



# Ricci Tyrrell Johnson & Grey

ATTORNEYS AT LAW

## QUARTERLY NEWSLETTER

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### News and Events:

**Ricci Tyrrell Johnson & Grey** is honored to have been recognized by **The Pennsylvania Defense Institute (PDI)** as the **2020 Pennsylvania Defense Firm of the Year**. PDI is Pennsylvania's defense advocate, dedicated to the defense of civil claims through advocacy and education. Organized in 1969, PDI is one of the largest organizations of its kind in the United States. PDI "annually honors a civil defense firm that best exemplifies the qualities of professionalism, dedication to the practice of law, promotion of the highest ideals of justice in the community and has a demonstrated commitment to PDI and its members". This is a great tribute to the hard work of all of our lawyers and other employees.

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**Ricci Tyrrell opened its Pittsburgh office** on July 1, 2020 at 500 Grant Street Pittsburgh, PA 15219. This is the Firm's fifth physical office location. The office will be staffed full-time. This strategic placement will allow the Firm to continue to efficiently and effectively represent its clients in the western portion of the Commonwealth of Pennsylvania.

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Founding Member **Bill Ricci** has been appointed Vice-President of Operations for the Philadelphia Association of Defense Counsel (PADC). This positions Mr. Ricci as the PADC President-Elect for 2021.

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Managing Member **John Tyrrell** and Associate **Alisha Rodriguez** co-authored "Governmental Immunity & College Basketball" for *Sports Facilities and the Law*. A link to the article can be found here: [www.rtjglaw.com/2020/06/29/governmental-immunity-college-basketball](http://www.rtjglaw.com/2020/06/29/governmental-immunity-college-basketball)

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On June 1, 2020 **Bill Ricci** was one of the presenters at a Webinar jointly sponsored by **Philadelphia Association of Defense Counsel** and **Pennsylvania Trial Lawyers Association**. The Webinar addressed "Reaching Across The Bar: Litigation Opportunities In Times of Uncertainty". Mr. Ricci presented together with Hon. Sandra Mazer Moss (Ret.); Larry Bendesky Esquire; and Melissa M. Gomez, Ph.D.

Member **Brian Wolensky** has been recently admitted to the Bar of the State of New York. Brian joins a number of other New York attorneys at Ricci Tyrrell. The Firm has an office in New York located at 445 Hamilton Avenue, Suite 1120, White Plains, NY.

### RICCI TYRRELL ANNOUNCES COMMUNITY JUSTICE PRO BONO PROGRAM



John E. Tyrrell



Nancy Green

In June 2020, Managing Member **John E. Tyrrell** released the following statement concerning **Ricci Tyrrell's** expansion of its *Pro Bono* efforts:

Among the observations available of events over the last few weeks is the growing consensus that might be emerging over a cause that should never have been a subject of controversy to begin with. The momentum toward recognition and rejection of unjust police conduct against Blacks could be swiftly advancing after moving at a painful crawl for decades.

As awareness has improved, statements of unity and support have been issued by law firms and other businesses. These affirmations of policy and resolutions against discrimination and for diversity are welcome; but Ricci Tyrrell should strive to stand at this time with those firms looking to take real action.

So motivated, we are excited to announce the formation of the **Ricci Tyrrell Community Justice Pro Bono Program**. Our firm will immediately provide structure and resources to expand our *pro bono* commitment and focus on efforts by our lawyers which seek to aid the representation of interests fighting discrimination and inequity. Efforts to combat prejudice and violence perpetrated against the Black community will receive firm support as will efforts directed to fighting the targeting of other groups. The news in recent months has included unwarranted attacks on Asian Americans related to the origin of the coronavirus; anti-Semitic attacks are at historically high levels according to the Anti-Defamation League; FBI statistics reveal that 1 in 5 hate crimes stem from anti-LGBTQ bias; bias against people of Hispanic and Latin American origin has increased in response to a concerted political effort at cultivating it. These and other causes will be appropriate recipients of firm support.

Firm Member **Nancy Green** will provide leadership in this important effort. As lawyers we can march and donate and volunteer as others can. But we can also try to affect change by using our professional legal skills and experience. This is a method of contribution uniquely available to us.

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### DOES FAIR MEAN EQUAL? THE APPLICATION OF THE FAIR SHARE ACT UNDER ROVERANO



**Jacqueline Zoller** is an Associate at **Ricci Tyrrell Johnson & Grey**.

The Fair Share Act, 42 Pa. C.S. §7102, was enacted in 2011 and changed the law of joint and several liability in Pennsylvania. The Act provides, with a few exceptions:

[W]here recovery is allowed against more than once person, including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability.

42 Pa. C.S. §7102(a.1)(1).

The Act further provides, "a defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability." 42 Pa. C.S. §7102(a.1)(2). However, a defendant found liable for 60 percent or more of the total liability is still jointly and severally liable and responsible for 100 percent of plaintiff's damages. 42 Pa. C.S. §7102(a.1)(3).

Although the Fair Share Act explicitly applies to "actions for strict liability," the application of the Act by trial courts has been inconsistent, in particular, in strict liability asbestos actions. The Act does not define the term "apportioned amount" nor does it provide a method of determining the ratio of liability. The issue was recently examined by the Pennsylvania Supreme Court in *Roverano v. John Crane, Inc.*, 226 A.3d 526 (Pa. 2020). Although the *Roverano* decision provides guidance for asbestos strict liability cases, it left many questions regarding the general application of the Fair Share Act unanswered.

In an issue of first impression, in *Roverano*, the Supreme Court of Pennsylvania ruled the plain language of The Fair Share Act, 42 Pa. C.S. §7102 is consistent with *per capita* (equal shares) apportionment in asbestos strict liability. The Supreme Court also held that upon appropriate requests and proofs, bankruptcy trusts that are either joined as third-party defendants or that have entered into a release with the plaintiff may be included on the verdict sheet for purposes of liability only.

In *Roverano*, plaintiff, William Roverano, a former PECO employee, filed suit in the Philadelphia County Court of Common Pleas against thirty defendants asserting that exposure to asbestos products caused his lung cancer. His wife, Jacqueline Roverano, asserted a loss of consortium claim. A Philadelphia jury awarded \$6.4 million to Mr. and Mrs. Roverano. The trial court ruled that the Fair Share Act did not apply and apportioned the judgment equally among the eight defendants determined to be tortfeasors. The two defendants left at trial appealed, arguing (1) that the Fair Share Act applied to strict liability matters and (2) that a jury may consider evidence of settlements with bankrupt entities in connection with apportionment of liability.

In December 2017, the Superior Court held that the Fair Share Act applied to both negligence and strict liability actions, and therefore, "liability in strict liability cases must be allocated in the same way as in other tort cases [fault based by percentage], and not on a *per capita* basis." *Roverano v. John Crane, Inc.*, 177 A.3d 892, 906 (Pa. Super 2017). The Superior Court further held that "settlements with bankrupt entities [may be] included in the calculation of allocated liability" under the Fair Share Act provided that defendants at trial "submit evidence to establish that the non-parties were joint tortfeasors." *Id.* at 909. Accordingly, the court remanded the case for a new trial on damages, with instructions for the jury to apportion liability to each defendant on a percentage basis rather than on a *per capita* basis.

The Pennsylvania Supreme Court granted a petition for appeal and heard the case in March of 2019. In its written decision issued in February 2020, the Supreme Court reversed the Superior Court and held liability must be apportioned on a *per capita* basis in strict liability asbestos cases.

In support of its decision, the Supreme Court reasoned that although the Fair Share Act explicitly applies to strict

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liability actions, the Act is silent on how apportionment is to be made among joint tortfeasors:

There is nothing in the [Fair Share] Act that suggests that the method of determining the ratio of liability for strict liability cases must be the same as specifically described for negligence cases alone in the prior version of Section 7102. It does not follow, as concluded by the Superior Court, that the inclusion of strict liability cases in Section 7102(a.1)(1) evidenced an intent to treat such cases the same as negligence case in all respects. It is clear that in both types of cases the Section directs that the ratio of damages must be determined among defendants and that, pursuant to Section 7102(a.1)(2) such proportions will not be subject to joint liability exposure. **However, the Section 7102(a.1)(1) is silent about the basis for determining those proportions.**

*Roverano*, 226 A.3d at 539 (emphasis added). Since the Act does not specify the basis for determining the proportions, the Supreme Court found no reason to disrupt the common law which mandated per capita allocation in strict liability actions. See *Baker v. AC&S*, 755 A.2d 664 (Pa. 2000) and *Walton v. Avco Corp.*, 610 A.2d 454 (Pa. 1992). The Court reasoned strict liability is "liability without fault" with each defendant "wholly liable for the harm." *Roverano*, 226 A.3d at 538 (internal quotations omitted). Therefore, it would be "improper to introduce concepts of fault in the damage-apportionment process." *Id.* at 538-39. As each strictly liable defendant is entirely legally responsible for the harm, the ratio of the amount of one defendant's liability to the liability of all defendants is 100%. Accordingly, liability must be equally apportioned among strictly liable joint tortfeasors.

As a secondary argument, the Supreme Court explained that an allocation of liability would be "impossible of execution" in asbestos cases. The Court explained lung cancer resulting from asbestos inhalation is inherently a single, indivisible injury that is incapable of being apportioned in a rational manner because the individual contributions to the plaintiff's total dose of asbestos are impossible to determine. *Roverano*, 226 A.3d at 541. Specifically, in asbestos cases where expert testimony is necessary to establish causation, and the experts agree there is no scientific or medical basis to apportion liability, it is impossible to instruct a

jury to apportion liability for an indivisible injury on a percentage basis.

The Supreme Court also held that bankrupt entities that have settled or were joined as defendants must be on the verdict sheet. The Supreme Court again pointed to the plain language of the Fair Share act, specifically §7102(a.2), which provides: "[f]or purposes of apportioning liability only, the question of liability of any defendant or other person who has entered into a release with the plaintiff with respect to the action and who is not a party shall be transmitted to the trier of fact upon appropriate requests and proofs by any party." The Supreme Court found this section required the trial court to include the bankrupt defendants on the verdict sheet for the limited purpose of determining liability.

The *Roverano* decision gives guidance on how to apportion liability amongst defendants in strict liability asbestos cases. However, it is unclear if the ruling extends outside the realm of asbestos. Moreover, the Court failed to provide guidance as to how a jury or fact finder would apportion liability in a case involving both negligence and strict liability claims.

### BENJAMIN V. JBS S.A. ET AL: AN EMERGING PATTERN OF COVID-19 LITIGATION



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

On May 7, 2020, the estate of Enoch Benjamin filed the first lawsuit of its kind in Pennsylvania.<sup>1</sup> Mr. Benjamin, a union steward at the JBS meat processing plant in Souderton, Pennsylvania, died on April 3, 2020, of respiratory failure caused by the pandemic virus, Covid-19. The wrongful death and survival action was brought against Brazilian-based meat processing company, JBS S.A. and several subsidiaries, over claims that the employers failed to properly protect workers from the coronavirus.

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The Complaint alleges that the JBS Defendants: (1) failed to provide sufficient personal protective equipment; (2) forced workers to work in close proximity; (3) forced workers to use cramped and crowded work areas, break areas, restrooms, and hallways; (4) discouraged workers from taking sick leave in a manner that had sick workers in fear of losing their jobs; and (5) failed to properly provide testing and monitoring for individuals who have may have been exposed to Covid-19. The Complaint includes claims of negligence, fraudulent and intentional misrepresentation, and extreme and outrageous conduct, in an obvious effort to sidetrack the exclusive remedy provision of the Worker's Compensation Act.

The defendants removed the matter to the United States District Court for the Eastern District of Pennsylvania and moved to dismiss the Complaint for lack of personal jurisdiction, the exclusivity of remedy of the Pennsylvania Workers' Compensation Act, referral to the Occupational Safety and Health Administration (OSHA) under the primary jurisdiction doctrine and failure to plead facts to state claims of negligence, misrepresentation and punitive damages. Defendants' motion highlighted that the alleged claims arose while federal, state and local governments were forming a response to the Covid-19 pandemic.<sup>2</sup> Specifically, "throughout March of 2020, federal organizations and officials advised against the use of face masks for anyone other than healthcare providers in direct contact with sick individuals" and that "the Centers for Disease Control and Prevention (CDC) did not recommend the general public use cloth face coverings until April 3, 2020." The defendants emphasized how the public at large received conflicting messages. For example, after the CDC changed its position on face coverings, the World Health Organization (WHO) continued to state that there was no evidence that "wearing a mask (whether medical or other types) by healthy persons in the wider community setting" could prevent the transfer of Covid-19.

The lawsuit was not the first of its kind in the county. A similar lawsuit was filed on May 5, 2020, in Dallas, Texas against Quality Sausage, Company LLC, another meat processing plant, following the death of Hugo Dominguez on April 25, 2020.<sup>3</sup> The Complaint alleged that Dominguez "contacted Covid-19 at work", "was told to report to work . . . [or] otherwise he would be laid off" and that Quality Sausage "refused to take the pandemic seriously, and kept its functions as normal,

taking no precautions and implementing no protocols for the safety of workers."

Meat processing defendants in the above matters may find guidance in a May 5, 2020, opinion written by Judge Greg Kays of the United States District Court for the Western District of Missouri dismissing a watchdog lawsuit filed by The Rural Community Workers Alliance on behalf of employees of a Missouri meatpacking facility owned and operated by Smithfield Foods Inc.<sup>4</sup> The employees sought injunctive relief seeking to force Smithfield to provide masks; ensure social distancing; give employees an opportunity to wash their hands while on the line; provide tissues; change its leave policy; develop a contact-tracing policy; and allow their expert to tour the plant.

Judge Kays declined to hear the matter pursuant to the primary-jurisdiction doctrine, ruling that oversight of how the plant adheres to guidance aimed at slowing the spread of Covid-19 falls to OSHA, and not the courts. Judge Kay cited President Trump's April 28, 2020, executive order directing the Secretary of Agriculture to ensure that meat and poultry processors continued during the pandemic consistent with the guidance issued by the CDC and OSHA. On July 14, 2020, Judge Kays denied a motion for reconsideration of the Court's decision dismissing – rather than staying the matter while plaintiffs consulted with OSHA.

Signifying a trend in employer wrongful death lawsuits, the first wrongful death lawsuit against a Pennsylvania nursing home was filed on July 1, 2020.<sup>5</sup> The family of the late Elizabeth A. Wiles, a housekeeper, died on May 10, 2020, at age of 69 from Covid-19, after she was allegedly exposed to the virus while working at the Brighton Rehabilitation and Wellness Center in Beaver, Pennsylvania. The Complaint alleges the nursing home is linked to at least 80 Covid-19 deaths and further chronicles a history of Pennsylvania Department of Health citations and fines related to the sanitary condition of the nursing home. Like the *Benjamin* matter, the *Wiles* Complaint includes claims of negligence, fraudulent misrepresentation, and malicious and intentional misrepresentation. At one point, Brighton Rehab was home to the worst Covid-19 outbreak in the Commonwealth, requiring intervention by the Pennsylvania National Guard and resulting in a \$62,000 fine by the CDC for how it handled the Covid-19 pandemic.

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Employers everywhere should be aware that similar lawsuits may be coming in states where they operate, especially as states ease lockdown restrictions and business reopen for their survival. A news article dated May 15, 2020, stated that 45 of 1,018 coronavirus-related lawsuits filed were personal injury or medical malpractice cases against a business. Of the 45 cases, 28 were against Princess Cruise Lines.<sup>6</sup> Additionally, as of July 28, 2020, an online litigation tracker reports that as of since the beginning of the year, 392 employment litigation lawsuits related to the COVID-19 outbreak have been filed in U.S. courts.<sup>7</sup> Many of these employment litigation claims are by current or terminated employees with pre-existing health conditions that needed time off from work due to heightened risk of Covid-19 and seek compensation under Family and Medical Leave Act (FMLA), or as an accommodation under the Americans with Disabilities Act (ADA).

While patterns of workplace litigation are already visible, the number of personal injury and wrongful death claims is increasing and attorneys already have different opinions on whether such claims are meritorious, and the likelihood of proving such claims. Expert witness and thorough investigation will be needed to prove causation, that the employee contracted Covid-19 at the workplace. That said, without glaring evidence of gross negligence, such as may be proven in the *Wiles* matter, or sufficient contact tracing, many believe it would be impossible to provide a Covid-19 personal injury or wrongful death claim.

Employers may get some relief from their state's legislature. Five states have passed laws that grant businesses immunity from civil liability for claims relating to Covid-19, while legislation in several other states is advancing. North Carolina now provides limited tort immunity to all "essential" businesses.<sup>8</sup> Oklahoma provides tort immunity for exposure, or potential exposure, by "any person conducting business" that follows guidance issued by at least two health authorities.<sup>9</sup> Similarly, Wyoming provides immunity from lawsuits to businesses that follow the

Wyoming State Health Officer's orders and guidance.<sup>10</sup> Utah provides tort immunity for any injuries resulting from Covid-19 exposure to all business regardless of adherence to health authority guidelines.<sup>11</sup> Louisiana law grants immunity unless a business failed to comply with COVID-19 federal, state, or local guidance.<sup>12</sup>

Liability protections have also passed the Arizona House and Alabama, Illinois, Ohio, and South Carolina have also introduced legislation. Conversely, in Tennessee, negotiations with lawmakers broke down after it looked like that state, in its push to reopen the economy, would be the latest to adopt a business immunity provision.<sup>13</sup> On May 26, 2020, Governor Laura Kelly of Kansas vetoed House Bill 2054 which enacted the Coronavirus Response and Reopening for Business Liability Protection Act.

At this point, all business should have written policies and protocols in place, consistent with state and federal guidelines, to maximize safety and protection because personal injury law firms are filing suits and many states remain without business immunity protections.

[1] *Estate of Enock Benjamin v. JBS S.A et al.*, Philadelphia Court of Common Pleas, May Term 2020, Docket No. 200500370.

[2] *Estate of Enock Benjamin v. JBS S.A et al.*, No. 2:20-cv-02594 (U.S.D.C. Eastern District of Pennsylvania).

[3] *Blanca Esther Parra, et. al., v. Quality Sausage Co.*, Tex. Dist. Ct., 5/4/20.

[4] *Rural Community Worker's Alliance et al v. Smithfield Foods, Inc. et al*, No. 20-cv-6063 (U.S.D.C. Western District of Missouri, May 5, 2020).

[5] *Estate of Elizabeth A. Wiles v. Comprehensive Healthcare Management Services, LLC, et al.*, Allegheny Court of Common Pleas, No. GD-20-007319).

[6] <https://www.reuters.com/article/us-health-coronavirus-usa-lawsuits-idUSKBN22R1OV>

[7] <https://www.fisherphillips.com/covid-19-litigation>

[8] §§66-460. Essential businesses; emergency response entities; liability limitation.

[9] Section 111 of Title 76.

[10] 35-4-114. Immunity from liability.

[11] 78B-4-517. Immunity related to COVID-19.

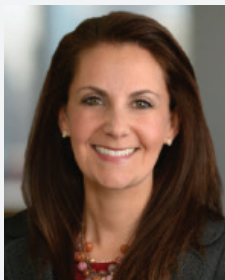
[12] Louisiana Senate Bill 435

[13] <https://www.insurancejournal.com/news/southeast/2020/07/07/574548.htm/>

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## IN THE COMMUNITY

(JULY 2020 NEWSLETTER)



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

Please see our lead article in this edition detailing the **Ricci Tyrrell Johnson & Grey Community Justice Pro Bono Program**.

In the midst of the pandemic, Ricci Tyrrell's Director of Administration and Operations **Lisa Halbruner** and her family donated lunch to the **Collingswood Police Department**. Along with friends they also donated pizza and specialty cookies to the 4<sup>th</sup> floor staff at **Virtua Hospital** in Voorhees to thank them for their work on the front line.



Since March 2020, Ricci Tyrrell Member **Nancy Green** has made more than 100 meals for **Caring for Friends**. Caring for Friends provides food and friendship to homebound and medically compromised seniors, kids, and families in Philadelphia and its surrounding suburbs who do not have the means to cook for themselves. She and her family have also continued to make monthly deliveries of food to low-income families in the greater Philadelphia area through the **Jewish Relief Agency (JRA)**.

In April 2020, Ricci Tyrrell Member **Monica Marsico** and her daughters Siena and Savanna, and sister and

nephew, made Easter "Cheer Baskets" for residents of the dementia-care facility where her mother lives. The baskets were filled with goodies and encouraging messages letting the residents know that they are greatly cared for, loved and missed by their families during this very difficult time. The baskets were well-received and the facility posted a story on their Facebook page. Monica and her family are planning more surprises for these very special people as the painful separation from their loved ones continues. Monica and her siblings also provided lunch and drinks for the wonderful care staff who take care of her mother and the other residents on a daily basis.



On May 30, 2020, Ricci Tyrrell Member **Tracie Bock Medeiros** assisted her 7 year old son in creating **Zach's Socially Distant Car Wash**. According to the business plan, 50% of revenue will be donated to **Alex's Lemonade Stand** once he reaches his goal of \$400. Tracie and Zach have been washing cars on weekends and to date have over \$150 on the books.

