Ricci Tyrrell Johnson & Grey
ATTORNEYS AT LAW

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NEWS AND EVENTS:

Ricci Tyrrell is pleased to announce that it has again been named a Tier-1 Law Firm for Products Liability, recognized by **U.S. News & World Report** as a Best Law Firm in Pennsylvania.

Kelly J. Castafero has joined Ricci Tyrrell as an associate in its Philadelphia office. Ms. Castafero is a graduate of Bucknell University and Temple University Beasley School of Law. She previously clerked for the Honorable Albert J. Snite, Jr. in the Commerce Program in the Philadelphia County Court of Common Pleas. She is in her third year of practice.

The firm is also happy to announce that **Alex Shaen** and **Matthew Mortimer** will join Ricci Tyrrell as associates in 2018 upon their graduation from law school. Mr. Shaen will be graduating from Drexel University Thomas R. Kline School of Law and Mr. Mortimer from Temple University Beasley School of Law. Both Mr. Shaen and Mr. Mortimer have previously interned with Ricci Tyrrell.

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PENNSYLVANIA SUPREME COURT DENIES BRIGHT LINE RULE FOR ADMISSIBILITY OF INTOXICATION EVIDENCE

On September 28, 2017, the Pennsylvania Supreme Court issued an opinion regarding the admissibility of a pedestrian's post-mortem blood alcohol content in a personal injury action. More specifically, the court focused on the issue "whether independent corroborating evidence of the pedestrian's intoxication is required, in addition to expert testimony interpreting the BAC, before the BAC evidence may be admitted." *Ann Coughlin, Administratrix of the Estate of Thomas Coughlin, Deceased, v. Ummu Massaquoi*, No. 32 EAP 2016, *1 (Pa. 2017).

In the underlying action, Ummu Massaquoi was driving on a four lane road in Philadelphia when she struck Thomas Coughlin near an intersection. *Id*. at *2. Massaquoi admitted that she did not see Coughlin prior to impact. Following the accident, Coughlin was transported to the hospital where he was pronounced dead. *Id*. The results of the Coughlin's toxicology test revealed he had a BAC of .313[1] and trace amounts of illegal substances in his blood. *Id*. It is unknown where Coughlin was prior to the accident, and no one saw his condition/behavior earlier that day or prior to the accident. *Id*. Additionally, the police report for the incident did not indicate whether or not Coughlin appeared intoxicated or if intoxication had been a factor in the accident. *Id*. at *3.

Approximately a year and a half later, Coughlin's mother filed a wrongful death and survival action against Massaquoi. *Id*. Prior to the start of trial Coughlin's mother filed a motion *in limine* to preclude evidence that her son had alcohol and illegal substances in his system at the time of death. It was her position that this evidence lacked the necessary independent corroboration, was irrelevant and would prejudice the jury. *Id*. The trial court ultimately denied the motion, but precluded the defense from giving an opinion as to the cause of Coughlin's death. *Id*. At trial, the defense's expert opined that an average person with a BAC of .313 would be severely intoxicated, would have poor coordination and "have a significant deterioration in judgment and self control." *Id*. It was further opined that a person with a BAC of .313 "could not safely cross the street without endangering his life and well-being" and when under the influence of that level of alcohol a person should not be driving nor be taking chances walking as a pedestrian. *Id*. at *4.

Following deliberations, the jury determined that Massaquoi was negligent, but that her negligence was not the cause of Coughlin's death. *Id*. Coughlin's mother filed an appeal regarding the motion *in limine* ruling regarding her son's BAC. *Id*.

In reviewing the development of the case law for the admissibility of intoxication in Pennsylvania, the Court discussed the Superior Court's opinion in *Ackerman*. The *Ackerman* Court held that "[BAC] alone may not be admitted for the purpose of proving intoxication"; rather, it must be accompanied by "other evidence showing the actor's conduct which suggests intoxication." *Ackerman v. Delcomico*, 486 A.2d 410, 414 (Pa. Super. 1984). No expert testimony was offered in *Ackerman*, but the Superior Court stated that BAC evidence should be accompanied by expert testimony, as "[w]ithout explanation, the [BAC] has little meaning to factfinders and quite possibly great potential for resulting prejudice to the party against whom it is used." *Id*.

Based on the above, Coughlin's mother maintained that the trial court abused its discretion in denying her motion *in limine* because *Ackerman* required some corroborating evidence regarding a pedestrian's intoxication before evidence of that pedestrian's BAC may be admitted. *Coughlin*, No. 32 EAP 2016 at *12 (Pa. 2017). It was her position that additional corroborating testimony concerning Coughlin's conduct/demeanor was necessary to provide foundation for the defense expert's testimony, and to ensure the BAC was reliable. *Id*.

In addressing this argument, the Supreme Court noted that when the Court in *Ackerman* put forward the "other evidence" requirement, it did not provide any support or policy basis for this additional requirement. *Id*. at *10. The Supreme Court "has never endorsed this heightened evidentiary requirement for BAC evidence." *Id*. at *16 It noted that:

> [A]lthough evidence of a pedestrian's BAC alone may fail to establish unfitness to cross the street... where, as here, an expert testifies thoroughly regarding the effects that a given BAC has on an individual's behavior and mental processes, and where that expert *specifically opines* that a particular BAC would render a pedestrian unfit to cross the street, we find that probative value of such evidence outweighs its potential for unfair prejudice... we are unpersuaded by *Ackerman* and its progeny, which provided no rationale for requiring BAC evidence to be accompanied by independent corroborating evidence of intoxication.

Id. at *16-17.

The Court, further reasoned that there will not always be witnesses to an accident or to an individuals behavior/demeanor leading up to an accident. *Id*. at *17:

> In such cases evidence of a pedestrian's BAC, when combined with expert testimony explaining how that BAC correlates with certain behavior, is particularly valuable, as it is probative of intoxication and, perhaps, unfitness to cross a street. If we were to categorically exclude relevant BAC evidence from all cases which lack independent corroborating evidence of the pedestrian's intoxication, we would be depriving juries of valuable insight, which, absurdly, would place pedestrians - whose intoxication potentially contributed to the accident for which they are suing - at an unfair advantage simply because no one happened to witness the pedestrian's behavior prior to the accident or the accident itself.

Id. at *17-18.

The Court rejected the *Ackerman* standard, and held that BAC evidence is admissible if the trial court determines that it reasonably establishes a pedestrian's unfitness to cross the street. *Id*. at *18.

[1] The court noted that the legal limit to operate a vehicle in Pennsylvania is .08. This was used as a reference point with regards to Coughlin.

Jonathan A. Delgado *is an Associate at Ricci Tyrrell Johnson & Grey.*

WILL DRUG COMPANIES BE HELD ACCOUNTABLE FOR OPIOID ADDICTION?

The fact that there is an opioid epidemic currently taking place in the United States is not new information. However, the magnitude of the crisis may come as a surprise. Statistics regarding the severity of the problem are staggering. For example, the Centers for Disease Control and Prevention (CDC) estimates that there are now nearly 100 deaths per day from opioids. For every person killed by gun violence, three people will die from an opioid overdose. Nationally, overdose deaths from opioids, including prescription opioids and heroin, have more than quadrupled since 1999. In 2015 alone, more than 33,000 people died from opioid overdoses. In 2016, an estimated 64,000 people died from overdoses in the United States, and more than 50,000 of those deaths involved opioids.

The most shocking statistics show just how close to home the opioid epidemic is hitting for many. The National Institute on Drug Abuse stated that 75% of people who enter treatment for a heroin addiction took their first opioid *legally* from a doctor's prescription. From 1999 to 2015, more than 183,000 people died from overdoses related to *prescription* opioids. The cause of "normal" people falling victim to drug addiction? When the opioid drug industry expanded in the 1990s in response to the medical community's push to better treat pain and chronic pain, doctors and patients were possibly mislead about the dangers of opioid addiction by the big players in the industry. And now, the consequences are deadly.

The amount of human loss from the ongoing opioid crisis has certainly been enormous. But the crisis has also devastated county and municipal budgets, due to the significant cost for law enforcement, first responders, drug treatment, lost productivity of government workers, incarceration, and services like autopsies that have resulted from the drug addiction. Consequently, state and local governments are attempting to hold opioid manufacturers and distributors accountable and recoup on the governments' costs (and therefore the taxpayers' burden) of handling the opioid epidemic. To do this, state and local governments have filed over one hundred lawsuits against opioid manufacturers and distributors, including Endo International, Purdue Pharma, Johnson and Johnson's, Janssen Pharmaceuticals Inc. unit, Teva Pharmaceutical Industries and Allergan.

Plaintiffs in the lawsuits against opioid manufacturers and distributors primarily allege that the companies used deceptive marketing practices to mislead doctors and patients regarding the addictive nature of the drugs, thereby flooding communities with the addictive prescription pills. The lawsuits allege that the deceptive marketing encouraged doctors to overprescribe the medications, and convinced patients that they were safe for long-term use. Further, the plaintiffs claim that distributors failed to report suspiciously large orders of opioids in certain areas. There is data that shows that in some counties and states, there were more prescribed bottles of painkillers than there were people, but the distributors kept quiet.

Recently, Pennsylvania has joined other states filings these lawsuits. In Pennsylvania, opioid overdoses killed 4,642 people last year, a 37 percent increase from 2015, according to U.S. Drug Enforcement Agency data. Delaware County filed the first lawsuit of this kind in Pennsylvania. This year, almost 90% of Delaware County's 167

drug deaths were linked to opioids. Lackawanna, Beaver and Luzerne counties have followed Delaware County's lead, filing similar lawsuits against manufacturers and distributors. In Luzerne County, the number of overdose deaths jumped from 67 in 2013 to 140 last year. The county's rate of overdose death last year was 43.6 deaths per 100,000 people, which exceeds the statewide average rate of 27.4 deaths per 100,000 people.

In the lawsuits, the Pennsylvania counties allege that the drug companies employed marketing tactics that misrepresented the dangers of long-term opioid usage. The counties allege that the companies knew that opioids were addictive, yet they acted to create a false perception of the safety of the drugs in the minds of medical professionals and the public, through a coordinated, sophisticated and highly deceptive marketing campaign that began in the late 1990s. They allege that this campaign resulted in expanded use of the drugs and major profits for drug companies. They claim that the counties spent millions of dollars each year fighting the drug addiction that resulted from the deceptive practices. The lawsuits make allegations including deceptive acts, fraud, unjust enrichment, negligence, misrepresentation and public nuisance, and seek compensatory damages, punitive damages, and legal costs.

Lawsuit targets have expanded beyond the drug manufacturers and distributors. Cities and towns in West Virginia, the state with the nation's highest drug death rate, have filed a class-action lawsuit against the Joint Commission, a nonprofit that inspects hospitals' performance and sets practice standards for their physicians. Hospitals must abide by the group's standards to get reimbursed for care provided to Medicaid and Medicare patients. The lawsuit claims that the nonprofit has spread misinformation about the risks of opioid addiction dating back to the early 2000s, including published materials underwritten by opioid manufacturers. The lawsuit centers on the group's pain management standards, first issued in 2001, and the financial ties the group has to pharmaceutical firms. However, there is doubt as to whether the lawsuit will have any affect beyond a symbolic message, as the group does not have the deep pockets of the pharmaceutical companies. Of course, doctors have also been named as defendants in these lawsuits, and have been found liable for overprescribing opioid drugs and contributing to the epidemic.

In addition to the numerous lawsuits by state and local governments, the Attorneys General of 41 U.S. states, including Pennsylvania, are banding together to investigate the makers and distributors of opioids. The coalition issued subpoenas seeking information from five manufacturers and three distributors. Specifically, the subpoenas seek information about how the companies marketed and distributed prescription opioids.

Ultimately, we will have to wait to see whether these major companies will be held accountable for their role in the opioid epidemic and the huge toll it is taking on communities across the country.

Kelly Castafero *recently joined Ricci Tyrrell Johnson & Grey as an Associate in its Philadelphia Office.*

THE PENDULUM SWINGS? FORUM NON CONVENIENS DECISION

SINCE *BRATIC V RUBENDALL*

Following the Pennsylvania Supreme Court's foundational decision in *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156 (Pa. 1997), the Superior Court developed a jurisprudence that applied *Cheeseman* stringently, often considering defendants' arguments in isolation and then rejecting a motion to transfer as a whole. In various cases, the Superior Court cited such grounds as that the movant's evidence was not sufficiently explicit in spelling out the "oppressiveness" or "vexatiousness" required for a venue transfer; the impositions occasioned by travel to the existing venue were insufficient to meet that standard, even where non-party witnesses would have to travel a considerable distance; or the operative facts of the case had little or no connection to the plaintiff's chosen forum. *See, e.g., Walls v. Phoenix Ins. Co.*, 979 A.2d 847 (Pa. Super. Ct. 2009) (holding county of plaintiff's residence irrelevant); *Borger v. Murphy*, 797 A.2d 309, 312 (Pa. Super. Ct. 2002) (concluding absence of connection to forum county insufficient); *Cooper v. Nationwide Mut. Ins. Co.*, 761 A.2d 162 (Pa. Super. Ct. 2000) (rejecting *forum non conveniens* transfer where supporting affidavits did not state effect initial venue would have on work duties).

However, the Pennsylvania Supreme Court in *Bratic v. Rubendall*, 99 A.3d 1 (Pa. 2014), rejected the Superior Court's approach. In *Bratic*, the plaintiffs sued in Philadelphia County asserting claims of wrongful use of civil proceedings and abuse of process arising from a previous lawsuit in Dauphin County. *Id*., 99 A.3d at 3. The trial court granted a *forum non conveniens* transfer to Dauphin County, noting: (1) the prior suit took place in Dauphin County; (2) the plaintiffs all were from Dauphin County and none of the defendants were from Philadelphia County; (3) each of the defendants' eight witnesses lived more than 100 miles from Philadelphia County; (4) each witness's business activities rendered appearing at a trial in Philadelphia far more burdensome than a trial in Dauphin County; and (5) the only connection to Philadelphia was that the defendants occasionally conducted business there. *Id*. at 4. The Superior Court, on *en banc* review, examined each of the trial court's reasons for granting the transfer, found each one standing alone to be insufficient, and reversed.

The Supreme Court reversed the Superior Court and reinstated the transfer. The Court rejected the Superior Court's "examination in isolation of each individual fact," and instead endorsed a holistic consideration of the totality of the evidence. *Id*. at 8. The Court explained that its decision in *Cheeseman* was not intended to increase the level of oppressiveness or vexatiousness required for a *forum non conveniens* transfer, but rather merely overruled lower courts' then-existing practice of giving excessive weight to so-called "public interest factors," such as court congestion. The Court clarified that public interest factors, like other factors, are not determinative on their own but may be given some weight. *Id*.

The *Bratic* Court also rejected the plaintiffs' contention that affidavits the defendants had presented to support their motion were insufficiently specific. *Id*. at 9. While a movant for a *forum non conveniens* transfer must support the application with "detailed information on the record," the Court explained that no particular form of proof is required. *Id*. (citing *Wood v. E.I. du Pont de Nemours and Co.*, 829 A.2d 707, 714 (Pa. Super. Ct. 2003) (noting affidavits have never been held necessary to obtain transfer). Rather, the Court made clear that if the movant has presented a sufficient factual basis to support the motion, the trial court then has the discretion to determine whether the movant has carried its burden to obtain a transfer. *Id*. Regarding the proof offered in the case before it, the Court stated that "the interference with one's business and personal life caused by the participatory demands of a distant lawsuit is patent," again stating that, as with other factors, distance alone is not dispositive but is a permissible consideration. *Id*. The Court then quipped that "as between Philadelphia and counties 100 miles away, simple inconvenience fades in the mirror and we near oppressiveness with every milepost of the turnpike and Schuylkill Expressway." *Id.* at 10. Emphasizing the discretion trial courts have in granting a *forum non conveniens* transfer, the Court concluded that because the evidence supported the trial court's order, the Superior Court had erroneously reversed the transfer. *Id*. at 10.

Subsequent decisions applying *Bratic* make clear that defendants moving for *forum non conveniens* transfers must establish a strong, detailed factual record in order to persuade the courts that a transfer is in order. For example, the Philadelphia County Court of Common Pleas recently applied *Bratic* to grant a transfer to Fulton County in *Chamberlain v. Ward Trucking, LLC*, February Term 2016, No. 1661, 2017 Phila. Ct. Com. Pl. LEXIS 115, at *1 (Pa. C.P. April 5, 2017), *appeal dismissed*, No. 78 EDA 2017 (Pa. Super. Ct. Oct. 4, 2017). There, the Court granted the defendants' motion for a transfer, citing the movants' three affidavits - two from representatives of a corporate defendant likely to testify at trial and one from the individual defendant - attesting that venue in Philadelphia would require each to travel approximately 200 miles each way, while Fulton County would entail much shorter distances, and setting forth the burdens that a trial in Philadelphia would occasion for them. *Id*. at *10-*11. Citing *Bratic*, the Court rejected the plaintiffs' claims that a Philadelphia trial would not prove oppressive or vexatious to the affiants as ignoring the impacts on professional, personal, and family obligations and granted the transfer. *Id*. at *13-*14.[1]

Many other decisions of the Philadelphia Court of Common Pleas since *Bratic* have reached similar conclusions. *See Moody v. Lehigh Valley Hosp. - Cedar Crest*, May Term 2016, No. 038, 2017 Phila. Ct. Com. Pl. LEXIS 75, at *1 (Pa. C.P. Feb. 15, 2017) (transferring to Lehigh County); *Sinclair v. First Global Express, Inc.*, 2016 Phila. Ct. Com. Pl. LEXIS 527 (Pa. C.P. Dec. 30, 2016) (Cumberland County); *Capper v. Sharma Equity, LLC*, 2014 Phila. Ct. Com. Pl. LEXIS 242 (Pa. C.P. July 14, 2014) (Lehigh County); *Keefer v. Conrail*, 2014 Phila. Ct. Com. Pl. LEXIS 197 (Pa. C.P. July 9, 2014), *aff'd*, No. 1955 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 347 (2015) (Cumberland Co.); *Passodelis v. Erie Ins. Co.*, 2013 Phila. Ct. Com. Pl. LEXIS 427 (Pa. C.P. Oct. 16, 2013), *aff'd*, 2873 EDA 2013, 2014 Pa. Super. LEXIS 4654 (Sept. 16, 2014) (Allegheny County).

In other cases, the Philadelphia Court has refused transfers where the movant failed to carry its burden, either because the defense provided an insufficient factual basis, or because the factual basis provided failed to rise to the level of oppressiveness or vexatiousness. *See Barany v. Giant Food Stores, LLC*, 2016 Phila. Ct. Com. Pl. LEXIS 274, at *5 (Pa. C.P. June 30, 2016) (characterizing *Bratic* as having relaxed standard for obtaining *forum non conveniens* transfers, but concluding travel of approximately 30 miles from Bucks County did not amount to oppressiveness or vexatiousness); *Bauer v. Herr-Voss Stamco, Inc.*, 44 Pa. D. & C.5th 171 (C.P. Jan. 6, 2015) (denying transfer where defendant "failed to provide an evidentiary foundation...."); *Fishel v. Christian-Baker Co.*, 2014 Phila. Ct. Com. Pl. LEXIS 333 (Nov. 18, 2014) (refusing transfer to Dauphin County, noting case involved insurance dispute, not tort, and related underlying suit was in Philadelphia); *Martinez v. Am. Honda Motor Co.*, 2015 Phila. Ct. Com. Pl. LEXIS 276 (Sept. 17, 2015) (denying transfer to York County where defendant failed "to establish on the record that trial in the chosen forum [would be] oppressive....").

Since *Bratic*, the Superior Court has affirmed *forum non conveniens* transfers where it concluded that the record has supported the trial court's exercise of its discretion. *See Lytle v. Conrail*, No. 1952 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 614, at *3 (Pa. Super. Ct. Mar. 24, 2015) ("[O]ur review of the certified record demonstrates to us that the trial court's decision to transfer this matter to Blair County is supported by the record."); *Lee v. Bower Lewis Thrower*, 102 A.3d 1018, 1025 (Pa. Super. Ct. 2014) (affirming transfer where record contained affidavits providing "the necessary factual basis for transfer.").

In other cases, however, the Superior Court has not hesitated to vacate a transfer order where it determined the record did not supply adequate factual support. *See Bettwy v. Am. Premier Underwriters, Inc.*, No. 1039 EDA 2015, 2016 Pa. Super. Unpub. LEXIS 3579, at *18 (Pa. Super. Ct. Oct. 3, 2016) (vacating transfer order where defendants failed to provide detailed information establishing that trial in Philadelphia would be oppressive or vexatious); *Finch v. v. Am. Premier Underwriters,*

Inc., No. 1416 EDA 2015, 2016 Pa. Super. Unpub. LEXIS 3562, at *14 (Pa. Super. Ct. Oct. 3, 2016) (same); *Fessler v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 131 A.3d 44, *54 (Pa. Super. Ct. 2015) (reversing transfer where Court considered evidence that Chester County witnesses would be required to drive 40 miles for trial in Philadelphia to be insufficient).

In view of these holdings, defense counsel making a *forum non conveniens* motion in Pennsylvania will be wise to present plenty of evidence of the burden the plaintiff's chosen forum will cause to defendants and witnesses. Doing so will not only help persuade the trial court to grant the transfer in the first instance, but will also support the transfer on appeal.

[1] The Court also rejected the plaintiffs' arguments that Fulton County would prove oppressive to them and their physician witnesses, all of whom were near the plaintiffs' residence in Brooklyn, New York. The Court explained that it had afforded the plaintiffs' supporting affidavits little weight because the Cheeseman standard presumes the plaintiff's chosen forum is more convenient to the plaintiff and places the burden on the defense to establish that the plaintiff's preferred forum is oppressive or vexatious to the defendant. Id. at *16 (citing Wood, 829 A.2d at 715-16).

Thomas Grammer *is an Associate at Ricci Tyrrell Johnson & Grey.*

COVERAGE CORNER - STANDING TO ENFORCE THE DUTY TO DEFEND: INSURER DISPUTES

When an insured has access to potential coverage under multiple liability policies, a dispute over which insurer should assume the duty to defend may erupt, and frequently does. If litigation is considered to resolve an impasse, the first question to be addressed is whether one insurer has standing to enforce another's duty to defend. The question is prompted by a fundamental - i.e., the insurers are not contracting parties between or among themselves. To have standing, a party must asset its own legal interest.[1] What little guidance exists on this point is found exclusively in trial court decisions. A recent federal district court decision is a useful resource: *Nautilus Ins. Co. v. Westfield Ins. Co.*, 2017 U.S. Dist. LEXIS 158480 (E.D. Pa. 2017).

The coverage dispute in *Nautilus v. Westfield* arose from an action for personal injury commenced in state court by an employee of the Tenant in possession of a commercial property. The claimant was injured in an accident at the leased premises.[2] *Nautilus* insured the Landlord and assumed its defense when the Tenant's insurer, *Westfield*, refused to defend. *Nautilus* commenced a declaratory judgment action seeking reimbursement of costs incurred to defend the Landlord because the written lease obliged the Tenant to name the Landlord as an Additional Insured. *Westfield's* policy included an endorsement that extended insured status to anyone the Tenant "agreed in a written contract...to name as an insured...with respect to liability arising out of the ownership, maintenance or use" of the premises.

Nautilus' Complaint pleads four causes of action which, taken together, request a declaration that Westfield is obliged to defend the Landlord and seeks reimbursement of all past and future costs incurred to defend the Landlord in state court. *Westfield*

responded to the coverage action with a motion to dismiss that, among other things, challenged *Nautilus'* standing to sue because it was seeking a declaration of the Landlord's legal interests, not its own, under the Lease and the *Westfield* policy to which *Nautilus* is not a party.[3] *Westfield* urged the court to find that because *Nautilus* lacked standing to sue for declaratory relief, it could not press a claim for reimbursement of defense costs that is dependent upon a predicate declaration of coverage.

The court rejected the no-standing argument and held instead that, under Pennsylvania law, an insurance company has standing to bring an action to recover defense costs under an "other insurance" clause or the equitable doctrine of contribution so long as both policies insure the same insured, insurable interest and risk.[4] The court distinguished decisions cited by *Westfield* that held an insurer has no standing to seek a declaration of coverage absent an aligned claim of its own for reimbursement of or equitable contribution to costs paid for the benefit of a common insured: "Although we must determine the meaning of the Lease and [the Landlord's] rights under the Westfield Policy in order to decide [Nautilus'] claim, that fact does not deprive [Nautilus] of standing to either assert its unjust enrichment claim or to seek the declarations necessary to its theory of recovery, because the Complaint in this case alleges that [Nautilus] has legal interests that are adverse to [Westfield]."

This recent decision offers two key takeaways: before an insurer seeks a declaration of coverage under another insurer's policy, it must suffer legal harm in the form of costs which it should not have been obliged to pay at all or that it should have paid only as an equitable share; and consideration should be given to enlisting the insured as a co-plaintiff requesting a declaration of coverage.

[1] *Nautilus Ins. Co. v. Westfield Ins. Co.*, 2017 U.S. Dist. LEXIS 158480 n.7 (E.D. Pa. 2017).
[2] The state court complaint alleges that the plaintiff was catastrophically injured when he fell into a large cryogenic chamber or tank. *Postell v. Metlab Potero at al*, Philadelphia Court of Common Pleas, Case No. 128802845.
[3] The Landlord is not a party to the coverage suit.
[4] The court cites an earlier reported decision in *Transportation Ins. Co. v. Pennsylvania Manufacturers' Ass'n Ins. Co.*, 641 F. Supp. 2d 406 (E.D. Pa. 2008).

Francis P. Burns, III *is a Member of Ricci Tyrrell and heads its Insurance Coverage practice.*

COMMON LAW COPYRIGHTS VS. FEDERALLY REGISTERED COPYRIGHTS

In a previous article, I addressed the difference between common law trademarks and registered trademarks under the federal trademark statutes. Similarly, important differences exist between common law copyrights and registered copyrights under the Federal Copyright Act. In fact, there is a public misconception that, in order to obtain a copyright, the creator or "author" of the copyright must file for a formal registration with the U.S. Copyright Office. This is not the case. Although registering a copyright has certain advantages, registration is not required in order to obtain rights to a copyright.

A common law copyright arises automatically as soon as a copyrightable work is created and fixed in a tangible medium. Examples of works which can be copyrighted include literary, musical, choreographic, and dramatic works; pictorial, graphic, and sculptural works; computer programs and software, motion pictures and other audio visual works, sound recordings; architectural works; and compilations of works. Again, the moment such a work is created and fixed in a tangible medium, there is a copyright.

If the original work is created by the author, the copyrightable work is owned by the author. The author then has the right to place the notice of copyright on his or her work, i.e. a small "c" with a circle around it (©), the date of creation of the work, the name of the author/owner, and the phrase, "All rights reserved." For instance, for this article, the appropriate copyright notice would be "© 2017 Ricci Tyrrell Johnson & Grey. All rights reserved."

The creation of a copyright under common law provides some minimal benefits of ownership to the author. For instance, proof of copyright ownership can give rise to injunctive relief and provable, consequential damages. However, registration of the copyright under the Copyright Act, 17 U.S.C. § 101 et seq, provides the author with significant additional advantages over a common law copyright, especially in enforcing the copyright and recovering statutory damages.

Fundamentally, the author must have a copyright registration obtained from the Copyright Office at the Library of Congress, or have applied and have been refused registration, in order to bring a lawsuit for copyright infringement. Enforcement of the copyright and actions for infringement can then be brought in the U.S. federal courts. Under the copyright statutes, the owner of a registered copyright can obtain damages up to $150,000, plus attorney's fees, for willful copyright infringement.

Copyright registration also creates a public record of the original work of authorship. This establishes prima facie evidence of the validity of the copyright.

Copyright registration is relatively easy to obtain by filing for registration online or by paper, express mail submissions of the required documentation. The current fees required to be submitted for copyright registration applications are between $35 and $85, depending on whether the filing is done online or by paper filing. Filing for registration prior to or shortly after publication or public showing of the copyrightable work will protect the registration under the copyright statutes and permit its effective enforcement.

Given that the copyright registration process is relatively simple and inexpensive, the author of an original work is well advised to file for copyright registration in order to obtain the full ability to protect his or her copyright from infringing parties.

Stuart Goldstein *heads the Intellectual Property practice at Ricci Tyrrell Johnson & Grey.*

SPECIAL ANNOUNCEMENTS

Ricci Tyrrell employee **Alyssa Wasson** married her boyfriend of two years, Kurtis

Doman, on November 26, 2017. The couple met while Alyssa was studying Criminal Justice at The Pennsylvania State University. Kurtis is currently serving in the Military as a Hydraulic Specialist and is stationed at McGuire Air Force Base in New Jersey.

Ricci Tyrrell Associate **Kelly Castafero** married her boyfriend of five years, Jonathan Woy, on December 2, 2017. The couple met during their first week at Temple University Beasley School of Law, where they were in the same 1L Section. Jonathan currently works as an attorney in the litigation department of White & Williams in Philadelphia.

IN THE COMMUNITY

Ricci Tyrrell will be one of the sponsors of the inaugural **Eagles Autism Challenge** which will be held on May 19, 2018. The **Eagles Autism Challenge** is dedicated to raising funds for innovative research and programs to help unlock the mystery of autism. Philadelphia Eagles players, alumni, coaches, executives, cheerleaders and Swoop will be present for the one day bike ride and family friendly 5K run/walk.

On November 18, 2017, Ricci Tyrrell Associate **Samuel Mukiibi** took part in **The Barristers' Association of Philadelphia's 33nd Annual Thanksgiving Drive**. With the support of Ricci Tyrrell, the Barristers provided Thanksgiving "turkey baskets" to more than 750 lower income families in the Philadelphia area. Included in the baskets were legal aid materials on pursing a claim in landlord-tenant court, including the Philadelphia Court of Common Pleas' Residential Mortgage Foreclosure Diversion Program. Each year the Barristers inform the public on a different area of law. In previous years, the legal aid materials have covered wills and estates, protection from abuse, family law, small claims court, criminal records searches and the expungement process.

Ricci Tyrrell again sponsored a hole at the **Brookfield Schools 24th Annual Golf Outing** on September 25, 2017. The golf outing is the organization's main fundraiser. Brookfield Schools serves students needing intensive behavior/therapeutic intervention. Its mission "is to provide innovative, practical and effective educational and therapeutic services for students with special emotional and behavioral needs that will put them on the pathway to success toward becoming productive members of society."

In honor of **Breast Cancer Awareness Month** and all those we know affected by breast cancer, October 31, 2017 was "wear pink" day at Ricci Tyrrell. The firm sold pink donuts and yogurt to raise money on behalf of **Susan G. Komen Philadelphia**.

On November 2, 2017, Ricci Tyrrell Member **Mary Grace Maley** attended **Saint Joseph's University's** second annual **Leadership Awards Dinner**, the University's premier fundraising event which drew more than 500 attendees - selling out - and grossed in excess of $400,000 for scholarship support. Mary Grace attended in support of her good friend and former co-captain of the women's basketball team, **Muffet McGraw**, who was a recipient of the Alumni Professional Achievement Award. The team members present were photographed for the Inquirer and enjoyed reminiscing about the "glory days."

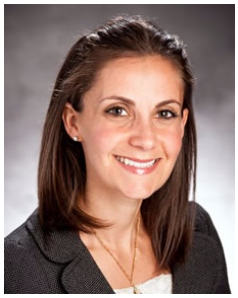
On November 19, 2017, Ricci Tyrrell Chief Operating Officer **Julianne Johnson** successfully completed the Philadelphia marathon in honor of the **American Association for Cancer Research (AACR)** and in memory of two important women in her life who both fought a good, long battle with cancer. She also ran for the too many people who are still fighting the battle today. Julie first ran the Philadelphia marathon 20 years ago. After being diagnosed with breast cancer this past spring and conquering the disease thanks to early intervention and many advancements in science and medical research, Julie decided to run again to raise awareness and essential funds for the **AACR**. Through the help of family, friends, and firm employees, Julie exceeded her fundraising goal of $2,500 and raised $3,677 for the **AACR**. The **AACR** is based in Philadelphia and is the oldest and largest professional organization for cancer research.

On November 19, 2017, Ricci Tyrrell Associate **Tracie Bock Medeiros** along with her husband Matt and their pre-school aged children Zachary and Naomi delivered Thanksgiving baskets to local families in need. Their synagogue, **Har Zion Temple**, organized a food drive and with the help of the **Noreen Cook Center for Early Childhood Education of Har Zion Temple**, baskets were decorated for Thanksgiving and filled with food for a Thanksgiving meal.

On November 20, 2017 **Philadelphia Lawyers for Social Equity (PLSE)** conducted its first-ever training program for professional paralegals, and our employee, **Yolanda Jenkins**, was part of the Inaugural Class. **PLSE** is a non-profit that provides *pro bono* help to lower income Philadelphians (www.plsephilly.org). With a very small staff, it files and presents to the Criminal Court more than a thousand petitions each year. With the partnership of the **Philadelphia Association of Paralegals**, **PLSE** is looking to more than double that number.

In August 2017, Ricci Tyrrell Associate **Tracie Bock Medeiros** was selected to serve on the Senior Rabbi Search Committee for her synagogue, **Har Zion Temple**. Since then, Tracie has volunteered an extensive amount of time to the Committee and will continue to do so through the search process which is expected to end in the Spring of 2018. While time consuming, Tracie is committed to the process and honored to be a part of selecting the congregation's spiritual leader for years to come.

"In the Community" is edited by Ricci Tyrrell Associate ***Tracie Bock Medeiros.***



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