding that amount." Citing the decision of the United States Supreme Court in *Standard Fire Insurance Company v. Knowles*, 133 S. Ct. 1345 (2013), the district court held that plaintiffs are masters of their complaints and can avoid removal to the federal system by stipulating to amounts at issue below the federal jurisdictional requirement. Confident that a plaintiff can be held to a self-imposed limit by way of the court's equitable powers, the district court found that the amount in controversy fell below $75,000 and remanded the action to state court. *Petrille v. Liberty Insurance Underwriters, Inc.*, 2015 U.S. Dist. LEXIS 10894 (E.D.Pa. 2015).

Francis P. Burns III's practice at Ricci Tyrrell Johnson & Grey is varied but focused principally on defense of product liability actions and all dimensions of insurance coverage including coverage opinions, declaratory judgment actions and bad faith.

SUCCESSOR LIABIILTY FOR PRODUCTS OTHER THAN THE PRODUCT LINE EXCEPTION THINGS TO CONSIDER

BY PATRICK J. MCSTRAVICK

The general rule against successor liability in Pennsylvania is well established. "With respect to successor liability in this Commonwealth, it is well-established that when one company sells or transfers all of its assets to another company, the purchasing or receiving company is not responsible for the debts and liabilities of the

selling company simply because it acquired the seller's property." *Cont'l Ins. Co. v. Schneider, Inc.*, 582 Pa. 591, 873 A.2d 1286, 1291 (Pa. 2005).

However, given the potential liabilities that can extinguished by a strict application of this general rule, six exceptions have sprung up under Pennsylvania law:

1) The purchaser expressly or impliedly agrees to assume such obligation;

2) The transaction amounts to a consolidation or merger;

3) The purchasing corporation is merely a continuation of the selling corporation;

4) The transaction is fraudulently entered into to escape liability;

5) The transfer was not made for adequate consideration and provisions were not made for the creditors of the transferor; and,

6) The successor undertakes to conduct the same manufacturing operation of the transferor's product lines in essentially an unchanged manner.

Id. On the bright side, the Plaintiff is going to have to prove that one of the exceptions apply. *See e.g. Schmidt v. Boardman Co.*, 958 A.2d 498, 506, (Pa. Super. 2008), *affirmed* 608 Pa. 327, 11 A.3d 924 (Pa. 2011) (discussing elements of plaintiff's burden to prove the product line exception). When most people who focus on strict product liability think of "successor liability", they tend to think immediately of 6) -the product line exception.

But *any* of these successor liability exceptions can be asserted to defeat the general rule, if you are a purchaser of a manufacturer of a product line, or even for debts of the prior entity. As a result, manufacturers, or any other corporations for that matter, must guard against falling into an exception if they have purchased assets, bought stock, or otherwise acquired or taken over any part of a business operation form another person or entity. The following is a non-exhaustive list of points to consider if confronted on either end of a successor liability issue that does not involve the product line exception (or if it does, just in case).

- The contract and its terms. This is the *alpha* and *omega* of considerations other than product line exception. Because the contact contains the terms, the parties and (most likely) a description of the assets, it will be probative of successor issues. The terms should definitively address, including but not limited to, the following:
    - Non-assumption of liability of the purchasing entity (or assumption if that is what is intended).
        - If this is not expressed, documentation of assumption of any post-contractual risk is imperative (i.e. evidence that the seller defended cases).
        - Documentation of the rejection of claims is the other side of this same coin
    - Indemnification v. assumption - An agreement to indemnify is not an agreement to assume liability, as the former is a contract right of the seller while the latter establishes a right in a third party. *See e.g. U.S. v. Sunoco*, 637 F.Supp.2d. 282 (2009).
        - Again, active proof of who has paid claims, and

whether they have sought indemnification, is important.

- Insurance. Who is required to insure the post transaction risks? A good contract makes this explicit, with the party assuming the liability obligated to insure all risks and name the other part(ies) as insured (not additional insureds).
  - There is a choice, reminiscent of Scylla and Charybdis, for sellers regarding insurance – if there is any vagueness in the contract and you purchase insurance, this is (potentially) evidence you knew you were liable. On the other hand, if you did not purchase insurance, and it is determined despite the transaction you are a successor, the entire risk is on you.
  - The purchaser must be sure to confirm insurance is purchased. Most contracts require, for example, purchase of insurance with proof (e.g certificate of insurance). This needs to be calendared and confirmed.
- Defense responsibilities. Although not quite as important as who pays, there is *evidentiary* value in who defends. In some respects, the agreement to defend is the best evidence of control, and liability (almost) always follows control.
- Delineation/description/definition of assets. How assets are delineated, described, and defined, even in exhibits or appendix to a contact (such as trademarks, even in foreign jurisdictions), are as important as how liabilities are delineated. It will be the assets, and the use/sale/benefit derived from them that will form the equitable basis of a successor claim.
- Incorporation of other agreements. Have, and know, the terms of ancillary agreements. If incorporated, they can give rise to arguments never anticipated in the original transaction.

- Viable entity left after transaction; insurance; post-sale defense of claims.
  - Is the entity that sold the assets and kept any aspect of liability still amenable to suit and able to defend and pay?
  - Remedy is a huge issue, especially in equity. The legitimacy of dissolution notwithstanding, if the sale leaves no remedy, your well-crafted contact might be irrelevant.
  - Ability to pay of the predecessor is an identified factor in many jurisdictions.
    - Insurance
    - Assets left to cover pay indebtedness
  - Bankruptcy. Both the buyer and seller need to monitor the status of the other party on a regular basis especially if the other party assumed or retained liability. Bankruptcy can radically alter the landscape, 180° of any agreement.
- Advertisements and other public statements or government filings.
  - Be careful of the content of advertisements, public filings, non-contractual documents exchanged with others

  - One exception includes "implied" agreement to assume – dangerous in any communication
- *De Facto* looks at what happened
  - Owners/Employees/property/ contracts – under each and every analysis, the Court is going to have a jaundiced eye of the overlaps.
    - Some overlap can be expected
    - Obvious, or obvious attempts to obscure obvious, relationships will create issues of fact.
      - Friends, family, business partners getting majority positions in "new" entities
      - Stock distributions designed to permit control of persons/entities hidden from cursory inspection
- This may be analyzed with analogy to alter ego/"pierce the corporate veil"
  - In Pennsylvania, corporate veil jurisdiction is "mature" and multi-factored
  - Expect a full analysis in any successor situation, including
  - analogous arguments from alter ego
    - Fact/equity based arguments such as common owners
    - Fraud-based argument Successor liability is a manageable, but
    - occasionally unpredictable, area of the law. Consider this non-exclusive list of considerations as the starting point for analyzing the vast landscape of issues when confronted with liability arising from either side of a sale of a business.

Patrick J. McStravick is a Member of Ricci Tyrrell Johnson & Grey. Mr. McStravick, together with Bill Ricci, recently secured a defense verdict in a bench trial based on defenses against imposition of successor liability.

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