

Ricci Tyrrell Johnson & Grey

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John E. Tyrrell with members of the John Wister Elementary School in Philadelphia, PA on September 18, 2015. Ricci Tyrrell Johnson & Grey partnered with Eagles Youth Partnership to donate school supplies to the Wister Elementary students.

Ricci Tyrrell has again been named a Tier 1 firm in Philadelphia for Product Liability Defense Litigation by *U.S. News – Best Lawyers* “Best Law Firms”.

Ricci Tyrrell is proud to announce the opening of its suburban Pennsylvania office located at 794 Penllyn Pike, Blue Bell, PA 19422.

On October 17, 2015, **William J. Ricci**, was on the panel of a CLE (Continuing Legal Education) presentation at the Philadelphia Bar Association 2015 Bench-Bar & Annual Conference. The CLE focused on Product Liability Law in Pennsylvania and the Supreme Court’s ruling in *Tincher v. Omegaflex, Inc.* 64 A.3d 626 (Pa. 2014). The superb panel also included Hon. John M. Younge of the Philadelphia Court of Common Pleas and Lawrence E. Bendesky, of Saltz, Mongeluzzi, Barrett & Bendesky, PC. The course planner and moderator was Robert W. Zimmerman of Saltz, Mongeluzzi, Barrett & Bendesky, PC. In conjunction with the presentation, RTJG published the article “*Tincher v. Omegaflex, Inc.: An Audit Sampling*”

which was co-authored by Ricci Tyrrell Members, **Francis P. Burns III, John E. Tyrrell, and William J. Ricci.**

On October 22, 2015, Ricci Tyrrell Member **Monica V. Pennisi Marsico** presented at The Dispute Resolution Institute’s Annual Personal Injury Practicum. Ms. Marsico’s CLE presentation focused on practical insights for video depositions.

Sean L. Corgan was a guest speaker at the Drexel Law School co-op program’s Supervisor Roundtable on September 11, 2015. The topic for this Roundtable discussion was Best Practices in Supervision and Mentoring.

John E. Tyrrell has been invited to be a presenter at the 2016 Association of Equipment Manufacturers (AEM) Product Liability Seminar in Rosemont, Illinois on April 21, 2016. Mr. Tyrrell also presented at the AEM conference in 2012. AEM is a trade association representing equipment manufacturers in agriculture, construction, forestry, mining and utility.

Quarterly Newsletter

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Ricci Tyrrell Johnson & Grey
ATTORNEYS AT LAW

SUMMARY JUDGMENT OBTAINED IN NEW JERSEY FALL CASE

Ricci Tyrrell client Mattel, Inc. recently obtained Summary Judgment in the matter of *Moschella v. Kings Supermarkets, Inc., et al.* in the Essex County Superior Court, Law Division, Judge Thomas Vena presiding.

The case involved an allegation that the top of a Mattel display for Hot Wheels cars was on the floor of a Kings Food Market facility in Livingston, NJ. Plaintiff Mrs. Moschella alleged that she did not see the top of the display and tripped or slipped on it.

Based on these facts, Plaintiffs' Complaint alleged that Mattel and/or other defendants were negligent in the set up and maintenance of the display. However, after the initial phases of discovery, it became clear that the display was sold by Mattel to an intermediary supplier and that Mattel had no involvement in either the set up or the maintenance of the display.

Despite the lack of connection of Mattel to any activities which formed the basis of the negligence action, Plaintiffs refused to dismiss Mattel. As a result, a Summary Judgment Motion was filed by Ricci Tyrrell on Mattel's behalf, asserting the lack of connection of Mattel to the alleged negligent conduct. The Plaintiffs' response did not address the actual negligence claims, but instead, raised previously unidentified claims relating to instructions and the design of the display. These types of claims, however, are only cognizable under the New Jersey Product Liability Act (NJPLA), which is the exclusive remedy for injury allegedly arising from a product, and Plaintiffs had neither pled nor identified such claims. Further, Plaintiffs alleged that these "new" claims were really negligence claims outside of the scope of the NJPLA's exclusive effect, and also that the NJPLA did not apply since the display was not a "consumer product".

In Reply, Ricci Tyrrell pointed out the errors in the Plaintiff's position: the NJPLA provides the exclusive remedy relating to products; the NJPLA is not limited to "consumer products"; and no negligence claims survived the NJPLA relating to products. We further pointed out that the Plaintiffs had failed to plead these claims, and that the Plaintiffs were barred from doing so by the applicable statute of limitations (two years). Finally, we advised the Court that no products liability action could lie in any event, as the Plaintiff could never prove causation since there was no witness to the set up of the display or how it got on the floor (if in fact it was on the floor), and further, the display had been discarded several months after the accident, and there was no

evidence of its condition at any time post-sale including at the time of the accident, making any comparison to its intended as-sold condition impossible.

Judge Thomas R. Vena of the Superior Court, Essex County, agreed with Mattel and dismissed all claims against it with prejudice. The Court agreed that the "new", previously unidentified claims were only cognizable under the applicable NJPLA, and that because the Plaintiffs had not identified the NJPLA claims in the Complaint, dismissal was proper. The Judge wrote an extensive opinion, which summarized NJPLA law and its exclusive dominion. The case was an important victory for Mattel, in part because Mattel would have been required to continue in discovery for several months, as the case had recently been extended and new parties added.



John E. Tyrrell was lead counsel representing Mattel in the Moschella case. Patrick J. McStravick, Esquire was the principal author of the Summary Judgment Motion Brief and argued the Motion orally.



DUNLAP V. RIDLEY PARK SWIM CLUB: A PLAINTIFF'S EXPERT CAN SUPPLY YOUR PRIMA FACIE CASE AGAINST A SETTLED CO-DEFENDANT

By: Sean L. Corgan

On September 4, 2015, the Pennsylvania Superior Court vacated a judgment for the plaintiff in the Court of Common Pleas of Delaware County because the trial judge refused to allow evidence of negligence of a settling defendant offered by a non-settling defendant. The decision and memorandum opinion authored by Judge Olson in *Dunlap v. Ridley Park Swim Club, et al*, 3199 EDA 2004, 2015 Pa. Super. Unpub. LEXIS 3207 (Pa. Super. Ct. 2015) is significant because it affirmatively allows the use of a plaintiff's expert by a defendant to present a *prima facie* case of negligence against a settled defendant, warranting that defendant's inclusion on the jury verdict sheet for apportionment of fault.

On June 24, 2009, Maryann Dunlap was a guest swimming at Ridley Swim Club's pool. While leaving the property a tree fell on her causing serious injuries. The tree was located on neighboring property owned by Harper Associates some fifteen to twenty feet from the property line. The tree was decaying and dead and Harper Associates had never examined the tree or taken any precaution with respect to the hazard it posed to individuals on either the Harper or Ridley properties. Mrs. Dunlap filed suit against both Harper and Dunlap. Mrs. Dunlap retained a facilities management expert, Brian O'Donel, who authored a report wherein he opined that Harper Associates was responsible for Dunlap's injuries. O'Donel authored a second report in which he faulted Ridley Park for not examining the trees located on the Harper property. Dunlap settled her claim against Harper prior to trial for \$350,000 with a *pro rata* release.

At trial, Ridley attempted to question O'Donel regarding his report finding fault by Harper Associates. Dunlap objected and the trial court sustained the objection. The trial court further ruled that Harper Associates would not appear on the verdict form. The trial court reasoned that Ridley could not prove a *prima facie* case against Harper Associates because Ridley Park did not retain an expert witness to testify about Harper's negligence. The jury returned a verdict in favor of Dunlap for \$750,000 against Ridley. Ridley appealed.

In its Memorandum Ruling, the Superior Court noted that a defendant has a right to have a settling defendant appear on the verdict form for an apportionment of liability upon a showing of a *prima facie* case of negligence as to the co-defendant. Where the *Dunlap* trial court got it wrong according to the Superior Court was concluding that Ridley could not make a *prima facie* showing without an expert of its own.¹ The Court considered the hornbook elements of negligence (duty, breach, causation and actual damages) within the context of the facts of the *Dunlap* case. Citing *Barker v. Brown*, 340 A.2d 566 (Pa. Super. 1975), and concluded that Harper Associates did possess a duty to visually inspect the tree:

A possessor of land in or adjacent to a developed or residential area is subject to liability for harm caused to others outside of the land by a defect in the condition of a tree thereon, if the exercise of reasonable care by the possessor (a) would have disclosed the defect and the risk involved therein, and (b) would have made it reasonably safe by repair or

otherwise. The reasonable care standard encompasses, at least, a duty to make a visual inspection.

Barker, 340 A.2d at 569. The Superior Court noted that the duty existed as a matter of law. No expert opinion was necessary to establish the duty to visually inspect the trees. That does not mean that duty is always a question of law, and the Court noted that in some instances expert testimony might be needed to meet the *prima facie* showing of a special or greater duty. *Dunlap*, at 8.

The Court, however, did not end its analysis there. Whether Ridley could make a *prima facie* showing of negligence without an expert was essentially a hypothetical question because at the end of the day, "even if expert testimony were required to show Harper Associates possessed a duty to visually inspect trees, **Dunlap's own experts provided such testimony.**" *Dunlap*, at 9 (emphasis added). Dunlap's facilities management and arboriculture experts testified that Harper Associates had a duty to visually inspect a tree and their testimony also created a factual question as to whether that failure to do so was a breach that caused the accident. To the Superior Court it was "appropriate for Ridley Park to rely upon expert testimony offered by Dunlap's expert." Thus, the Superior Court found that the trial court abused its discretion by not including Harper Associates on the verdict form and permitting the jury to apportion responsibility between Ridley Park and Harper Associates.

It is not uncommon for plaintiffs to serve an expert report authored by one expert that indicts the conduct and/or products of several defendants. The danger of doing so is evident in a case like *Dunlap*. By issuing an expert report against Harper Associates before trial, and calling that same expert to testify against Ridley Park after she settled with Harper, Dunlap essentially handed over the roadmap for Ridley Park, without its own expert, to present a *prima facie* case of negligence against Harper Associates and warranting Harper's inclusion on the verdict form for the jury's apportionment of fault.

Plaintiffs are likely to downplay the *Dunlap* decision as one turning on its particular facts. However, there is no doubt that going forward in multiple defendant cases, plaintiffs will have to be more discerning in compartmentalizing expert reports. After *Dunlap*, a "kitchen sink" expert report may result in a verdict sheet

that includes all defendants, settled or not, presented before the jury.

¹ Plaintiff argued on appeal that Harper Associates should be removed from the verdict form because Ridley never “seriously pursued” its crossclaim against Harper Associates. The Superior Court dismissed this argument out of hand because a cross-claim is “not necessary to seek apportionment of responsibility.” *Dunlap*, at *6, citing *Herbert v. Parkview Hosp.*, 854 A.2d 1285, 1290 (Pa. Super. 2004).



Sean Corgan is an Associate at Ricci Tyrrell Johnson & Grey.

AVAILABILITY OF ADVERSE INFERENCE INSTRUCTION AS REMEDY FOR SPOILIATION

By Brian J. Scanlon

The spoliation doctrine recognizes the common sense observation that a party which has destroyed relevant evidence is likely to have been threatened by said evidence. *Mount Olivet Tabernacle v. Edwin L. Wiegand Division, Emerson Electric Company*, 781 A.2d 1263, 1269 (Pa. Super. 2001). Pennsylvania courts have crafted various sanctions to deter parties from destroying evidence and to help an aggrieved party. However, the most common remedy for a party alleging spoliation is the adverse inference jury instruction. An adverse inference instruction is warranted “where evidence which would properly be part of a case is within the control of the party in whose interest it would naturally be to produce it, and without explanation he fails to do so.” *Bowser v. Albert Einstein Med. Ctr.*, 2013 Phila. Ct. Com. Pl. Lexis 178, 19-20 (2013) quoting *Magette v. Goodman*, 771 A.2d 775 (Pa. Super. 2001).

The Supreme Court of Pennsylvania has created a three-prong test to determine whether to sanction a party for spoliation of evidence: (1) the degree of fault of the

party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of a lesser sanction that will protect the opposing party’s rights and deter future similar conduct. *Schroeder v. Com. Dept. of Transp.*, 710 A.2d 23, 27 (Pa. 1998). Determining the “fault prong” requires consideration of two components, responsibility and the presence or absence of bad faith. *Mount Olivet Tabernacle v. Edwin L. Wiegand Div., Emerson Elec. Co.*, 781 A.2d 1263, 1270 (Pa. Super 2001). The test adopted in *Schroeder* is a balancing of all three prongs. *Tenaglia v. P&G*, 737 A.2d 306, 308 (Pa. Super. 1999).

A. Fault and the Duty to Preserve

It is important for parties in litigation to determine when an obligation exists to maintain or preserve evidence. A party’s duty is established where: (a) the offending party knows that litigation is pending or likely; and (b) it is foreseeable that discarding the evidence would be prejudicial to the opposing side. *Creazzo v. Medtronic*, 903 A.2d 24, 29 (Pa. Super. 2006). At a minimum, if the plaintiff knows that a particular party is potentially responsible, in the absence of exigent circumstances the plaintiff should provide this party with the opportunity to inspect the evidence. *Mount Olive Tabernacle v. Edwin L. Wiegand Div., Emerson Elec. Co.*, 781 A.2d 1263, 1270-1271 (Pa. Super. 1998). However, courts have recognized that there is no blanket rule that all (or any) potential defendants need to be present during a plaintiff’s initial inspection. *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 81 (3d. Cir. 1994). The Court, in *Schmid*, recognized that many accident investigations are conducted to determine if there is a basis for suit and many do not lead to suit or function to narrow the field of potential defendants. *Id.*

Defendants may be on notice that the severity of the incident itself establishes the duty to preserve evidence. For example, where a motor vehicle accident was not a minor accident, police were called to the scene, and plaintiff was transported to the hospital via ambulance, a jury was permitted to draw an adverse inference that defendant was on notice and was required to preserve documentation. *Thompson v. Lau*, 2011 Phila. Ct. Com. Pl. LEXIS 267,48 (2011). However, in a personal injury case brought against a paintball facility, where there was no evidence presented that the facility knew or should have known at the time plaintiff was shot in the eye and would bring product liability claims against the facility based on the paintball guns being used, there was no duty to preserve the guns. *Martinez v. Skirmish, U.S.A., Inc.*, 2009 U.S. Dist. LEXIS 43837, 23 (E.D. Pa. 2009).

A duty to preserve evidence may begin well before suit is filed depending on the circumstances of the underlying accident and a defendant cannot ignore the duty to preserve evidence when it knows a possible plaintiff was injured.

B. Prejudice

Even if it is determined that a duty existed to preserve evidence, the Court will examine the prejudice to the offending party to determine whether to give an adverse inference instruction. This prong of the test enunciated in *Schroeder* has vastly different effects depending on the cause of action. For example, in design defect cases, where plaintiff is alleging that all products in a particular product line are defective, there is little prejudice to either party should the subject product be destroyed. See e.g. *Mount Olivet Tabernacle*, 781 A.2d at 1272. Courts have reasoned that if liability is based upon a design defect common to every of its kind, parties can comparably test and examine exemplar for the alleged design defect. See *Schmid*, 13 F.3d 76.

In certain negligence cases, the determination to instruct a jury on adverse inference maybe more fact specific. The particular piece of evidence destroyed weighs heavily on the determination of the degree of prejudice a party suffers. For instance, where a building fire was allegedly caused by inadequately tightened wires, plaintiff preserved the area she believed was the source of the fire but replaced all other electrical equipment in a warehouse. *Pia v. Perrotti*, 718 A.2d 321 (Pa. Super. 1998). Defendants were unable to rebut the plaintiff's assertion of fire origin as the remainder of the scene was repaired; therefore, the spoliation instruction was given to the jury. *Id.* In *Bowser*, the Court determined that an unpreserved sign out sheet was the only documentary record of a doctor's visit to a plaintiff; therefore the prejudice to plaintiff warranted an adverse inference instruction. *Bowser v. Albert Einstein Med. Ctr.*, 2013 Phila. Ct. Com. Pl. LEXIS at 25 (2013). A critical factor in determining the level of prejudice is whether there is additional evidence which a party can use to prove or defend its case.

C. Permissible v. Mandatory

It is important to remember that "(t)he failure to produce evidence raises a permissible inference, not a mandatory inference or presumption" *Wisler v. Manor Care of Lancaster PA, LLC*, 2015 Pa. Super. LEXIS 515 (2015), 18 quoting 1 Packel & Poulin on Pennsylvania Evidence §427 (4th ed. 2014). Even if a jury finds that spoliation has occurred, it is not required to find an adverse inference against the spoliator. The Pennsylvania jury instruction for failure to produce a

piece of evidence states that the jury **may** find that the evidence would have been unfavorable to the plaintiff/defendant if it had been produced at trial. Pa. SSJI (Civ.) 5.30. (emphasis added). The inference is certainly one that must be developed through advocacy. Even after the Court agrees to give the adverse inference instruction, it is up to the attorneys to ensure that the jury applies it correctly.



Brian Scanlon is an Associate at Ricci Tyrrell Johnson & Grey.

EVERYTHING YOU SHOULD KNOW ABOUT PATENTS – BUT NEVER DID

By Stuart M. Goldstein

President Abraham Lincoln received one, so did Marlon Brando, Michael Jackson, Hedy Lamarr, Zeppo Marx and Steve McQueen. Christie Brinkley and Eddie Van Halen each have one. Albert Einstein had approximately fifty and Thomas Edison had 1093. All these people were granted United States patents, valuable property rights which give inventors the exclusive right, for a limited time, to exclude others from making, using, and selling their inventions in the United States. In accordance with this exclusive right, patent owners are free to seek financial gain by commercially developing and selling their inventions without fear of competition.

In fact, this is exactly what the framers of the United States Constitution had in mind over two hundred and twenty eight years ago, when they explicitly included a provision which stated that "The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings

and discoveries.” Thus, a statutory vehicle was authorized to grant individuals the sole control of the products and processes they develop. The founding fathers concluded, and rightly so, that this would provide the incentive to develop new and useful technologies, free from the possibility that inventions would be exploited by others. By providing inventors this right, product innovation would be propelled forward and the fledgling economy of the United States could be converted from an agrarian society to a fully functioning industrialized nation. Of course, this concept was wildly successful, leading to the Industrial Revolution in the nineteenth century and ultimately to the highly industrial, technology-advanced economy we enjoy today.

Needless to say, today’s patent system is far different from the one envisioned in 1790 by Thomas Jefferson, one of the first Commissioners of Patents. The criteria and standards in place at that time had not yet been formalized and, at first, few people even bothered to apply for a patent. Between 1790 and 1836, only about 10,000 were granted. This is a far cry from present day. Since 2000, during this last fifteen years alone, 3.2 million patents have been granted.

Up until the late nineteenth century, most patents involved mechanical inventions, and a model of the invention was required along with the application. Models or even prototypes are not required now, nor are they accepted. However, the criteria for obtaining a patent is far more stringent. In order to obtain a patent today, the invention must fall into one of four, statutorily defined categories. The invention must be a process, a machine, an article of manufacture, or a composition of matter. The invention is required to be new, useful, and cannot be an obvious modification of an existing product, technology, or design. These standards are applicable to both utility patents, those patents which are functional and patent protection resides in their use and operation, and design patents, which are directed only to the ornamentation or appearance of an article.

The main headquarters of the United States Patent and Trademark Office (USPTO), which includes both the offices of patent and trademark personnel, is located in Alexandria, Virginia. The first USPTO satellite office was opened in Detroit in 2012. Other satellite offices are located in Denver, Colorado and in the Silicon Valley, in San Jose, California. An office in Dallas, Texas is expected to open soon.

Some additional little known, but important facts about patents follow:

- The first patent was issued in 1790 to

Samuel Hopkins for “Making Pot and Pearl Ashes.” The patent was signed by President George Washington.

- Approximately 250,000 patent applications are filed every year. There are currently approximately 600,000 unexamined applications in the Patent Office. Unfortunately, due to this backlog, patent application pendency runs between one and three years.
- An application for a patent must be filed within one year of the first public use or sale of the product or process which is the subject of the application. Failure to file within this year absolutely bars the grant of a patent.
- The USPTO now ascribes to the “first to file” rather than the “first to invent” rule. This means that the first individual to file a patent application with the USPTO, as opposed to the first person to invent the product or process, has priority of inventorship with regard to the subject matter of the application.
- A patent, once issued, has a life of twenty years from the initial date of filing of the application. A patent cannot be renewed. Subsequent applications improving upon the original invention which is the subject of an existing or expired patent can be filed, as long as the improvement meets the requirements of the USPTO. In fact, most patents are improvements of existing products and known technology.
- A patent application which has been filed with the USPTO is “patent pending” and remains in this status until it becomes a patent or the application is abandoned. Thus, products which are advertised on television or radio as being “patent pending” are products which are only the subject of patent applications. No patents have been issued for these products, and, in fact, patents may never be granted on such advertised products.
- While do-it-yourself patent companies like LegalZoom can assist the individual inventor in beginning the patent process, they cannot

assist in actually obtaining the patent. These companies serve only to guide the inventor in the filing of a "provisional" patent application. A provisional application is an informal filing designed only to establish a date of priority of the subject matter contained in the application. Provisional applications are not examined by the USPTO, nor can they ever become a patent. It is not until a non-provisional application is filed that the patent process, including an examination of the application, will proceed. Non-provisional patent applications must, in most cases, be prepared and filed by an attorney duly registered to practice before the USPTO.

- In case you were curious, President Lincoln was granted U.S. Pat. No. 6469 for a method of buoying vessels. Marlon Brando obtained U.S. Pat. No. 6,812,392 for a drum head tensioning device. Michael Jackson received U.S. Pat. No. 5,255,452 for a method of creating an anti-gravity illusion for his act. Hedy Lamarr obtained U.S. Pat. No. 2,292,387 for a secret communication system which assisted the allies in World War II. Zeppo Marx of the Marx brothers received U.S. Pat. No. 3,473,526 for a cardiac pulse-ray monitor. Steve McQueen obtained design patent Des. 219,813 for an automobile bucket seat shell. Christie Brinkley was granted U.S. Pat. No. 4,998,883 for an educational toy. And Eddie Van Halen obtained U.S. Pat. No. 4,656,917 for a musical instrument.



Stuart M. Goldstein has over 35 years of expertise in the area of intellectual property, specifically patents, trademarks, and copyrights. He oversees all of the firm's patent, trademark and copyright application prosecution and litigation.

COVERAGE CORNER – SETTLEMENT UNDER A RESERVATION OF RIGHTS

By Francis P. Burns III

The Pennsylvania Supreme Court has held that an Insured defended under a Reservation of Rights has the option to settle without its Insurer's consent, and over its objection, if the settlement is determined to be for a covered claim and is reasonable, non-collusive and within policy limits. *Babcock & Wilcox Co. v. American Nuclear Insurers*, 2015 Pa. LEXIS 1551 (Pa. July 21, 2015) ("ANI"). The decision prompts a number of related questions, not least whether the right to recovery may be assigned without first paying the settlement and whether recovery against the Insurer may include prejudgment interest.

In ANI hundreds of radiation exposure claims defended for many years under a reservation of rights were resolved over the Insurer's objection for the aggregate sum of \$80 million. Prior to settlement approximately \$40 million had been spent on defense under eroding liability policies with remaining limits of \$280,000,000.00. Settlement was reached while a declaratory judgment action was pending. Under the policies a decision to settle rested exclusively with the Insurer which "may make such investigation, negotiations and settlement of any claim or suit as they deem expedient." The policies did not cover "liability assumed by the insured under contract." And the policies included an assistance and cooperation clause which provided that the Insured "shall not, except at his own cost, make any payments, assume any obligations or incur any expense."

The Insured successfully pursued an action for reimbursement of the settlement paid. The trial judge determined that the settlement was for covered claims and a jury found the amount paid was fair, reasonable and at arm's length. The insurance company argued that a settlement without its consent materially breached an express contractual obligation, the breach should result in a forfeiture of coverage and relieve it of any obligation to fund the settlement, and it could not be responsible for payment unless found by clear and convincing evidence to have acted in bad faith by refusing to settle.

The Supreme Court affirmed the trial verdict. The majority held an Insured defended under a Reservation of Rights may, despite control of settlement provisions running to the insurance company, enter into a settlement agreement and thereafter recover the full amount paid so long as the Insured proves that: (1) there

is coverage for the settled claim; and (2) the settlement sum was fair, reasonable and non-collusive. Two dissenting justices argued that under existing precedent an Insured defended under a Reservation of Rights may not unilaterally settle absent bad faith on the part of the insurance company.

The Supreme Court also unanimously reversed an earlier ruling by the Superior Court in the *ANI* case which adopted the "Insured's Choice Test" under which an Insured may reject a defense under a Reservation of Rights, furnish its own defense either *pro se* or through independent counsel, and settle the underlying claim under terms it believes best. If coverage is found to apply the Insured may recover defense costs and the settlement amount to the extent fair, reasonable and non-collusive. The Supreme Court reaffirmed the principle that an Insured does not have the option of rejecting an Insurer's defense under a Reservation of Rights because to do so [in the absence of insurer bad faith or a conflict of interest] would constitute a breach of the insurance contract and in consequence of the breach release the Insurer from the duty to provide coverage. All justices also reaffirmed existing precedent to the effect that an insurance company has the right to defend under a Reservation of Rights, that such action may be taken unilaterally, and that a declaratory judgment action is appropriate to avoid the risk of potential bad faith or an inept defense which might expose the Insurer to payment at the conclusion of the case.

Assigning the Right to Payment of the Settlement. *ANI* does not discuss an Insured's option, if any, to negotiate a settlement and assign its reimbursement right to the tort claimant without first paying the agreed amount fully or in part. To date, Pennsylvania law has been found to allow an assignment without any payment from the Insured's own funds, or a residual risk of collection from its own assets, only in contexts where coverage had been disclaimed and the insurer declined participation in the defense or settlement negotiations. *General Refractories Co. v. First State Insurance Co.*, 862 F.Supp.2d 382, 389-390 (E.D.Pa. 2012)(collecting cases). Key to prior assignment enforcement decisions, as in *ANI*, was a finding that the settlement was fair, reasonable and negotiated in good faith – that is, the settlement was not artificially inflated by the prospect of pursuing an insurance company for payment.

Prejudgment Interest on the Settlement. *ANI* also does not discuss the Insured's or its Assignee's right to prejudgment interest calculated from the date of the settlement to the date when reimbursement is made under the policy. Payment of statutory interest on damages for money owing upon a contract is a legal

right and not subject to a court's discretion. *Trusery Corp. v. Morgan's Tool & Supply Co., Inc.*, 39 A.3d 253, 264 (Pa. 2012). A federal district court recently held that, absent express policy language to the contrary, simple interest at the statutory rate of 6% *per annum* on an Insured's settlement with a claimant is recoverable in an action for payment of a settlement without regard to the Limits of Liability. *General Refractories Co. v. First State Insurance Co.*, 2015 U.S. Dist. LEXIS 119642 (E.D.Pa. 09/09/2015)(Insurer held to have improperly disclaimed coverage under an asbestos exclusion).



Francis P. Burns, III is a Member of Ricci Tyrrell whose practice includes an emphasis on all dimensions of insurance coverage including coverage opinions, declaratory judgment actions and bad faith claims.

IN THE COMMUNITY

On September 18, 2015, Ricci Tyrrell participated in an Eagles Youth Partnership (EYP) Eagles Book Mobile event. The firm made a donation to cover the cost of school supplies for the K-2 students of the John Wister Elementary School in Philadelphia, PA. Ricci Tyrrell Managing Member **John E. Tyrrell**, Chief Operating Officer **Julianne Farber Johnson**, Member **Mary Grace Maley**, and Legal Assistants **Lisa Tiffany** and **Yolanda Jenkins**, along with members of EYP, went to the school to distribute the supplies to the students. It was a great, rewarding experience. Ricci Tyrrell volunteers got as much enjoyment out of it as the children! EYP was founded in 1995 to serve low income children in the Philadelphia area with a focus on health and education programs. EYP takes its services directly to kids at their schools and in their neighborhoods. EYP's signature programs are the Eagles Eye Mobile and Eagles Book Mobile.



Ricci Tyrrell Johnson & Grey employees joined Eagles Youth Partnership to donate and distribute school supplies for the students at Wister Elementary School in Philadelphia, PA on September 18, 2015.

(from left to right) **Julianne Johnson**, **Cherisse Cavan** of EYP, **Yolanda Jenkins**, and **Lisa Tiffany**.

The Philadelphia Ronald McDonald House (“RMH”) provides housing to families who travel to Philadelphia to obtain medical treatment for their children. In honor of its 41st birthday and to raise awareness and funds, the RMH sold Ronald McDonald socks, asked people to take photographs of themselves wearing the socks, and post the photographs on social media, #sockie. On October 15, 2015, firm employees participated in the #sockie campaign by purchasing socks, posing for and posting photographs and organizing a food drive. Ricci Tyrrell matched the money raised by firm employees.



On October 13, 2015, Ricci Tyrrell sponsored a hole for the Springfield Lions Club Golf Outing held at McCall Golf and Country Club in Havertown, PA. Administrative Assistant **Lisa Tiffany** is an active member of, and currently serves on the Board of Directors of, the Springfield Lions Club. The Club’s main goal is to help the hearing and visually impaired.

On September 21, 2015, **Patrick J. McStravick**, along with **Samuel Mukiibi**, participated in the Brookfield Schools Golf Tournament. The golf tournament is the organization’s main fundraiser. Brookfield Schools has multiple school programs, including an elementary school, high school and transition to college, for kids with emotional and behavioral problems. Mr. McStravick’s wife serves as the business administrator for the schools.

Also on October 17, 2015, **Tracie Bock Medeiros** co-chaired Susan G. Komen Philadelphia’s Young Professionals Party of the Pink Tide Ball. Ricci Tyrrell sponsored tickets to the event which was attended by **Brian J. Scanlon** and **Samuel Mukiibi**. Woman by woman, family by family, community by community, Komen Philadelphia promises to stop at nothing until ALL people live freely from the threat of breast cancer. Saving lives here at home while empowering science to advance treatments and find the cure, Komen Philadelphia devotes its every step to assuring personal victories against this disease for every woman, man and child.



“In the Community” is edited by Ricci Tyrrell Johnson & Grey Associate Tracie Bock Medeiros.



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ATTORNEYS AT LAW