Ricci Tyrrell Johnson & Grey

ATTORNEYS AT LAW

QUARTERLY NEWSLETTER

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RTJG co-workers enjoyed a staff luncheon and wearing of Eagles Green on 1/4/20 in anticipation of the Philadelphia Eagles play-off game.

In This Issue:

News and Events:

We are proud to announce that **Ricci Tyrrell Johnson & Grey** has again been named a Tier-1 Products Liability Firm in **U.S. New & World Report's** 2020 ranking of **Best Law Firms**.

Ricci Tyrrell congratulates Members **Bill Ricci**, **Francis Grey** and **Michael Droogan** for their selection as 2020 Pennsylvania Super Lawyers™. We also congratulate Associate **Sam Mukiibi** who was selected as a Rising Star™.

On December 24, 2019 Associate **Alisha Rodriguez** appeared on the talk radio show, **Go Hard with Jennifer Gomez Hardy**, on WWDB-AM Talk Radio 860. Alisha provided a perspective on various issues from a defense lawyer. Please click on this link to hear the broadcast https://wwdbam.com/episodes/the-whos-who-in-philly-labor-show-20/

Managing Member **John Tyrrell** was interviewed with Philadelphia Eagles safety **Malcolm Jenkins** during the **Malcolm Jenkins Foundation's** 8th Annual Holiday Dinner Basket Surprise event. See the *In The Community* section of this Newsletter for more information. You can view the interview at this link: https://www.rtjglaw.com/2019/12/17/ricci-tyrrell-johnson-grey-supports-the-malcolm-jenkins-foundation/

Bill Ricci was one of the authors of *Amazon as "Seller" under Restatement (2nd) of Torts 402A: Paradigm or Paradox,* which was published in the October issue of CounterPoint, an official publication of **The Pennsylvania Defense Institute.**

Associate **Alisha Rodriguez** was a guest speaker at the October General Body Meeting of the **NBA Women's Lawyers Division, Philadelphia Chapter**. Ms. Rodriguez spoke on "Making the Most of Mentorship: Success Tips for Law Students and New Attorneys".

Loss of Consortium Exception to the Attorney-Client Privilege

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

In catastrophic injury cases, defendants routinely face not only the primary injury claim, but often a loss of consortium claim from the surviving spouse. When assessing the value and validity of the consortium claim, an issue to be cognizant of is the status of the marriage. If the marriage has entered, or contemplated divorce, communications made by the claiming spouse to his or her attorney may be discoverable pursuant to the loss of consortium exception to the attorney-client privilege.

In the case *Lesley Corey, as administratrix of the Estate of Joseph Corey, and Lesley Corey, in her own Right v. Wilkes Barre Hospital Company d/b/a Wilkes-Barre General Hospital Emergency Department, et. al.*, 2019 Pa. Super. 288 (2019) the decedent's spouse asserted a claim for loss of consortium. However, at the time of the decedent's death, the couple had been separated, retained separate attorneys, and a divorce action had been active for six months. *Id.* at *2. At issue in the case was whether documents between the decedent spouse and her divorce attorney were discoverable in the wrongful death action or if they were protected under the attorney-client privilege.

During the course of discovery, defense counsel sought documents from the surviving spouse's attorney in the divorce action. *Id.* at *3. Documents were produced, but were redacted on the basis of the attorney-client privilege. *Id.* Thereafter, an in-camera review and hearing was scheduled. *Id.* at *4. The trial court noted that in ordinary circumstances the attorney-client privilege retains the utmost authority and is rarely called into question. *Id.* That said, it was determined that the documents were relevant and discoverable. *Id.* at *5. The court reasoned that a loss of consortium claim is based upon the status of the marriage at the time of death. *Id.* The documents sought in discovery were both relevant and discoverable because they had been placed into evidence by seeking a claim for loss of consortium. *Id.*

On appeal, the Superior Court affirmed the trial court's decision. *Id.* at *12. The attorney-client privilege provides that "[i]n a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client." 42 Pa.C.S.A. §5928. The Superior Court noted that there is tension between the competing interest of encouragement of trust and candid communication with lawyers and clients, and the access to material evidence to further the process of determining the truth. *Lesley Corey, et. al.,* 2019 Pa. Super. 288 at *10. That being said, the attorney-client privilege "exists only to aid in the administration of justice, and when it is shown that the interests of the administration of justice can only be frustrated by the exercise of the privilege, the trial judge may require that the communication be disclosed." *Id.* at *10-11.

Transitioning into its analysis of the existence of a loss of consortium exception to the attorney-client privilege, the Superior Court stated that "a loss of consortium claim includes a claim for loss of sexual relations. Consortium is defined as 'the legal right of one spouse to the company, affection, and assistance of and to sexual relations with the other.'" *Id.* at *11 (*quoting Tucker v. Phila. Daily News*, 848 A.2d 113, 127 (Pa. 2004) (citation omitted). The Court continued that consortium has been more generally defined as "[c]onjugal fellowship of husband and wife, and the right of each to the company, society, co-operation, affection, and aid of the other in every conjugal relation." *Id.* In order to recover on a loss of consortium claim "the spouse who brings the claim must demonstrate an injury to the marital relationship that deprives him or her of the conjugal fellowship, company, society, cooperation, affection, and sexual relations that the spouses shared prior to the injury and that but-for the injury, the two would continue to share." *Id.* at *11-12.

The Superior Court reasoned that because the divorcing spouse had put the loss of consortium at issue, she must prove the existence of consortium. *Id.* at *12. She cannot hide behind the attorney-client privilege to protect communications when she put the marriage/divorce at issue by including a loss of consortium

claim. *Id.* "To do so would frustrate the administration of justice by giving [the spouse] an unfair advantage and by prejudicing [] the defense of the claim." *Id.*

The lesson to be learned from this case is that defense counsel must understand and investigate the status of a couple's relationship because it may allow for additional discovery tools and effect the value of the claim.

CELEBRITY TRADEMARKS

Stuart M. Goldstein heads **Ricci Tyrrell's** Intellectual Property Practice

A United States registered trademark, designated by ®, is a word, phrase, or logo which identifies particular goods or services. Registered trademarks are most often sought by companies and individuals who are intent on protecting their brands, and, of course, ultimately their financial bottom lines. Recently, however, a number of public figures, fairly well-to-do celebrities, and athletes have filed applications for trademark registrations to either increase their notoriety or their already hefty pocket books. Nonetheless, the United States Patent and Trademark Office (USPTO) reviews the applications of these high-profile individuals under the same criteria it utilizes for all applications. The USPTO's grounds for refusal of such applications are instructive.

For instance, before Donald Trump was elected President, he attempted to register the phrase "Your Fired." He contemplated using the mark for such things as alcoholic beverages, toys, sporting goods, housewares, pillows, cloths, and casinos. His applications were primarily refused, based on its "likelihood of confusion" with a prior registered mark, "Your Hired." Trademark registration will be barred if the applied for mark is so similar to a prior, registered mark, that it is likely that consumers would be confused, mistaken, or deceived as to the commercial source of the goods of the parties. Trump never pursued his applications after they were initially rejected.

Singer Cardi B's application for her catch phrase "OKURR" was refused, since this phrase also did not meet the requirements necessary for a registered trademark. To be registered, a mark must function to indicate the source of an applicant's services and to identify and distinguish them from other services. It was the USPTO's opinion that the public is accustomed to seeing this phrase commonly used in everyday speech. This common usage was the basis for refusal of Cardi B's application.

Recently, quarterback Tom Brady filed a registration for "Tom Terrific." Brady received a refusal based on a name of a living individual, Tom Seaver. Seaver, a former star pitcher for the New York Mets, is already known as "Tom Terrific." The USPTO stated that "The nickname Tom Terrific points uniquely and unmistakably to Tom Seaver, and the fame or reputation of Tom Seaver as Tom Terrific is such that a connection between Mr. Seaver and the applied-for goods would be presumed." Currently, this application is active and Brady has an opportunity to respond to the USPTO's refusal.

Another sports figure, basketball star LeBron James, sought to obtain a trademark registration for "Taco Tuesday." This application was denied as being a commonly recognized phrase. "The applied-for mark is a commonplace term, message, or expression widely used by a variety of sources that merely conveys an ordinary, familiar, well-recognized concept or sentiment message." James has since abandoned his attempt for a registration of this phrase.

Likelihood of confusion with prior registered marks, false connections with living individuals, widely used commonplace expressions, and registrations which convey a familiar or recognized concept or message are all well recognized, precedential grounds on which the USPTO relies to deny trademark registration applications. However, when trademarks are unique to a product or service and can overcome these, and other reasons for refusal, the USPTO will and has allowed registration to celebrities. For example, Paris Hilton's "That's Hot," Michael Buffer's "Let's Get Ready to Rumble," Taylor Swift's "This Sick Beat," Emerald Lagosse's "Bam!," and Tim Tebow's "Tebowing" have all received registered trademarks.

CLAIMS OF GROSS NEGLIGENCE SURVIVE CHALLENGE BASED ON SIGNED RELEASE

Alisha S. Rodriguez is an Associate at **Ricci Tyrrell Johnson & Grey**.

In the recent decision, *Feleccia v. Lackawanna College, et al.,* 215 A.3d 3 (Pa. 2019), the Supreme Court of Pennsylvania squarely addressed whether a plaintiff's signed waiver will bar recovery for claims of gross negligence. Citing public policy concerns, the Court held a waiver releasing Lackawanna College from "any and all liability, claims, demands, actions and causes of action" would not shield the junior college from claims of gross negligence. *Id.* at 16. The opinion noted concerns about allowing parties to be acquitted of conduct that carries some degree of consciousness, even a conscious disregard of the risk of harm to others. The Court reasoned that allowing parties to evade responsibility for gross negligence would incentivize conduct that puts the health, safety and welfare of the individuals signing waivers at risk.

Prior to *Feleccia*, there was uncertainty about whether a waiver would release parties accused of committing gross negligence rather than ordinary negligence. Public policy concerns always loomed large. It was generally understood that public policy would prevent a release from barring claims of both gross negligence and recklessness. *Weinrich v. Lehigh Valley Grand Prix,* 2015 Pa. Dist. & Cnty. Dec. LEXIS 79 (Pa. C.P. 2015) (finding a waiver of gross negligence and recklessness claims would be rendered void as a contravention of public policy). The Superior Court deviated from this position in its 2011 decision, *Valeo v. Pocono International Raceway, Inc.*, 500 A.2d 492 (Pa. Super. Ct. 1985), holding that a party may release another from liability for gross negligence. The Court, however, did not examine if the involved negligent maintenance claims rose to the level of gross negligence but issued a blanket holding that the release language was broad enough to cover all forms of negligence.

The Supreme Court of Pennsylvania in *Tayar v. Camelback Ski Corp.* 47 A.3d 1190 (Pa. 2012) left open the question of gross negligence and only addressed that a waiver was not applicable to injuries alleged to occur as a result of recklessness. Even if a party voluntarily entered an agreement to waive liability for recklessness, Pennsylvania courts would not honor such an agreement because of concerns for maintaining a minimal standard of care and safety.

By and large, "contracts providing immunity from liability are not favorites of the law and will be construed strictly." *Valeo*, 500 A.2d at 493. Though Pennsylvania courts will construe waivers strictly, the courts still look to contract principles and the language of the contract. If the parties intended to release each other from liability and unambiguously expressed that intent in a signed release, then the court will honor that agreement.

Now that the courts have closed the door on using waivers to shield against gross negligence, the question becomes whether the conduct in question constitutes gross negligence or merely ordinary negligence. The *Feleccia* court considered how to define gross negligence – which lies somewhere beyond negligence without reaching the level of an intentional tort – and found gross negligence is the "failure to exercise even scant care." 215 A.3d at 20. Without providing an exact calculation, the court defined gross negligence as a flagrant and gross deviation from the standard of care. Going forward, the degree of deviation will determine whether a claim can survive a challenge based on a signed waiver. Plaintiff will need to establish more than just a breach of the standard of care but an extreme departure from the standard to survive such a challenge.

JUROR BIAS: *SMITH V. CORDERO*

Samuel Mukiibi is an Associate at **Ricci Tyrrell Johnson & Grey**.

Recently, a unanimous three-judge panel of the Pennsylvania Superior Court reinstated a lawsuit, captioned *Smith v. Cordero*, 2019 PA Super 340, 2019 WL 6042529 (Pa. Super. Ct. Nov. 15, 2019), against the *University of Pittsburgh Medical Center* (*UPMC)* after determining that two jurors showed bias against medical malpractice litigation during *voir dire*.

The lawsuit stemmed from an alleged misdiagnosis of leg ulcers as venous ulcers, rather than arterial ulcers. The deceased, Dale Smith, suffered from diabetes, kidney disease, and other ailments. He visited Dr. Cordero of *UPMC* due to leg wounds/ulcers. Smith's estate alleged the misdiagnosis resulted in improper treatment, which caused Smith's leg amputation and led to this death.

At trial in the Allegheny Court of Common Pleas, the *voir dire* of the jury was conducted by a court clerk and not the trial judge. Jurors Nos. 25, 37, and 45 provided affirmative answers to two questions:

1. Do you have any feelings or opinions about whether medical malpractice lawsuits affect the cost, availability and other medical services?
   ...

2. Do you have any feelings or opinions as to whether there should be a minimum or maximum amount of money that can be awarded to an injured party?

Juror No. 37 believed that there should be a maximum on jury awards due to exorbitant awards and further believed that malpractice cases kept doctors from practicing medicine. Nonetheless when asked whether she could be fair and impartial, she said "yes," and stated that although she thought the verdicts were high and excessive she could "listen to the instructions and be fair and impartial." Juror No. 25 believed that juries awarded too much money in malpractice cases, which drives up the cost of services. However, she also stated she would follow the court's instructions. Juror No. 45 had similar responses to the above referenced jurors and was in favor of maximum awards. The trial court granted a Motion to Strike Juror No. 37, but denied it as to Jurors Nos. 25 and 45. Smith then used a peremptory strike for one of the jurors and the other juror was an alternate. Smith ultimately used all his peremptory strikes. Following a jury trial, the jury found in favor of UPMC defendants.

On appeal Smith argued that trial judge erred in denying the Motions to Strike because the judge did not witness the *voir dire* and therefore did not see the jurors' conduct and demeanor. Smith relied on *Trigg v. Children's Hospital of Pittsburgh of UPMC*, ironically a case decided after the jury selection in this matter but before the appeal. In *Trigg*, the plaintiffs alleged that the Allegheny County Civil Division's jury selection process deprived them of their right to a fair trial. The Superior Court found that where a "juror demonstrates a likelihood of prejudice by conduct or answers to questions," appellate courts defer to trial judges during *voir dire* because the trial judge observes the juror's conduct and hears the juror's answers.[1] Interestingly enough in *Trigg*, even though the *voir dire* was conducted by the court clerk, if an attorney sought to challenge a potential juror for cause, the clerk noted the challenge and, after interviewing all jurors, the clerk and the attorneys returned to the courtroom of the judge. The judge would then read the transcript to rule on the challenges for cause. Relying on *Trigg*, Smith further argued that the Superior Court should conduct a *de novo* review of the denial of the Motions to Strike and should not give the trial court's decision any deference.

The *UPMC* defendants claimed that Smith waived the issue because he did not challenge the absence of the trial judge during *voir dire*. Defendants further argued *Trigg* was indeed decided after jury selection in this matter and to apply it here would hinder the administration of justice. Accordingly, defendants argued that the Superior Court should apply the abuse of discretion standard and affirm the trial court.

In applying *Trigg* to the instant matter, the Superior Court applied a *de novo* review holding that *Trigg* merely addressed the applicable appellate standard of

review where a judge does not witness the *voir dire*. Therefore, Smith did not waive his claim by failing to object during *voir dire* because *Trigg* did not impose a requirement that a judge be present for *voir dire*. However, further relying on *Shinal v. Toms* (the case cited in *Trigg*) the Superior held that the trial court erred in denying the Motions to Strike jurors nos. 25 and 45 for cause. Despite the fact that the jurors stated they could follow the court's instructions and be fair and impartial, the trial judge was not present to hear the jurors' tone of voice and see the jurors' demeanor. Moreover, the Court citing *Trigg*, noted that where a party was forced to use a peremptory challenge to strike a juror that should have been struck for cause, the error was not harmless, and a new trial was warranted.

[1] *Trigg v. Children's Hospital of Pittsburgh of UPMC*, 187 A.3d 1013, 1017 (Pa. Super. 2018), petition for allowance of appeal granted, 201 A.3d 145 (Pa. 2019) (citing *Shinal v. Toms*, 162 A.3d 429, 442 (Pa. 2017)).

In The Community:

Ricci Tyrrell Johnson and Grey employees generously engaged in an office toy drive to benefit the **Malcolm Jenkins Foundation**. Managing Member **John Tyrrell**, Member **Nancy Green**, Associate **Alisha Rodriguez** along with staff members **Yolanda Jenkins**, **Bobby Nevin** and **Lisa Halbruner** volunteered their services on December 16th to assemble holiday baskets for the **8th Annual MJF Holiday Dinner Basket Surprise**. 280 families within the Philadelphia and Camden Communities benefited with donations of food and toys.

Associate Alisha Rodriguez volunteering alongside Eagles player and MJF founder, Malcolm Jenkins.

Rodriguez, Nevin, Green, Halbruner, Tyrrell and Jenkins at the MJF Holiday Basket volunteer day.

The International Institute for Conflict Prevention and Resolution hosted a Corporate Leadership Award Dinner honoring Ford Motor Company and Bradley M. Gayton, Chief Administrative Officer and General Counsel, on November 20th. Associates **Samuel Mukiibi** and **Jonathan Delgado** attended the black-tie affair in New York City.

Associate Sam Mukiibi, Honoree Bradley M. Gayton and Associate Jonathan Delgado.

Ricci Tyrrell Johnson & Grey

Go Pink for Halloween was celebrated by pink-wearing RTJG staff at an office luncheon. Donations by employees were matched by the Firm for the **Susan G. Komen Foundation** for breast cancer research.

Continuing in our holiday tradition, Ricci Tyrrell donated to **Philabundance** on behalf of valued colleagues and clients through holiday e-cards. A further donation was made by purchasing "Cards for a Cause" as the mailed holiday card of choice. ***Philabundance*** is the area's largest hunger relief organization and a proud member of Feeding America on a mission to make nutritious food accessible to all.

Associate **Alisha Rodriguez** volunteered at **The Barristers' Association of Philadelphia's 35th Annual Thanksgiving Drive**. Ricci Tyrrell donated to the event which supplied food baskets to over 700 families in the Philadelphia area.

Ricci Tyrrell was a Basketball Marathon Shirt Sponsor for **The Billy Lake ALS Fund** committed to research and finding a cure. The 28th annual event took place on October 12th at Haverford College.

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