Ricci Tyrrell Johnson & Grey

ATTORNEYS AT LAW

QUARTERLY NEWSLETTER

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In This Issue:

News and Events:

2021-22 PADC President Bill Ricci

Member **Bill Ricci** has taken office as the new President of the **Philadelphia Association of Defense Counsel (PADC)** for 2021-22. We congratulate Bill on this accomplishment.

Mr. Ricci also presented on closing arguments at a **PADC** webinar on May 18, 2021.

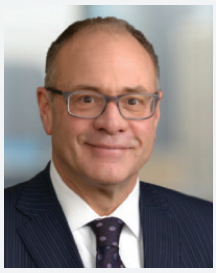
Mr. Ricci was the co-author of multiple articles in the all-products liability April, 2021 edition of **Counterpoint,** an official publication of the **Pennsylvania Defense Institute.** This issue included the latest published version of defense-authored Suggested Standard Jury Instructions on products liability.

RTJG congratulates Members **Bill Ricci, Fran Grey and Mike Droogan** for being named 2021 **Super Lawyers®.**

Members **John Tyrrell and Patrick McStravick** will present on two topics at the 2021 **Association of Equipment Manufacturers (AEM)** Product Liability Seminar. Messrs. Tyrrell and McStravick will offer insight into "Defending and Pursuing Claims Directed at Component Parts" and "When Your Witness is Called in Plaintiff's Case".

RTJG Member **Fran Grey** served as one of the course presenters for the **Pennsylvania Bar Institute PBI** seminar "Persuasion Skills for Trial Success" on March 25, 2021. The topic of Mr. Grey's presentation was "Technical Expert Cross & Direct Examination: A Defense Perspective."

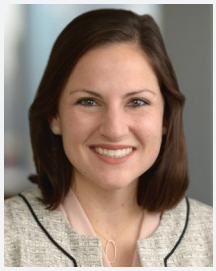
RICCI TYRRELL REOPENS ITS PHYSICAL OFFICES



Managing Member
John E. Tyrrell

RTJG reopened our offices on June 1, 2021. The Firm had operated in a primarily-remote manner since March 13, 2020. As the pandemic ebbs, we congratulate our attorneys and staff for maintaining their high quality of work in the remote environment. In August, 2020, the Firm actually relocated its Philadelphia offices to the 18th floor of 1515 Market Street, all while operating mostly from home. This maneuver could never have been accomplished in the 2020 setting without the tireless efforts of Director of Administration Lisa Halbruner and Administrative Assistant Sheila Ciemniecki. We look forward to the coming years of partnering with our loyal clients from our outstanding new office space.

UNFAIR SHARE?



Kelly Woy is an associate at **Ricci Tyrrell Johnson & Grey**.

On March 18, 2021, a two-judge panel of the Pennsylvania Superior Court (Panella, P.J. and McCaffery, J.) decided *Spencer v. Johnson,* 2021 Pa. Super. 48 (Pa. Super. Ct. March 18, 2021). The panel determined that a company's direct and vicarious liability through an employee can be combined to reach the 60% threshold for joint and several liability under Pennsylvania's Fair Share Act, 42 Pa.C.S. § 7102. Additionally, the panel suggested in dicta that the Fair Share Act is only implicated when the plaintiffs comparative negligence is at issue which could potentially have far-reaching implications for deep-pocket defendants in lawsuits in which evidence of plaintiffs' comparative negligence is not available.

Fair Share Act Background

Under Pennsylvania's Fair Share Act, a defendant must pay only its proportionate percentage of an award as long as the defendant is less than 60% liable. If the factfinder apportions 60% or more of the liability to one defendant, the joint and several liability scheme applies, and that defendant remains jointly and severally liable to satisfy the entire judgment.

The Fair Share Act completely bars a plaintiff from recovery only where the plaintiffs negligence is a greater cause of the plaintiffs injuries (more than 50%) than the defendants' combined negligence. If the plaintiffs comparative negligence is equal to or less than the defendants' negligence, the plaintiffs award diminishes in proportion to the amount of negligence attributed to the plaintiff. The Act does not overtly address whether and how it applies to a scenario where the defendants do not argue that the plaintiff was comparatively negligent, or where the factfinder concludes that the plaintiff was not comparatively negligent.

Factual Background of *Spencer v. Johnson*

This case arose out of an automobile accident, in which the plaintiff pedestrian allegedly sustained serious personal injuries when he was crossing the street and was stuck by a car driven by the defendant driver, who was under the influence of alcohol. The vehicle was a company owned car provided to its employee, the driver's wife; both the employer and employee wife were named as defendants.

The parties agreed that plaintiff pedestrian was not at fault for the accident, and that the defendant driver was negligent in his operation of the vehicle. However, the parties disagreed as to whether the defendant wife was negligent in allowing her husband to operate her work vehicle, and whether the defendant employer was negligent under the laws of agency and vicarious liability in failing to maintain reasonable policies and regulations for the vehicles that it provides to employees.

Procedural History

At the conclusion of the trial, the jury found all three

defendants were negligent, and that each defendant's negligence was a factual cause of harm to the plaintiff pedestrian (the only two questions posed to the jury on the verdict slip). The jury awarded a total verdict of approximately $13 million, and allocated liability as follows: driver- 36%, wife- 19%, and employer- 45%.

Various post-trial motions were filed. In relevant part, the plaintiff pedestrian filed a post trial motion to mold the verdict, arguing that the defendant wife's negligence should be imputed to her employer based on vicarious liability because she was purportedly acting in the colirse and scope of her employment at the time of the accident. The plaintiff argued that the employer's direct and vicarious liability combined amounts to greater than 60%, and the court therefore should have molded the verdict under a provision of the Fair Share Act that permits a plaintiff to recover solely from a single defendant, where the defendant has been found to be at least 60% responsible for the plaintiffs injuries. *See* 42 Pa.C.S.A. § 7102(a.1)(3)(iii).

The trial court denied the plaintiffs motion. It first reasoned that the jury made no specific findings that the wife was acting within the scope of her employment at the time of the incident. It noted that the verdict slip, which was drafted with the input of all counsel, had only two questions regarding the defendant wife: (1) whether she was negligent; and (2) whether her negligence was a factual cause of harm to the plaintiff. The trial court explained that because the plaintiff did not put the specific question of whether the wife was acting in the course of her employment to the jury, and because the jury made no specific finding on the issue, then there was no basis for the court to impute the wife's negligence to the company.

Additionally, the trial court reasoned that even if it were appropriate for the court to decide these questions of fact in the place of the jury, there was insufficient evidence to find that the wife was acting in the course and scope of her employment; rather, the trial evidence indicated that the wife was making personal use of the car unrelated to the business, as she was attending a family gathering at her mother's house when the driver used the vehicle.

Appeal to the Pennsylvania Superior Court

Superior Court's Holding:

On appeal, the Superior Court disagreed and reversed. It held that the evidence was sufficient for the jury to find that the wife was acting within the scope of her employment at the time of her accident. Even through the wife employee was at her mother's house for personal reasons at the time of the accident, the Court found that the undisputed evidence indicated that the wife was on-call for her job "24/7", and that she was effectively on-duty at all times (which was why the company provided the vehicle to her). Therefore, the jury could have concluded that she was acting within the course of her employment at all relevant times.

The Superior Court then discussed the verdict slip, which only posed two questions to the jury, as set forth above, but did not include a special interrogatory on whether the defendant wife was acting in the course of her employment at the time of the subject accident. The plaintiff had pursued multiple theories of negligence against the wife and employer, including both direct and vicarious theories of liability. The trial judge instructed the jury on both direct and vicarious liability, and that the jury was to decide whether the wife was acting within the scope of her employment. The jury returned a general verdict in favor of the plaintiff.

Reviewing Pennsylvania cases on "general verdicts", the court concluded that the plaintiff should not be precluded from recovery under a vicarious liability theory simply because the defendants failed to request a special interrogatory allocating damages based on individual or vicarious liability. Rather, the plaintiff received the benefit of the doubt with ambiguities in the verdict sheet because he was the verdict winner. Further, the defendants' failure to request a special interrogatory allocating damages based on individual or vicarious liability, despite several opportunities to do so, constituted waiver.

Accordingly, the Superior Court concluded that the jury's general verdict warranted a finding that

the company was vicariously liable for the wife's negligence, and therefore, the company was greater than 60% responsible based on the imputation of the wife's negligence. Consequently, the court found that joint and several liability applied, and reversed the trial court's denial of the plaintiffs post-trial motion and remanded the matter to the trial court.

Superior Court's Dicta:

The court provided an alternative discussion of trial court error in relation to the Fair Share Act. The court, assuming *arguendo* that the jury's verdict did not demonstrate the company was vicariously liable, provided that it still would have found the trial court erred in failing to mold the verdict because the Fair Share Act was inapplicable and the company was jointly and severally liable regardless.

The court discussed the Fair Share Act and its predecessors. It explained that structurally, the Fair Share Act begins with the general rule that a plaintiffs contributory negligence is not a complete bar to recovery, and provides for two scenarios based upon comparing the plaintiffs negligence with that of defendants. Then, if the plaintiff overcomes the obstacles to recover set forth in the general rule, the statute proceeds to subsection (a.l), dealing with apportionment of liability to multiple defendants. Accordingly, the court explained that the "general rule" of the Fair Share Act involves situations where the plaintiff is found to have negligently contributed to her own injuries, and that subsection (a.l) does not clearly or explicitly expand the scope of the Fair Share to include cases where the plaintiff has not been found to be contributorily negligent. **Therefore, for the Fair Share Act to apply (including the apportionment provisions), the plaintiff's negligence must be an issue in the case.**

Based on that reasoning, and noting that the plaintiff here was not alleged to be negligent, the Superior Court stated that it would have found the Fair Share Act inapplicable, and the wife and company would have still been jointly and severally liable for the plaintiffs injuries.

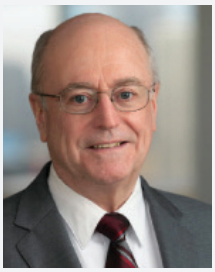
Implications

Although the Superior Court's alternative discussion on the application of the Fair Share Act is merely dicta, it potentially has significant and far-reaching implications in cases involving multiple tortfeasors in which there is no comparative negligence alleged on the part of the plaintiff.

The court's discussion suggests that when a plaintiffs negligence is not at issue in a case, then the Fair Share Act's apportionment provision is not applicable and any defendant can be held jointly and severally liable for the full amount of damages, regardless of the percentage of liability assessed against them by the jury. This is a reversion back to Pennsylvania's common law, which was theoretically modified by the Fair Share Act. Such a change would expose "deep-pocket" defendants to substantially greater liability in large exposure cases in which a plaintiff is not found to be comparatively negligent.

Coverage Corner:

"NO PRIOR KNOWLEDGE" AS AN E&O POLICY EXCLUSION



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

A claims-made professional liability policy typically includes language within the Insuring Agreement stating that coverage applies only to "wrongful acts" in the rendering or failure to render professional services of which the insured had no knowledge prior to the inception date of the policy. Policy language can vary materially, and the precise words used always control the coverage analysis for a specific claim, but certain questions commonly arise as a threshold matter. One is, does the policy language express an exclusion which the insurer must prove applies or a condition precedent to coverage which the insured seeking covering must show is satisfied? The second is, if the contract language is deemed to be an exclusion may

the insurer seek to be relieved of the duty to defend by proving facts beyond those pleaded in an underlying lawsuit in order to show that the exclusion is satisfied and there is no coverage? A recent federal district decision applying Pennsylvania law tackled both questions in the context of a Rule 12(b)(6) challenge to an insurer's declaratory judgment complaint seeking a no-duty-to-defend declaration. The court held that the policy's "no prior knowledge" language operated as an exclusion, not a condition precedent, and that Pennsylvania admits no exception to its four-comers rule precluding consideration of evidence extrinsic to the underlying complaint tendered for defense. *Republic Franklin Insurance Company v. Ebensburg Insurance Agency, eta!.,* 2021 U.S. Dist. LEXIS 103137 (M.D. Pa. 2021).[1]

Republic issued an Insurance Agents and Brokers Errors and Omissions Policy to *Ebensburg* for the policy period from September 1, 2019 to September 1, 2020. *Keystone Insurers Group* is comprised of 300 agency partners, including *Ebensburg,* and *Keystone* qualified as an additional insured under an endorsement to the policy.

Ebensburg prepared and submitted an application for workers' compensation insurance to *American Builders Insurance Company* on behalf of *Custom Installations,* a roofing company. A claim was made under the comp policy on behalf of a roofer who fell25 feet from his work location on September 8, 2015, less than two months after the inception date of the policy. *American Builders* paid wage indemnity and medical benefits in excess of $1,000,000 on behalf of the injured worker. *American Builders* commenced an action in 2015 against *Custom* to rescind the workers' compensation policy because the policy application included materially false information. In answer to specific questions the application failed to disclose that *Custom* performed roofing work and denied that its employees performed any work above 15 feet.

In November 2017, *American Builders* conducted depositions of *Ebensburg* employees and learned that *Ebensburg* and not *Custom* completed the application. On August 28, 2019 *American Builders* sued *Ebensburg* and *Keystone* alleging professional negligence, negligent and fraudulent misrepresentation and breach of contract. The 2019 suit was tendered to *Republic* which entered a defense for *Ebensburg* and *Keystone* under a reservation of rights and commenced a declaratory judgment action to be relieved of the duty to defend. The coverage action was based principally on two no-prior-knowledge ("prior-notice") provisions; one appeared in the Insuring Agreement of the E&O policy and the other in the additional insured endorsement.[2]

The Insuring Agreement in the policy provided coverage for amounts an insured becomes legally obligated to pay as damages for any "claim" arising out of a "wrongful act" to which the insurance applies. "Wrongful act" was defined as any negligent act, error or omission committed in the performance of an insured's duties. The insurance applied to wrongful acts that take place prior to the policy inception date but only if prior to the inception date the insured had no knowledge that such wrongful acts were likely to give rise to a claim. The Insuring Agreement in the Additional Insured Endorsement stated that the insurance did not apply to any "claim" for, or arising out of, a "wrongful act" which any insured knew of before the effective date of the endorsement.

In its declaratory judgment complaint, *Republic* alleged that both *Keystone* and *Ebensburg* knew that *Ebensburg* had committed a "wrongful act" by submitting the workers' compensation policy application to *American Builders* and such knowledge was demonstrated by the fact that an *Ebensburg* employee acknowledged receiving a 2015 reservation of rights letter sent by *American Builders* to *Custom Installations.* The reservation of rights letter asserted that inaccurate information had been included in the application for workers' compensation insurance. *Republic* also maintained that depositions conducted in the action seeking rescission of the comp policy showed that *Keystone* and *Ebensburg* knew they had committed a wrongful act.[3]

Keystone argued that the two "prior-notice provisions" constituted exclusions, and thus the only question was whether those exclusions applied on the face of the underlying complaint of *American Builders.*

[1] This case review is based on the district court's opinion and review of filings in the court docket.

[2] *Republic's* declaratory judgment complaint also alleged that it had no duty to indemnify based on an intentional-acts exclusion.

[3] These and other allegations found in *Republic's* declaratory judgment complaint did not appear in the complaint filed by *American Builders* against *Ebensburg* and *Keystone*; thus, *Republic's* allegations were extrinsic to the underlying action.

Republic argued that extrinsic evidence may be used to show that a policy was not in effect at the time a claim was made, and thus it could offer such evidence of *Keystone* 's and *Ebensburg's* prior knowledge because the existence of such knowledge would render the policy ineffective- that is, conditions stated within the insuring agreement of the policy and its additional insured endorsement that must be met for the coverage to come into effect were not satisfied. The Court rejected *Republic's* argument, citing an unreported Third Circuit opinion which had rejected an insurer's argument that a related-claims provision constituted a condition precedent because it was found in the section of the policy titled "Conditions" and not within the policy's list of exclusions. *Borough of Moosic v. Darwin Nat'l Assur. Co.,* 556 Fed. Appx. 92 (3d Cir. 2014). The Third Circuit reasoned that a provision's effect, not its placement in the insurance agreement, was controlling. Consequently, the district court decided that it was appropriate to evaluate the prior notice provisions (the "no-prior-knowledge" language) in *Republic's* policy according to what the provisions do rather than by how they are labeled. The district court concluded that the provisions facially appeared to define claims covered under the policy, but in effect served to limit coverage to those claims of which an insured had no prior notice [i.e., a claim is covered unless excluded by prior knowledge]. In addition, the district court held that the prior-notice provisions do not meet the definition of a contractual condition precedent because they do not require an act or event that must occur or that the insured must perform before coverage is available. Instead, the policy language specified that past wrongful acts of which an insured has knowledge are excluded from coverage.

The district court next declined to adopt *Republic's* interpretation of the four-comers rule as allowing extrinsic evidence where consistent with the allegations of the underlying complaint tendered for defense.[4] The rule is summarized in the opinion:

> Under this approach, the "question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the complaint." This principle, known as the four-corners rule, holds that "[a]n insurer is obligated to defend its insured if the factual allegations of the complaint on its face and Compass and injury that is actually or potentially within the scope of the policy." Pennsylvania provides for no exception to this rule.

2021 U.S. Dist. LEXIS 103137 *9.

Having determined that the policy language in dispute expressed exclusions, the court turned attention to whether *Republic* could show that either exclusion or both exclusions applied on the face of the factual allegations in the underlying complaint of *American Builders.*

The district court first examined the policy language to evaluate whether it required both a subjective component (regarding the insured's actual "knowledge" of a wrongful act) and an objective component (regarding whether the insured should have known that the wrongful act "would likely give rise to a claim"). It found both requirements in the exclusion found as part of the policy's Insuring Agreement; the policy only applied to wrongful acts where "the insured had no knowledge [objective component] that such 'wrongful act' was likely [objective component] to give rise to a 'claim' hereunder."

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[4] *Republic* argued that the duty to defend is not locked into place indefmitely, regardless of what may be proven by evidence submitted in a declaratory judgment action. *Republic* cited a Third Circuit opinion for the proposition that the duty to defend persists until such time that the claim is confined to a recovery that the policy does not cover. *Ramara, Inc. v. Westfield Insurance Company,* 814 F.3d 660, 673 (3d Cir. 2016). *Keystone* countered that the only changes of consequence to relieving the duty to defend must occur within the underlying action and not based on evidence proffered in a declaratory judgment action. *Palmer v. Twin City Fire Ins. Co.,* 2017 U.S. Dist. LEXIS 190993 (E.D. Pa. 2017) (collecting cases). The parties did not brief in detail and the court did not discuss a circumstance where the duty to defend may turn on facts that are inconsequential to the underlying dispute (e.g., unpaid premium, untimely notice of a claim) and, therefore, not likely to be addressed in the underlying action. However, the district court declined to revisit a decision in another coverage case that refused to consider, citing the four-comers rule, an admission by an insured in its answer to a declaratory judgment complaint that an allegation pivotal to the duty to defend in the underlying complaint was false. *MMG Ins. Co. v. Giuro, Inc.* 432 F. Supp. 3d 471 (M.D. Pa. 2020).

But the district court found that the additional insured endorsement was governed by a purely objective standard; additional insured coverage did not apply to "any 'claim' for, or arising out of a 'wrongful act' which any insured knew of before the effective date of this endorsement." Because the exclusion in the endorsement did not include any language referencing a reasonable-person standard (e.g., "basis to believe" or "would likely give rise to"), no objective component was implicated.

In the end, despite their differences, both exclusions were construed to require an insured's subjective knowledge that a wrongful act had been committed [and not simply that a wrongful act had been the subject of an accusation].

Turning to the allegations in the underlying complaint, the district court construed the pleading as alleging only that *Ebensburg* completed the insurance application for the comp policy and that the application contained incorrect information. The complaint did not allege that *Ebensburg* supplied the information, falsified it, or even knew that it was incorrect. The district court also found that the underlying complaint did not allege any facts establishing that *Keystone,* the additional insured, was aware that the application had been submitted with false information. Consequently, the exclusions did not apply on the face of the underlying complaint.

Republic's claims regarding the duty to defend were dismissed with prejudice, and without leave to amend the declaratory judgment complaint because any amendment would be futile [absent an amendment of the underlying complaint by *American Builders]. Republic's* claims regarding its duty to indemnify were dismissed without prejudice as unripe and pending further factual development in the underlying action.

The "without prejudice" dismissal signals the potential for there to be no indemnity coverage at the end of the underlying litigation, but a "no coverage" outcome is uncommon based on "factual development in the underlying action" given the low percentage chance that an underlying action will be resolved by a trial rather than a settlement. A knotty issue arises if the insurer, exercising control of the defense under a reservation of rights, elects to proceed to trial and risks an allegation of bad faith that it did so to advance its own interest and at the expense of a favorable settlement in the insured's interest, or where the insurer agrees to settle but reserves the option to pursue reimbursement from the insured by a separate action to enforce a policy exclusion. Absent a policy provision allowing the insurer to recoup defense expenses if the absence of coverage is later proven in a separate action, defense expenditures are not recoverable under Pennsylvania law. Policy drafting solutions are available, including provisions that avoid judicial approaches like the four-comers rule by defining how a duty to defend determination will be made when a claim is submitted for coverage and enhanced cooperation clauses tailored to investigations needed to determine coverage.

BARRED NO MORE: RAISING THE STATUTE OF LIMITATIONS DEFENSE VIA PRELIMINARY OBJECTIONS

Alex Shaen is an associate at **Ricci Tyrrell Johnson & Grey**.

Pennsylvania Rules are clear, a statute of limitations defense is properly raised in a new matter and not in preliminary objections. Specifically, Pennsylvania Rule of Civil Procedure 1030 provides:

> (a) Except as provided by subdivision (b), all affirmative defenses including but not limited to the defenses of .. **statute of limitations**
> . . . shall be pleaded in a responsive pleading under the heading "New Matter." A party may set forth as new matter any other material facts which are not merely denials of the averments of the preceding pleading.
> (b) The affirmative defenses of assumption of the risk, comparative negligence and contributory negligence need not be pleaded.

Given this rule, any defendant raising a statute of limitations defense would be required to answer a

plaintiffs complaint and raise the statute of limitations as an affirmative defense in the new matter regardless of whether the statute of limitations had expired by one day or ten years. Thus, in order for a defendant to have a lawsuit dismissed based on the statute of limitations defense, the defendant would have to comply with Pa.R.Civ.P. 1030 and file an answer with the statute of limitations raised in the new matter and then file a motion for judgment on the pleadings. This practice needlessly increases fees in defending a lawsuit clearly barred by the applicable statute of limitations, as well as wasting the court's judicial resources. Recognizing this issue, a three-judge panel of the Pennsylvania Superior Court in *William Scott Sayers, Individually and as Administrator of the Estate of Patricia Ann Sayers v. Heritage Valley Medical Grp., Inc., et al.,* Civ. A. No. 405 WDA 2020 (Pa. Super. Mar. 15, 2021) affirmed a trial court's decision to sustain preliminary objections raising the statute of limitations defense and cited the interest of judicial economy as the basis for dismissing the complaint.

Sayers involved a claim of medical malpractice wherein the Plaintiff claimed that the decedent died on April19, 2015 as a result of combined drug poisoning. *!d.* at *2. Plaintiffs filed a praecipe for writ of summons on April18, 2017, but no attempt at service of the writ appeared in the record. *!d.* On August 10, 2017, Plaintiffs filed a praecipe to reissue the writ of summons, but again there was no evidence in the record of attempted service of the reissued writ. *!d.* at *2-3. Plaintiffs obtained new counsel on March 18,2019, who subsequently filed a praecipe to reissue the writ of summons on April3, 2019 and all defendants were served in April of2019. *!d.* at *3. Plaintiffs filed a Complaint against the Defendants for medical malpractice on May 20, 2019. *!d.* at *3.

The Defendants each raised a statute of limitations defense by way of preliminary objections. *!d.* at *3. Plaintiffs then filed preliminary objections to the Defendants' preliminary objections. *!d.* at *3-4. The trial court heard argument on January 28, 2020, with the Defendants arguing that the writ of summons did not toll the statute of limitations; whereas, the Plaintiffs did not therein dispute the merit of the Defendants' assertion and instead argued that the Defendants preliminary objections were improper because they should have been raised by way of new matter. *Id* at *4. The trial court found that the pleadings and record established that the writ of summons issued by the Plaintiffs clearly failed to toll the statute of limitations and that the statute of limitations defense was addressed "in the interest of judicial economy and dismissed [Plaintiffs'] complaint." *Id* Plaintiffs appealed this ruling.

On appeal, Plaintiffs raised the following issue for review:

> 1. Whether the trial court abused its discretion and/or erred as a matter of law in granting [Defendants'] preliminary objections on statute of limitation grounds where that affirmative defense must be plead[ed] in [] new matter and not in preliminary objections?

!d. Plaintiffs contended that all affirmative defenses, including the statute of limitations defense, must be raised in new matter and that the Defendants incorrectly raised a statute of limitations defense in their preliminary objections. *Id* at *5. Plaintiffs further claimed that the trial court reached an improperly pleaded issue on the merits "in reliance upon judicial economy." *Id* As the Superior Court was required to interpret the Rules of Civil Procedure, the court's standard of review was *de novo. Id*

The Superior Court began its review of Plaintiffs' claim by stating that "[g]enerally, a statute of limitations defense is properly raised in new matter and not in preliminary objections." *Id* at *6 *(citing* Pa.R.Civ.P. 1030(a). Despite identifying this Rule, the Superior Court cited to its past decision in *Cooper v. Downington Sch. Dist.,* wherein it dismissed a complaint after a defendant filed preliminary objections raising the statute of limitations defense in the interest of judicial economy. 357 A.2d 619, 621 (Pa. Super. 1976). Specifically, the Superior Court in *Cooper* stated:

> [a]lthough the issue of the expiration of the statute of limitations is properly raised under new matter, rather than by preliminary objection, we will reach the merits at this time, in the interests of judicial economy, for two reasons. First, it was briefed, argued, and considered in the [trial] court. Secondly, once the statute of limitations is raised in new matter, [the defendant's] right to a judgment on the pleadings, based on the statute of

> limitations, will be clear. Therefore, we see no reason to remand this case for further pleadings.

Id

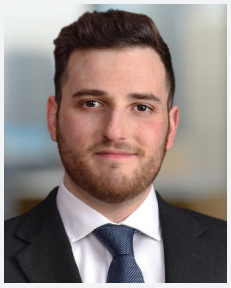
The Court found further support for addressing the statute of limitations defense in preliminary objections in *Pelagatti v. Cohen,* 536 A.2d 1337, 1346 (Pa. Super. 1987), *app. den.,*548 A.2d 256 (Pa. 1988). In *Pelagatti,* the Court permitted review of the statute of limitations defense in preliminary objections and stated "while [an] affirmative defense[] is generally to be [pleaded] in new matter, an affirmative defense may be raised by way of preliminary objections where it is established on the face of the complaint, or where the plaintiff fails to object to the procedural irregularity." *!d.*

Relying on these decisions the court examined the preliminary objections filed by the Defendants in the *Sayers* matter. *Sayers,* at *8. Based on the review of the facts, the preliminary objections, and the handling of the preliminary objections by the trial court, the court found that the trial court committed no error in considering the merits of the Defendants' statute of limitations defense. *!d.* The court provided the following reasons as to why the trial court did not err in hearing these preliminary objections: "(1) all parties briefed and argued the merits of the statute of limitations defense, and the trial court considered the same, and (2) the record demonstrates that if the statute of limitations defense were raised in new matter, [Defendants'] right to judgment on the pleadings is clear[.]" *!d.* at *8-9. With this basis, the Superior Court considered the substantive basis for the preliminary objections while also noting that the Defendants had, in fact, "improperly raised their statute of limitations defense by way of preliminary objections and not via new matter[.]" *!d.* at *9.

Upon reviewing the merits of the preliminary objections, the court found that the Plaintiffs filed a praecipe for writ of summons, that a writ of summons was issued, and then Plaintiffs did nothing for 23 months. *!d.* at*12. Based on the court's review of the docket, there was no evidence that the writ of summons was delivered to the sheriff for service on the Defendants, so the statute of limitations was not tolled. *!d.* at *13. The court concluded that the "record clearly demonstrates that the statute of limitations bars [Plaintiffs] from bringing their present action for medical negligence, and [Plaintiffs] were entitled to an order sustaining their preliminary objections and dismissing [Plaintiffs'] complaint." *!d.*

While the Pennsylvania Rules of Civil Procedure prohibit the statute of limitations defense from being raised via preliminary objections, certain Superior Court and Supreme Court rulings have carved out situations that permit a defendant to raise the statute of limitations defense in preliminary objections based on the interest of judicial economy. This principle was reaffirmed by *Sayers.* Defendants can now make the strategic decision to file preliminary objections raising the statute of limitations defense where it is evident from the complaint and/or record that the claim is barred by the applicable statute of limitations thus enabling Defendants to quickly move to dismiss untimely claims.

PENNSYLVANIA SUPERIOR COURT PROVIDES NEW GUIDANCE ON QUANTITY PRONG OF VENUE ANALYSIS



Adam Mogill is an associate at **Ricci Tyrrell Johnson & Grey**.

In *Hangey v. Husqvarna Professional Products, Inc.,* 247 A.3d 1136 (Pa. Super March 8, 2021), the Pennsylvania Superior Court voted 7-2 to reverse a Philadelphia trial court's decision to sustain Preliminary Objections to improper venue and transfer the case out of Philadelphia County. The Superior Court held that the trial court abused its discretion in finding the contacts of Husqvarna Professional Products, Inc. ("HPP") with Philadelphia County did not satisfy the quantity prong of the venue analysis.

Plaintiff, Ronald Hangey, purchased a Husqvarna riding lawnmower from Defendant Trumbauer's Lawn and Recreation in Bucks County, PA in 2013. In 2016, Hangey was severely injured when he fell off his lawnmower and the lawnmower ran over his legs while the blades

were still engaged. The accident occurred at Hangey's property in Wayne County, PA.

Hangey's Amended Complaint named HPP, Husqvarna Group, Husqvarna U.S. Holding, Inc., Husqvarna AB, and Trumbauer's Lawn and Recreation. All Defendants filed Preliminary Objections. Defendants Husqvarna U.S. Holdings, Inc. and Husqvarna AB filed Preliminary Objections which, among other things, challenged personal jurisdiction. Defendants HPP,Husqvarna Group, and Trumbauer's Lawn and Recreation, Inc., filed Preliminary Objections arguing, among other things, improper venue. The trial court permitted the parties to take discovery relevant to the issues of personal jurisdiction and venue.

The following facts were learned during the course of discovery. In 2016, at the time of the accident, HPP had approximately $1.4 billion in sales revenue in the United States, of which $75,310 came from direct sales in Philadelphia County. Of the $75,000 in sales made in Philadelphia in 2016, roughly $69,700 came from a single Husqvarna authorized dealer, DL Electronics. Approximately 0.005% of HPP's 2016 United States sales revenue resulted from direct sales in Philadelphia County. Sales data from 2014 and 2015 was substantially similar.

In finding venue in Philadelphia was not proper, the trial court found HPP's contacts satisfied the quality prong of the venue analysis, but did not satisfy the quantity prong. The Trial Court reasoned that only 0.005% of HPP's national revenue came from sales in Philadelphia and concluded that because this amount was *"de minimis,"* HPP's contact with Philadelphia was not general and habitual.

The trial court dismissed Husqvarna U.S. Holdings, Inc. and Husqvarna AB due to want of personal jurisdiction and transferred the case against HPP, Husqvarna Group, and Trumbauer's Lawn and Recreation to Bucks County. Hangey appealed the Trial Court's decision to the Superior Court to determine the following issue:

> Did the trial court err as a matter of law, and thereby abuse its discretion, in holding that [HPP] does not regularly conduct business in Philadelphia County, merely because the overwhelming majority of its sales in the United States have occurred elsewhere, thereby overlooking the undisputed continuous, ongoing, and regularly recurring sales of Husqvarna consumer products in Philadelphia County?

Principally at issue in this case was Pennsylvania Rule of Civil Procedure 2179, which provides that venue is proper against a corporation or similar entity in a county where it "regularly conducts business." In determining whether venue is proper under this rule, courts "employ a quality-quantity analysis." *Zampana-Barry v. Donaghue,* 921 A.2d 500, 503 (Pa. Super 2007). To satisfy the quantity prong of this analysis, acts must be "sufficiently continuous so as to be considered habitual." *Id* at 504.

The Superior Court noted in its opinion that Pennsylvania appellate courts have often considered the percentage of overall business a defendant company conducts in a county to determine if the quantity prong was met. However, no court has stated that the percentage of a defendant's business is the sole evidence relevant to the "quantity" analysis. Rather, courts must determine whether all the evidence presented, including the scope of the defendant's business, viewed in the context of the facts of the case, establish that a defendant's contacts with the venue satisfy the quantity prong. *Mathues v. Tim-Bar Corp.,* 652 A.2d 349, 351 (Pa. Super. 1994) (finding trial court did not abuse discretion in finding quantity prong not satisfied where evidence established only one or two sales occurred in county); *Monaco v. Montgomery Cab Co.,* 208 A.2d 252, 256 (Pa. 1965) (noting "[t]he question is whether the acts are being 'regularly' performed within the context of the particular business"). In prior precedent where the Superior Court concluded that conducting a small percentage of a business in a venue did *not* satisfy the quantity prong, the Court's core finding was that the contacts failed the quality prong of the venue test and the cases often addressed defendants who were small and/or local companies, not multi-billion dollar corporations.

The Superior Court concluded that HPP was a multi-billion-dollar corporation which had at least one authorized dealer located in Philadelphia County to which it delivered products for sale. Although HPP's sales through authorized dealers in Philadelphia County constituted only 0.005% of HPP's national sales, the dollar figure of those Philadelphia sales in 2016 was $75,310. The number and dollar figure of sales in Philadelphia, and the fact that HPP has an authorized

dealer in Philadelphia to sell its products, was relevant to the court's determination of whether HPP's contacts with Philadelphia satisfied the "quantity" prong of the venue analysis. Ultimately, the Superior Court concluded the trial court erred in relying almost exclusively on evidence of the percentage of HPP's business that occurred in Philadelphia when addressing the quantity prong. The Superior Court found that based on the totality of the evidence, HPP's contacts satisfied the quantity prong of the venue test and were "sufficiently continuous so as to be considered habitual."

The two dissenting justices argued that the trial court's determination was reasonable in light of the muddled precedent and the specific facts of the *Hangey* case:

> Under our existing jurisprudence, all of which the Majority leaves intact, trial courts have discretion to assign great weight--even decisive weight-to the fact that a defendant conducts a vanishingly small percentage of its business in the plaintiffs chosen forum. In contrast with existing precedent, the Majority has all but forbidden trial courts to transfer venue on that basis. If five one-thousandths of a percent is sufficient to establish quantity, it is difficult to imagine a percentage that is too small.

In light of the Superior Court's holding, the following language from the majority opinion may influence how future venue arguments are presented and defended moving forward:

> The percentage of a company's overall business that it conducts in a given county, standing alone, is not meaningful and is not determinative of the 'quantity' prong. Each case turns on its own facts, and we must evaluate evidence of the extent of a defendant's business against the nature of the business at issue. A small or local business may do all of its work in just a few counties or even a single one, while a large business may span the entire nation. Indeed, the percentage of sales a multi billion-dollar company makes in a particular county will almost always be a tiny percentage of its total sales. *Courts thus should not consider percentages in isolation. Rather, courts must consider all of the evidence in context to determine whether the defendant's business activities in the county were regular, continuous, and habitual.* (emphasis added).

The *Hangey* decision provides Plaintiffs with even greater discretion in choosing a venue that has little to do with an underlying case when suing companies with significant revenues and multi-county sales. Due to the continued increase in internet-driven commerce, companies will have a hard time challenging venue under the 'quantity' prong of the venue analysis when focusing solely on the percentage of sales in the venue versus the company's overall revenue. Instead, challenges to venue must focus on whether a company's business practices in a particular venue can be constituted as "regular, continuous, and habitual."

ANOTHER UNITED STATES PATENT MILESTONE

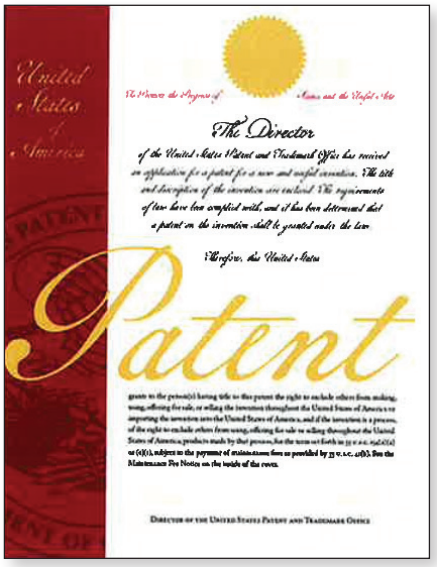
Stuart M Goldstein heads **Ricci Tyrrell Johnson & Grey's** Intellectual Property practice.

In 2018, I reported that US patent No.10,000,000 was issued for "Coherent LADAR Using Intra-pixel Quadrature Detection," a laser detection and ranging system. The patent was granted just three years after US patent No. 9,000,000. This is extraordinary since I also noted that it took seventy-five years, from 1836 to 1911, to reach patent No. 1,000,000. While the first United States patent was actually issued in 1789, the Patent Act of 1836 required that patents be formally numbered henceforth. US patent No. 1 was granted to Senator John Ruggles for a traction wheel for a steam locomotive on July 11, 1836.

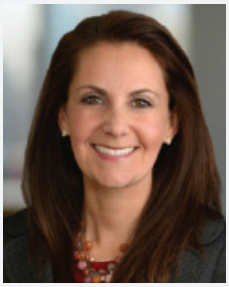
US patent No. 11,000,000 has now been granted less than three years after US patent No. 10,000,000. The new patent discloses a method for delivering, positioning, and/or repositioning a collapsible and expandable stent frame within a patient's heart chamber. US patent No. 9,000,000 provides for a system to collect and condition rainwater from the windshield of a vehicle and US patent No. 8,000,000 describes a prosthesis apparatus for limiting power consumption in the prosthesis. These markedly different patents are a clear reminder that the expanse and success of the US economy is dependent on new ideas, innovations, and inventions from all sectors of industry. As stated by Drew Hirshfield, performing the functions and duties of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office (USPTO):

> Since the founding of our nation, American inventors have driven our culture and commerce with incredible ideas that have improved every function of our lives. We owe a debt of gratitude to inventors who continue to show up day after day with solutions to the world's most pressing problems. We congratulate the investors behind patent No. 11,000,000 and all of the innovators who helped the country reach this milestone.

In recognition of this accomplishment, the USPTO has re-designed the official US patent cover, the seal-and-ribbon document which is awarded with each granted patent. This design, shown below, pays homage to the classic elegance of previous patent document designs.



In The Community:



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

The Ricci Tyrrell Community Justice Pro Bono Program continues to progress. Several firm lawyers, paralegals and others recently participated in reviews of the entire trial and appellate records of multiple convictions for the **Pennsylvania Innocence Project.** The Ricci Tyrrell Johnson & Grey Pro Bono program is headed by Member **Nancy Green.**

As RTJG officially reopened its office, we returned with a renewed intent to give back to our community. Throughout the year, RTJG will be initiating community help projects. Our first project in 2021 is during the month of June. RTJG employees are participating in a non-perishable food drive to benefit **Philabundance- "Driving hunger from our communities."** RTJG's goal for the month of June is to donate 500 pounds!

RTJG Member **Bill Ricci** and his band **The O'Fenders** are scheduled to play a total of 9 and counting concerts at venues they usually play. However, for this set of concerts **The O'Fenders** are donating all proceeds (both out pay and raffles) to waitstaff and bar staff who have been impacted by the pandemic.

On April 17, 2021, RTJG Associate **Kelly Woy** acted as a judge for the preliminary round of **Temple Law School's I. Herman Stern Moot Court Competition.** Second year students who are members of **Temple's Moot Court Honor Society** participate in the competition annually, requiring the submission of a written brief on a "case" on appeal, and then engaging in oral argument. This year, the issue the participants argued was the following: whether a sentence of fifty years to life imposed upon a juvenile constitute a de facto life sentence that requires the sentencing court to make a finding of permanent incorrigibility, irreparable corruption or irretrievable depravity behind a reasonable doubt. A panel of federal and state judges presides over the final round of the competition each year.

Ms. Woy is no stranger to the **Stern Moot Court Competition.** She attended **Temple Law** School 2012-2015, meeting her now husband, Jonathan (also an attorney in Philadelphia) in the first week of 1L year. Kelly and Jonathan were both members of the **Moot Court Honor Society** (Kelly the Vice President during 3L year). On April 17, 2014, Kelly and Jonathan (just dating at the time) argued against each other in the final round of the competition on the topic of gay conversion therapy, in front of three federal judges.