Ricci Tyrrell Johnson & Grey

ATTORNEYS AT LAW

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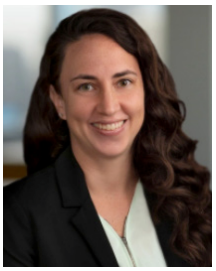

Jackie Zoller has become a Member (Partner) at **Ricci Tyrrell**. Ms. Zoller is a graduate of Rutgers University School of Law -Camden. She is admitted to practice in Pennsylvania, New Jersey and New York. Ms. Zoller's practice is concentrated on defense of products liability and premises liability suits. She is very deserving of this achievement.

In This Issue:

News and Events:

RTJG has again been recognized by **U.S. News & World Report** in its ranking of **Best Law Firms** in the nation. **Ricci Tyrrell** has been selected as a Tier 1 Products Liability defense firm in Philadelphia. The Best Law Firm rankings are based on a process that includes the collection of client and lawyer evaluations, peer review and review of additional information provided as part of the submission process. Our firm is honored by this achievement.

Founding Member **Bill Ricci** was both a presenter and panelist at **The Dispute Resolution Institute's** Annual Personal Injury Practicum held on November 11, 2021.

On November 17, 2021, Mr. Ricci was one of three presenters at a webinar sponsored by the **Philadelphia Trial Lawyers,** titled "From the Defense Perspective, Part 1".

Mr. Ricci has been re-appointed as co-chair of the **Pennsylvania Defense Institute** Products Liability Committee for 2022.

Founding and Managing Member **John E. Tyrrell** will address the **Philadelphia Association of Golf Course Superintendents** with a presentation on liability issues being held on January 26, 2022 at **Concord Country Club** in Concordville, PA.

Ricci Tyrrell Johnson & Grey

RTJG CELEBRATES ANOTHER SUCCESSFUL YEAR

The challenges of 2021, trailing the challenges of 2020, are almost behind us. As Managing Member, I want our clients to know that our Firm greatly appreciates partnering with you to adapt to and succeed in the face of two unprecedented years in the legal community. On behalf of my partners, I also want to thank all of our lawyers and staff for maintaining the highest level of service and professionalism during the pandemic. We look forward optimistically to 2022.

John E. Tyrrell is the Managing Member at **Ricci Tyrrell Johnson & Grey**.

SUMMARY JUDGMENT AWARDED TO TARGET CORPORATION

Francis J. Grey is a Founding Member at **Ricci Tyrrell Johnson & Grey**.

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

Long-time Firm client Target Corporation was awarded summary judgment on all claims in a decision by District Court Judge Malachy E. Mannion in Debra Pickett v. Target Corporation, 3:20-cv-00247 (M.D. Pa. 2021). The case involved a slip and fall on a toy called a spritz grabber (which is large and brightly colored) at the Target store in Wilkes-Barre, PA.

Judge Mannion's Memorandum Opinion explained that a reasonable jury could not conclude Target had constructive notice of the toy on the floor. He also alternatively determined that reasonable minds could not differ regarding the obviousness of the spritz grabber to a reasonable person exercising normal perception under Plaintiff's circumstances.

The Pickett case was handled by Founding Member Francis J. Grey, Jr. and the Motion for Summary Judgment was principally authored by Associate Kelly Woy.

RTJG COMMUNITY JUSTICE PRO BONO PROGRAM PARTNERS WITH PENN LAW

Nancy D. Green is a Member at **Ricci Tyrrell Johnson & Grey**.

The Ricci Tyrrell Community Justice Pro Bono Program was created to encourage and support efforts by its employees to increase access to justice for all individuals and to have a positive impact on the world around us. This fall, the Firm partnered with the Penn Housing Rights Project (PHRP) at the University of Pennsylvania Carey School of Law. PHRP supports low income Philadelphia tenants in various disputes or issues with their landlords, including representing tenants in Fair Housing Commission cases. Recently, Members Rebecca Leonard and Nancy Green mentored two groups of Penn Law students as they prepared for and appeared before the Philadelphia Fair Housing Commission. Under the leadership and supervision of Ms. Leonard and Ms. Green, the students learned how to prepare their case for court, including interviewing of the client and preparing them for trial, drafting opening and closing statements, conducting direct examinations of their client and cross-examination of witnesses. The Firm hopes to continue its partnership with the PHRP, with new cases being assigned to students each fall with the goal of them coming to resolution before the end of the school year.

The RTJG Community Justice Pro Bono Program is directed by Member Nancy Green.

COVID-19 AND RELEVANT FACTORS TO CONSIDER IN A MOTION TO TRANSFER BASED ON FORUM NON CONVENIENS

Alexander M. Shaen is an Associate at **Ricci Tyrrell Johnson & Grey**.

On September 10, 2021, a three-judge panel of the Pennsylvania Superior Court in *Doe v. Bright Horizons Children's Ctr.,* Civ. A. No. 1733 EDA 2020, 2021 Pa. Super. LEXIS 572 (Pa. Super. 2021) unanimously affirmed an order transferring a case from Philadelphia County to Berks County based on *forum non conveniens*. The Superior Court denied a Petition for Reargument on November 17, 2021. In reaching this decision, the Superior Court determined that the trial court (Philadelphia Court of Common Pleas) appropriately considered the totality of the evidence in the record including the residency of various witnesses, distance between Berks County and Philadelphia City Hall, and the impact of traveling to Philadelphia. The Superior Court's review of the certified record confirmed the accuracy of trial court's recitation of the facts and testimony; therefore, there was a sufficient evidentiary basis for the trial court's order transferring venue to Berks County.

This negligence and premises liability action arises from alleged abuse of a minor at a daycare center in Reading, Pennsylvania (Berks County). *Id*. at *1-2. Following the filing of plaintiff's second amended complaint, the defendants, collectively referred to as Bright Horizons filed a motion to transfer the case to Berks County. *Id*. at *2. The other defendant in the case, Pennsylvania State University, also filed a motion to transfer, but argued the case should be transferred to Centre County. *Id*., n.2. The University's motion was denied and it subsequently joined Bright Horizon's motion to transfer. *Id*.

Bright Horizons argued in their motion that Philadelphia County would be oppressive to them because the daycare center would not be able to maintain its state-mandated teacher-to student rations if teachers were required to travel one and one-half to two and one-half hours to Philadelphia City Hall." *Id*. In support of the motion, Bright Horizons provided an affidavit from · for the daycare facility. *Id*. at *3. The affidavit stated the following:

1. Pennsylvania law mandates teacher-to-student ratios based on the age of the children, the daycare center required twenty-three teachers and three administrators to meet the required ration each day, and, as of March of 2020, the daycare center employed thirty teachers and administrators.
2. If four or more staff members were unavailable to work at the same time, the daycare center could not meet the require ratio and it would have to close.
3. Plaintiffs identified nine staff members in their Third Amended Complaint and Bright Horizons anticipated the presence of at least those nine staff members at various portions of the trial.
4. It would be impractical to hire additional staff because the hiring process takes three to four weeks and requires background checks and training to provide the necessary coverage.
5. Bright Horizons was able to arrange for the District Attorney's office of Berks County to interview more than thirty daycare center employees in September of 2019 without hiring additional staff or violating the state mandated ration because the Berks County Courthouse was a ten-to-fifteen-minute drive from the daycare center rather than the minimum one and one-half hour drive to Philadelphia City Hall.

Id, at *3-4.

Plaintiffs opposed the motion to transfer and argued that it would not be oppressive for the daycare center employees to appear at trial in Philadelphia. *Id*. at *4. The plaintiffs also argued Philadelphia was a more convenient venue for Bright Horizons corporate witnesses who would be flying in to testify. *Id*. Lastly, plaintiffs argued that the affidavit of the regional manager of the daycare center lacked specificity because it did not specifically identify the ages of children who attended, number of children, and total staff employed to determine the proper ration. *Id.* Plaintiffs further argued based on the affidavit that the daycare center would be able to

comply with state mandates with nineteen teachers and administrators and that the daycare center was adequately staffed to meet this number. *Id*.

The trial court first issued an order permitting the parties to conduct discovery and then submit supplemental briefs on the forum non conveniens issue. *Id*. at *4-5. The trial court found the following facts persuasive in reaching its conclusion. Plaintiffs' Third Amended Complaint named nine teachers and the court found it reasonable that at least nine teachers and as many as twenty current teachers could be called to testify at trial. *Id*. at *6. Given this, the court found that testimony in Philadelphia County would require a dynamic feat of scheduling to comply with the law" to ensure enough teachers were present at the daycare center. *Id*. There was a far heavier burden on requiring daycare employees to travel into Philadelphia, coupled with the burden of the daycare meeting the state mandated student-teacher-ratio, compared to having the employees shuttled the ten minutes from the daycare to the Berks County Courthouse. *Id*. at *7. The court found plaintiffs' arguments unpersuasive and that the testimony of the regional manager of the daycare center was trustworthy and credible. *Id*. at *7-8. The trial court thus granted the motion to transfer and the case was transferred to Berks County because Bright Horizons "met their burden of providing detailed information on the record to demonstrate trial in Philadelphia would be oppressive." *Id*. at *5-6.

The plaintiffs appealed and the main issue on appeal was:
Did the trial court abuse its discretion by concluding that Bright Horizons would be oppressed by venue in Philadelphia, and therefore by transferring this case to Berks County under Pa.R.C.P. 1006(d)(1), where the pertinent evidence described Bright Horizons' concerns about the inconvenience associated with trial as a general matter and did not demonstrate oppression as a consequence of trial in Philadelphia as compared to Berks County?

Id. Before evaluating the plaintiffs' specific claim, the Superior Court outlined the applicable case law in evaluating a forum non *conveniens* issue:

A plaintiff's forum choice should be rarely ... disturbed,' is entitled to great weight, and must be given deference by the trial court, but it is not 'not absolute or unassailable.' *Powers v. Verizon Pa.*, LLC, 2020 PA Super 58, 240 A.3d 492, 496 (Pa.Super. 2020) *(quoting Wood v. E.I. du Pont de Nemours & Co*., 2003 PA Super 268, 829 A.2d 707, 711 (Pa.Super. 2003) (en banc)). In seeking transfer under Rule 1006(d)(1), a defendant must make a detailed factual showing that the chosen forum is oppressive or vexatious, not merely inconvenient. See *Bratic v. Rubendall*, 626 Pa. 550, 99 A.3d 1, 7-8 (Pa. 2014). However, the *Bratic* Court clarified that while inconvenience is not enough, there is no burden to show near-draconian consequences.' *Id*. at 10. As we held in Wood, supra at 712, factors such as the relative ease of access to sources of proof, whether compulsory process is available to obtain the attendance of unwilling witnesses, the costs associated therewith, and the possibility of a view are important considerations when measuring oppressiveness. See also *Powers, supra at 497; Moody v. Lehigh Valley Hosp. Cedar Crest*, 2018 PA Super 6, 179 A.3d 496, 502 (Pa. Super. 2018).

Id. at *5-6; see also *PennEnergy Res., LLC v. Armstrong Cement & Supply Corp.*, Nos. 970 WDA 2020, 13 WDA 2021, 2021 Pa. Super. Unpub. LEXIS 2924, at *14 (Nov. 4, 2021) (the case law cited in *Doe v. Bright Horizons Children's Ctr.* was cited verbatim in the opinion).

The Superior Court evaluated the factual basis for the trial court's opinion noting that the trial court's opinion would only be reversed if the trial court abused its discretion. *Id*. at *7, 9. The Superior Court noted the following circumstances as contributing to the trial court's finding of oppressiveness: "that the facts giving rise to the cause of action occurred in Berks County; none of the defendants is located in Philadelphia County; and [plaintiffs] did not identify any witnesses situated in Philadelphia." *Id*. at *7.

On appeal, plaintiffs argued that the record evidence did not justify a finding that Philadelphia was an oppressive locale for Bright Horizons to liti Plaintiffs' appeal relied heavily on *Bratic, supra, Moody, Fessler v. Watchtower Bible & Tract Soc'y of N.Y.,* Inc., 2015 PA Super 274, 131 A.3d 44 (Pa. Super. 2015), and *Walls v. Phoenix Ins.* Co., 2009 PA Super 93, 979 A.2d 847 (Pa. Super. 2009) claiming that the cases "underscore the significant

burden a defendant bears in overcoming a plaintiff's choice of proper venue." *Id.* Plaintiffs further claimed that with proper management, the employees could testify in Philadelphia County without the daycare closing. *Id*. at *13. The Superior Court was not persuaded by the plaintiffs' argument. *Id*.

Plaintiffs contended that the evidence in the case is insufficient to justify transfer to Berks County on forum non *conveniens*. *Id*. at *12-13. Plaintiffs argued that they would not call all of the daycare center employees, claiming that they would only call some employees, some
employees could testify via videotaped deposition, and there was no reason that the employees would be required to testify on the same day. *Id.* at *13. The Superior Court noted that the trial court placed great weight on the evidence that during the criminal investigation the proximity of the Berks County Courthouse/District Attorney's office made it possible to not close the daycare center. *Id*, at *13-14. Specifically, a great number of witnesses, including potentially all thirty of the proposed employees could be shuttled twenty minutes to the Berks County Courthouse over the course of several days rather than traveling to Philadelphia. *Id*. at *18. Both the trial court and the Superior Court provided further deference to the regional manager of the daycare center's testimony concerning COVID-19. *Id*. at *17; see also *Arceo v. AMF Bakery Systems*, Civ. A. No. 200601229 (Philadelphia Court of Common Pleas, Feb. 16, 2021) (transferring case from Philadelphia County to York County where numerous witnesses "were afraid to travel to more densely populated locale" where case counts of COVID-19 were on the rise). Specifically, the regional manager testified that there was a "heightened concern for the health and safety of the children" due to COVID-19. *Id*.

After reviewing the certified record, the Superior Court concluded that the trial court properly considered the totality of the evidence in the record including the residency of the witnesses, the distance between Berks County Courthouse and Philadelphia City Hall, and the impact of travel time and teacher absence from the daycare center on its operation and the children who attended. *Id*. at *20. The order transferring venue to Berks County was therefore affirmed.
Id.

The Bright Horizons opinion provides helpful insight into relevant factors to consider when attempting to transfer a case based on forum non *conveniens*. The Court recognized that COVID 19 continues to be a factor to consider in evaluating motions to transfer due to health and safety concerns with traveling to a large city, like Philadelphia. Not only did the Bright Horizons opinion address certain COVID-19 concerns justifying transfer, but it also recognized the hardships of requiring the majority of an employer's employees to travel a minimum of ninety minutes to Philadelphia compared to less than twenty minutes to Berks County, where the cause of action arose. This latter consideration is noteworthy as the impact on the employer of having a number of employees testify at trial and potentially resulting in the closure and/or loss of business for a day or days is a further issue to raise in support of a forum non *conveniens* motion.

PATENTS, TRADEMARKS, AND COPYRIGHTS: THE DIFFERENT COMPONENTS OF INTELLECTUAL PROPERTY

Stuart Goldstein oversees all of **Ricci Tyrrell Johnson & Grey's** patent, trademark and copyright application prosecution and litigation.

New clients who are not versed in intellectual property will inevitably ask me how they can "patent their trademark" or "copyright their inventive idea." In fact, a name cannot be patented, and you cannot copyright a product or trademark an invention. However, this confusion is understandable, since most people, including many non-intellectual property attorneys, do not know the differences between the various types of intellectual property. It is the purpose of this article to address the fundamentals of patents, trademarks, and copyrights, the tools which form the basic tenets for what is known as intellectual property.

Patents - A patent is granted, in accordance with federal statute, by the United States Patent and Trademark Office (USPTO), to inventions which are new, useful, and are not obvious modifications of existing products

or technologies. A patent grants to the patent owner the right to exclude others from making, using, and selling the invention for a limited term of years. There are three types of patents. Utility patents cover novel and unobvious processes (e.g. a method of 3D product fabrication; a process for deep sea oil drilling), machines (e.g. televisions; product conveyor systems), articles of manufacture (e.g. hammers; cleaning implements), and compositions of matter (e.g. plastics; medicinal drugs). Design patents cover new, original and ornamental designs for articles of manufacture (e.g. ornamentation of jewelry; the design of an iPhone®). Plant patents cover new varieties of cultivated asexually-reproduced plants.

A patent is obtained by filing a formal patent application with the USPTO. The application is thoroughly reviewed and examined by a patent examiner who has expertise in the particular substantive area of the invention, in order to determine whether the invention is patentable. If ultimately allowed, a utility and a plant patent generally has a term which begins on the date the patent issues and ends twenty years from the initial filing date of the p patents last fifteen years from the date they are issued by the USPTO. Patents can not be renewed. After patent terms lapse, the inventions disclosed in the patents become part of the public domain, that is the public is free to make, use, and sell the inventions disclosed in the patents.

Trademarks - A trademark is a word, a name, a design, a symbol, or a combination thereof, designating a manufacturer's or merchant's goods or services, in order to distinguish them from the goods and services of others. Trademarks include brand names that identify goods, like Apple® for computers or Coca-Cola® for soft drinks. Service marks identify entities which provide a service, like Chipotle for restaurant services or AAMCOR for vehicle repair services.

Unlike patents, which are strictly federal and statutory in nature, common law trademarks arise when a mark is actually used in commerce. Rights to the mark exist immediately upon use, as long as there are no prior marks in use which are the same or which are confusingly similar. Common law trademarks are generally designated with a small TM or SM adjacent to the mark; TM for product marks and SM for service mark.

While limited rights do exist for common law marks, there are substantial advantages in obtaining a federally registered trademark, which offer rights under the federal trademark statutes. A registered trademark is obtained by filing a formal trademark registration application with the USPTO. If the trademark is not yet being used in commerce, an intent to use" application is filed. When allowed by the trademark examiner, the formal registration will be issued when the mark is actually used in commerce and the appropriate proof of use is submitted to the USPTO. If the mark is currently being used in commerce, a "use" application can be filed and, again, upon the submission of the appropriate proof of use, the mark will be registered. A trademark which is federally registered is displayed with an ® adjacent to the mark.

Trademark rights can last forever, as long as the mark is continually used in commerce and, if the mark has obtained formal federal registration, the registration is renewed periodically.

Copyrights – A copyright protects the particular expression of an idea, not the idea itself. A copyright covers an original work of authorship fixed in a tangible medium of expression. Works which can be copyrighted include: literary, musical, choreographic, and dramatic works; pictorial, graphic, and sculptural works; computer programs, motion pictures and other audio visual works, and compilations of works.

A common law copyright arises automatically, as soon as the copyrightable work is created and fixed in a tangible medium. As long as it is an original work created by the author, the copyrightable work is owned by the author. Although a common law copyright comes into effect by the simple creation of the work, a copyright may be federally registered by submitting the appropriate application and a copy of the work with the United States Library of Congress. Like federally registered trademarks, federal copyright registration provides substantial advantages under the copyright statutes. Copyrights are often designated on a created work by a ©, the date of creation, the name of the owner and the phrase, "All rights reserved." For instance, for this article, the appropriate copyright notice would be: "© 2022 Ricci Tyrrell Johnson & Grey. All rights reserved."

The term of a copyright is basically the lifetime of the author plus seventy years after the author's death. There are other copyright terms which are determined by the type of copyright which is ultimately obtained.

Stuart Goldstein has decades of intellectual property law experience.

EXCULPATORY CLAUSES IN NEW JERSEY RECREATIONAL SETTINGS: ASSUMPTION OF RISK MAY MEAN NO REWARD

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

The enforceability of exculpatory clauses in New Jersey in the context of participation in a recreational activity is addressed in the Supreme Court's decision in Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 1 A.3d 678 (2010). In Stelluti, the Court held that it is not contrary to the public interest, or to a legal duty owed, to enforce a recreational facility's agreement limiting its liability for injuries sustained as a matter of negligence that result from a patron's voluntary use of equipment and participation in an activity.

In *Stelluti*, the plaintiff entered into an agreement with the defendant gym for membership at its facility, and in accordance with the gym's requirement, signed and dated a Waiver and Release of liability form ("Waiver"). The Waiver provided that the signing member acknowledges the risks of participation in activities at the gym, is voluntarily participating in those activities, and assumes all such risks, including injuries which may occur as a result of the members use of amenities and equipment, participation in activities, sudden and unforeseen malfunctioning of equipment, and instruction or training. *Id*. at 682. The Waiver explicitly provided that the signor was releasing the defendant gym for its own negligence. *Id.* at 683. After signing the Waiver, the plaintiff participated in a spinning class; she set up her bike with the assistance of an instructor, and as she stood up on the pedals during the class as instructed, the handlebars fell off, and she was injured. *Id*.

The plaintiff sued the gym (among other defendants), setting forth negligence claims. The gym defendant filed a motion for summary judgment, which the Law Division granted, and the Appellate Division affirmed. The New Jersey Supreme Court granted the plaintiff's petition for certification. *Id*. at 687.

Initially, the Supreme Court acknowledged that the Waiver at issue was a contract of adhesion, in that it was a standardized printed form presented to the plaintiff on a "take-it-or-leave it" basis, without the opportunity for the "adhering" party to negotiate. *Id*. at 687-88. However, the Court recognized that contracts of adhesion can be enforced where they are not unconscionable. The Court did not consider the plaintiff in this context to be in a classic "position of unequal bargaining power" such that the contract must be voided based on unconscionability, because the plaintiff "could have taken her business to another fitness club, could have found another means of exercise aside from joining a private gym, or could have thought about it and even sought advice before signing up and using the facility's equipment. No time limit was imposed on her ability to review and consider whether to sign the agreement." *Id*. at 688.

The Court explained that despite the general disfavor for exculpatory clauses and the need for careful scrutiny, such provisions are enforced unless they are adverse to the public interest. *Id*. at 689. Contracting-away of a statutorily imposed duty and agreements containing a pre-injury release from liability for intentional or reckless conduct are both against public interest. *Id*. at 688 89.

Beyond those categories, there are four factors used to determine whether an exculpatory agreement is against public policy and therefore unenforceable:

1. Whether it adversely affects the public interest;
2. Whether the exculpated party is under a legal duty to perform;
3. Whether it involves a public utility or common carrier; and
4. Whether the contract grows out of unequal bargaining power or is otherwise unconscionable.

Id. at 689 (citing *Gershon, Adm'x Ad Prosegundum for Estate of Pietroluongo v. Regency Diving Ctr*., 368 N.J. Super. 247, 248, 845 A.2d 720 (App. Div. 2004)).

The Court explained that "[a]s a threshold matter, to be enforceable an exculpatory agreement must 'reflect the unequivocal expression of the party giving up his or her legal rights that this decision was made voluntarily, intelligently and with the full knowledge of its legal consequences.'" *Id*. at 689 (quoting Gershon, 368 N.J. Super.at 247). In this case, the exculpatory agreement explicitly set forth what was covered (including negligence on behalf of the gym), and the terms limiting the gym's liability were prominent. *Id*. at 690. Further, the plaintiff did not claim that she signed the Waiver as the result of fraud, deceit or misrepresentation. *Id*. Therefore, the Court found that it could be presumed that the plaintiff understood the agreement.

Regarding the exculpatory clause's implications on public interest, the Court explained that while business owners must maintain safe premises for their business invites, the law recognizes that where certain activities posing inherent risks to participants are conducted by operation of some types of business, the business will not be held liable for injuries sustained as long as it acted in accordance with the "ordinary duty owed to business invitees, including exercise of care commensurate with the nature of the risk, foreseeability of injury, and fairness in the circumstances. When it comes to physical activities in the nature of sports--physical exertion associated with physical training, exercise, and the like--injuries are not an unexpected, unforeseeable result of such strenuous activity." *Id*. at 691 (internal citation omitted).

The *Stelluti* Court pointed out the New Jersey Legislature's recognition of the need for risk-sharing for certain inherently risky activities through certain activity-specific statutes:

Assumption of risk associated with physical-exertion-involving discretionary activities is sensible and has been applied in many other settings, including by the Legislature with reference to certain types of recreational activities. Recognizing that some activities involve a risk of injury and thus require risk sharing between participants and operators, the Legislature has enacted statutes that delineate the allocation of risks and responsibilities of the parties who control and those who participate in some of those activities. See N.J.S.A. 5:13-1 to -11 (Ski Act); N.J.S.A. 5:14-1 to -7 (Roller Skating Rink Safety and Fair Liability Act); N.J.S.A. 5:15-1 to -12 (Equine Act). Although no such action has been taken by the Legislature in respect of private fitness centers, that does not place the common sense of a risk-sharing approach beyond the reach of commercial entities involved in the business of providing fitness equipment for patrons' use. The sense behind that approach does not make it unreasonable to employ exculpatory agreements,

within limits, in private contractual arrangements between fitness centers and their patrons.

Id. at 692.

The Court found that while there is public interest in holding a health club to its general common law duty to business invitees, "it need not ensure the safety of its patrons who voluntarily assume some risk by engaging in strenuous physical activities that have a potential to result in injuries", as that could chill the establishment of health clubs". *Id*. at 693. It recognized that there is positive social value in allowing gyms to limit their liability, and "it is not unreasonable to encourage patrons of a fitness center to take proper steps to prepare, such as identifying their own physical limitations and learning about the activity, before engaging in a foreign activity for the first time." *Id.* Further, the Court found no evidence of grossly negligent and/or reckless conduct on behalf of the defendant gym. Accordingly, the Court affirmed.

GRANDE LATTE WITH EXTRA DUST? EASTERN DISTRICT SWEEPS AWAY CASE ALLEGING BATTERY FOR CLEANING AT PHILADELPHIA STARBUCKS

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

In *Grande v. Starbucks Corp.*, 2021 U.S. Dist. Lexis 194699, 2021 WL 4709926 (E.D. Pa. Oct. 8, 2021), the Eastern District of Pennsylvania granted Starbucks Corp.'s ("Starbucks") Motion for Summary Judgment in a case with a truly bizarre set of facts.

Procedural History

In 2018, Plaintiff, James Grande ("Grande"), filed suit against Starbucks Corporation, Starbucks' former Executive Chairman, Howard Schultz, and the property owners of two store locations, Two Six Two S. 18th Association and 1528 Walnut Limited Partnership. Grande's twelve count Complaint sought damages totaling $79,000,000 and alleged that during his frequent visits to Starbucks, Starbucks employees mistreated him in the following ways:

- By overcharging Mr. Grande and failing to provide him with receipts; . By sitting close to Mr. Grande to threaten or intimidate him;
- By fraudulently promising stores would be safe and clean when in fact the stores were dirty and employees used toxic cleaners; By publicly humiliating Mr. Grande and kicking him out of their stores; By invading Mr. Grande's privacy, including monitoring Mr. Grande; By making Mr. Grande sick from Starbucks coffee;
- By harassing Mr. Grande while he was using Starbucks restrooms; m By failing to provide safe and clean restrooms;
- By calling the police on Mr. Grande even if Mr. Grande was not breaking the law;
- By failing to adequately clean Starbucks stores;
- By seizing Mr. Grande's "personal data"; and
- By using Mr. Grande's surname in their products without compensating Mr. Grande.

Grande's Complaint was dismissed in its entirety, without prejudice, for failure to factually allege all twelve claims.

In 2019, Grande was permitted to file an Amended Complaint in which he alleged claims for battery, fraud, tampering with his products, invasion of privacy, endangering his life, and misappropriating his name and likeness for commercial gain. Grande's Amended Complaint reduced the demand for damages to $44,000,000 and alleged that during his visits to Starbucks he was mistreated in the following ways:

- By creating hazardous and infectious waste at their store locations that Mr. Grande patronized;
- By sweeping waste around Mr. Grande;
- By tampering with beverages to the extent that they made Mr. Grande sick;
- By creating products like tea and coffee that required Mr. Grande to utilize the restroom and that forced him to come into contact with human waste;
- By claiming that stores would be sanitary when in fact they were not;
- By invading Mr. Grande's privacy; .
- By seizing Mr. Grande's "personal data" and other forms of his "likeness"; and
- By using Mr. Grande's surname in their products without compensating Mr. Grande.

The Court permitted Grande's Amended Complaint to proceed on his claims for Hazardous Waste Battery and Consumer Product Tampering. The Court held he could file an amended complaint to pursue his claims for Misappropriation of Publicity of Name and Misappropriation of Publicity of Likeness. The Court dismissed the remaining claims with prejudice.

Grande followed the Court's Order and filed a Second Amended Complaint in 2020 which further reduced damages down to $30,000,000 and asserted four claims:

- Count 1: Hazardous Waste Battery
- Count 2: Consumer Product Tampering
- Count 3: Misappropriation of Publicity of Name
- Count 4: Misappropriation of Publicity of Likeness

Grande's Second Amended Complaint alleged he was "attack[ed]" at the Starbucks located at 1528 Walnut Street and 1801 Spruce Street in Philadelphia. In both

coffee shops, employees swept "at" him and emptied trashcans nearby where he was seated. Additionally, someone twice tampered with his tea or coffee, which allegedly made him sick. Starbucks did this, he alleged, "to intimidate" him because his last name was Grande.

The Court dismissed Counts 3 and 4 but permitted Grande to proceed on his counts for battery and product tampering. At the close of discovery, defendants moved for summary judgment to dismiss the final two counts of Grande's action.

Motion for Summary Judgment

The Motion for Summary Judgment was ruled upon by District Court Judge Gene K. Pratter. To establish a claim for battery, Mr. Grande was required to show that Starbucks intentionally subjected him to a "harmful or offensive contact."[1] Starbucks must have caused some part of Mr. Grande—his eyes, his skin, his clothes— "to come into contact with a foreign substance."[2]

Per Grande, the defendants "use[d] sweeping and trash removal to attack [him] with refuse ... to intimidate [him]." Mr. Grande posits that the dust and waste had to have contacted him. Starbucks used "open" dust pans and "open rag[s]" to clean. Because "waste" and "pathogens" can travel the "short distance" between him and the dustpan, he asserted, the particles must have come into his "proximity." Grande insisted he was touched by the dust and waste particles.

However, based on the record the Court found that no reasonable juror could find that Mr. Grande met any element of a battery.

The Court explained that being dusted near is not "harmful" or "offensive." Dealing with light cleaning is the price all customers pay to frequent coffee shops. Mr. Grande acknowledged it was "commonplace" for Starbucks to dust and empty trash bins with customers inside.

The Court further found that Mr. Grande consented to the light cleaning around him. He was aware Starbucks employees swept the floors and emptied trash cans while customers were present, yet he still chose to enter the coffee shop, order a beverage, and sit down to consume the beverage. Ultimately, the Court concluded that no reasonable juror could dispute he consented to the normal store cleaning activities.

Mr. Grande also accused Starbucks of tampering with his tea and coffee which caused him to become ill. The Court first analyzed the claims as an alleged battery. By allegedly putting a harmful substance in Grande's beverage, which he then consumed, Starbucks "indirectly" caused him "to come in contact with" and "offensive" "foreign substance." [3]

The Court also analyzed the tampering claim as a products-liability claim. To establish a prima facie case for products liability, Mr. Grande had to show that (1) Starbucks sold a product "in a defective condition," (2) Starbucks is "engaged in the business of selling" that product, (3) the product was "expected to and d[*id*] reach" Mr. Grande "without substantial change in (its] condition," and (4) the product caused "physical harm" to Mr. Grande or his property.[4] The Court found Mr. Grande did not articulate how the coffee or tea was defective beyond that it contained some unidentified "substance." To get to the jury, he needed to do more than point to a mysterious, unidentified problem with his coffee and instead provide "evidence ... sufficient to prove a defect."[5]

The decision by Judge Pratter is favorable for dining and retail establishments. Light cleaning activities on business premises are ubiquitous and routine for maintaining safe and clean environments for customers. Even when customers are nearby, normal cleaning activities are generally not harmful or offensive. By patronizing the premises, customers should normally be found to consent to the ordinary cleaning activities that occur thereon.

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1 Dalrymple v. Brown, 701 A.2d 164, 170 (Pa. 1997); accord Restatement (Second) of Torts § 13.

2 Restatement (Second) of Torts § 18 cmt. c.

3 Restatement (Second) of Torts § 18 cmt. c. Restatement (Second) of Torts § 18 cmt. c.

4 Restatement (Second) of Torts $ 402(A).

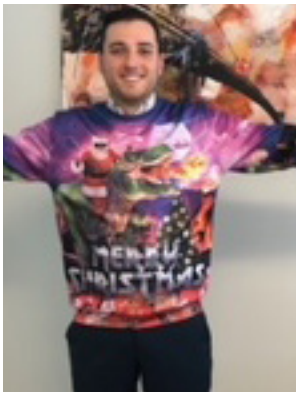
5 Tincher v. Omega Flex, Inc., 104 A.3d 328, 382 (Pa. 2014).

IN THE COMMUNITY

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

RTJG Administrative Assistant **Lisa Tiffany** volunteered her time at the **Springfield Lions Club** annual golf outing fundraiser on September 25, 2021. This year's event took place at **Putt Putt** in Clifton Heights, PA and had a great turnout. Lots of families and friends were able to enjoy a little competition, the beautiful weather, and had some laughs along the way. RTJG sponsored a hole for the event. The **Springfield Lions Club** is a group of men & women in the Springfield community who volunteer their time for humanitarian causes in Springfield, PA, regional and world-wide communities. See photograph of Lisa Tiffany and her favorite golfing partners.

Throughout October and early November Ricci Tyrrell hosted a clothing drive to benefit the young men at **Williamson College of the Trades**, located in Media, PA who were in need of outerwear and formal attire to help them through their schooling and enable them to dress for success at their ensuing interviews. RTJG's donations resulted in an SUV full of beautiful garments that were delivered to **Williamson's** on November 17, 2021. **Williamson's** mission is to prepare deserving young men to be respected leaders and productive members of society. All students attend on full scholarships that cover tuition, room, board and textbooks. See photograph of RTJG Administrative Assistant Lisa Tiffany and Firm Administrator Lisa Halbruner with the clothing donations.



On December 21, 2021, RTJG's annual **Holiday Ugly Sweater 50/50 Competition** returned! As in prior years all participants got in the holiday spirit and wore their competition submissions for the day. Following a firm wide vote, the winner was **Adam Mogill**, Associate who returned his winnings as a full donation to **The Philadelphia Ronald McDonald House (RMH)**. Along with donations from employees and the firm a total of $400.00 was contributed. The **RMH** provides a comfortable room to sleep, home cooked meals, and other supportive services to families who travel to Philadelphia to obtain medical treatment for their children. These services allow parents to comfort their children around the clock, in the hospital or after an outpatient treatment. By staying at the House, the families also get support from a community of other parents in similar situations, finding comfort and hope.