



# Ricci Tyrrell Johnson & Grey

## ATTORNEYS AT LAW

### QUARTERLY NEWSLETTER

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### News and Events:



Members **John E. Tyrrell**, **Patrick J. McStravick**, **Francis Burns**, **Jacqueline Zoller**, together with Associate **Kelly Woy**, conducted a full-day mock trial as part of the 2022 product liability seminar presented by the **Association of Equipment Manufacturers**. This year's conference was held on April 25, 2022 in Lincolnshire, IL. AEM is the leading organization in North America advancing construction and agriculture equipment manufacturers and their value chain partners in the global marketplace.

**RTJG** continues to grow and welcomes Member **Harminda Morales** and Associates **Jacob Kratt** and **Matt Cioeta** to the Firm.

**Francis J. Grey** will present in September together with David Kwass, Esquire at a **Pennsylvania Bar Institute** event on the topic of cross-examination of technical expert witnesses.

For the second consecutive year, **RTJG** was included on **Hackney Publications'** listing of **"100 Law Firms with Sports Law Practices You Need to Know About"**. The Firm's sports law practice is led by Members **John E. Tyrrell** and **Patrick J. McStravick**. The press release can be read here: <https://100lawfirms.com/2021/02/27/ricci-tyrrell-johnson-grey/>

Associate **Laquan T. Lightfoot** presented at the **Dispute Resolution Institute's** 24<sup>th</sup> Annual Personal Injury Potpourri CLE event on Thursday, April 7, 2022.

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Member **Bill Ricci** co-authored a chapter of a FDCC e-book on trial tactics being published by Federation of Defense & Corporate Counsel. The chapter was entitled "The Importance of the Opening Statement at Trial in the Defense of Serious Product Liability Claims."

Mr. Ricci also co-authored an article with Scott Toomey, Esquire in COUNTERPOINT, the publication of the **Pennsylvania Defense Institute**. The article addressed "Evidence of Concurrent Cause in Post *Tincher* Pennsylvania."

**John Tyrrell** and Associate **Matt Cioeta** co-wrote an article in Sports Facilities and the Law. See the article here: <https://hackneypublications.com/our-publications/sports-facilities-and-the-law/>

### PUBLIC NUISANCE LIABILITY



**Laquan T. Lightfoot** is an Associate at **Ricci Tyrrell Johnson & Grey**.

On November 23, 2021, after a six-week trial, a jury found the pharmacies of retailers CVS, Walgreens, and Walmart liable for unlawful dispensing conduct which proximately caused a public nuisance in the Lake and Trumbull Counties of Ohio. In re Nat'l Prescription Opiate Litig., 2022 U.S. Dist. LEXIS 40221 (N.D. Ohio March 7, 2022). Plaintiffs seek an abatement remedy, which will be determined by the trial court in a bench trial.

#### Factual Background

This case arose out of claims made by Ohio's Lake and Trumbull Counties that the conduct of the CVS, Walgreens and Walmart pharmacies "substantially contributed to an oversupply of legal prescription opioids and to diversion of those opioids into the illicit market outside appropriate medical channels, thereby endangering public health or safety and creating a public nuisance." 11/15/21 Trial Tr. at 7070-71

(Doc. #4153) (Charge to the Jury) (citations omitted). Plaintiffs presented evidence that between 2006-2019, Walgreens pharmacies dispensed a total of 25,346,069 dosage units of prescription opioids in Lake County, and 27,969,541 dosage units in Trumbull County; between 2006-2019 CVS pharmacies dispensed a total of 15,977,215 dosage units in Trumbull County and 25,528,782 in Lake County; and between 2006-2018 Walmart pharmacies dispensed 9,890,771 dosage units in Lake County and 5,228,488 dosage units in Trumbull County.

#### Public Nuisance Background

A public nuisance is an "unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B. To assess whether conduct constitutes a public nuisance, courts primarily assess three factors: (1) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, (2) whether the conduct is proscribed by a statute, ordinance or administrative regulation or (3) whether the conduct is of a continuing nature or has produced a permanent long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right. *Id.* The trial court mirrored the Restatement when providing the jury instruction on the definition of public nuisance; however, it did not include the third circumstance.

#### Procedural History

The verdict form presented two questions for each plaintiff: (1) Did Trumbull County [Lake County] prove, by greater weight of the evidence, that oversupply of legal prescription opioids, and diversion of those opioids into the illicit market outside of appropriate medical channels, is a public nuisance in Trumbull County [Lake County]?; and (2) Did Trumbull County [Lake County] prove, by the greater weight of the evidence, that any of the following Defendants engaged in intentional and/or illegal conduct which was a substantial factor in producing the public nuisance that you found exists in Question 1? Verdict Form (Doc. #4176). At the conclusion of the trial, the jury answered "yes" to both questions.

Defendants filed various post-trial motions, including Motion for a New Trial and Motions for Judgment as a Matter of Law, asserting a number of issues, including the expansion of nuisance liability, improper jury instructions and improperly admitted expert testimony.

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One such issue is defendants' contention that plaintiffs failed to present sufficient evidence that (1) defendants engaged in unlawful or intentional conduct; or (2) that their conduct proximately caused a public nuisance in Trumbull and Lake Counties.

The trial court denied defendants' motions. It first reasoned that plaintiffs presented sufficient evidence that the pharmacies did not have sufficient policies in place to ensure compliance with the Federal and Ohio Controlled Substance Acts, which included failing to take adequate measures to prevent diversion of opioids and/or failing to enforce and comply with their own internal policies. It also reasoned that Plaintiffs' expert evidence regarding the dispersion of opioid prescriptions, which had red flags for diversion by defendants without adequate procedures to guard against such diversion, and defendants' arguments against the same was properly weighed by the jury. Lastly, the trial court found that "aggregate evidence of massive increases in the supply of prescription opioids, combined with evidence demonstrating failures by each defendant to maintain effective controls against diversion, supported a reasonable inference that defendants' conduct was a substantial factor in creating the alleged nuisance." *In re Nat'l Prescription Opiate Litig.*, 2022 U.S. Dist. LEXIS 40221 \*126-27 (N.D. Ohio March 7, 2022). The court noted that to be considered a substantial factor in causing the public nuisance, the conduct did not have to be the sole cause, but could be "one of the material, meaningful or considerable causes, of the nuisance." 11/15/21 Trial Tr. at 7077 (Doc. #4153) (Charge to the Jury).

### Implications

The jury verdict and trial court's denial of defendants' post-trial motions potentially have significant and far-reaching implications in the expansion of and applicability of public nuisance law in mass tort and product liability cases, and whether the national opioid crisis constitutes the same. Furthermore, the trial court's discussion on causation of a public nuisance could expose defendants to liability in cases against manufacturers, pharmacies or distributors for dispensing opioids without direct causation.

## IS IT OBVIOUS?



**Stuart Goldstein** is the head of **RTJG's** Intellectual Property practice.

*"Build a better mouse trap and the world will beat a path to your door."*

This quote has been attributed to Ralph Waldo Emerson<sup>1</sup> and, over the years, many have taken the valuable advice it imparts to heart. As of this writing, there are over 4400 patents for "mousetraps," and many other like applications have been filed and rejected. In the long history of the United States Patent and Trademark Office (USPTO), "mousetrap" devices have been the most frequently invented and patent applied for inventions.

Mousetraps are not the only product inspired by Emerson's statement. This pronouncement has been understood to be the objective for innovation and the development of all types of new inventions. But what makes a "better mousetrap;" that is better invention? And what makes a better invention patentable in the United States?

Certainly a new invention can be "better" than what is previously known. However, in order to be granted a patent which would provide the inventor the valuable right to preclude others from making, using, and selling the invention, the "new" invention must pass the test of obviousness under 35 U.S.C. §103 of the patent statutes.<sup>2</sup> That is, the invention cannot be an obvious change or modification of an existing product or technology. This seemingly simple test belies the fact that the obviousness standard is one which inventors, patent attorneys, the USPTO, and the courts, have grappled with for many years.

<sup>1</sup> This phrase is actually a codification and, in fact, a simplification of Emerson's actual statement: "If a man has good corn or wood, or boards, or pigs, to sell, or can make better chairs or knives, crucibles or church organs, than anybody else, you will find a broad hard-beaten road to his house, though it be in the woods."

<sup>2</sup> To be patentable, an invention also must be "new" and "useful." 35 U.S.C. §§101 and 102.

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The fundamental standard for obviousness, and one which still applies in large measure today, was pronounced by the U.S. Supreme Court in *Graham v. John Deere*, 383 U.S. 1 (1966). In this case, a multi-factor test was set forth for determining whether an invention is obvious. In relevant part, one must determine the scope and content of prior inventions, consider the differences between the claimed invention and this prior art, and review the level of knowledge of someone having ordinary skill in the art. In other words, the question to be answered is whether there is any combination of prior art references which, when viewed together would constitute the subject invention. Stated differently, could someone having ordinary skill or expertise in that particular subject create the invention? If so, the invention is obvious. While the different factors elucidated by the Supreme Court are, in large part, subjective, they do provide some guidelines for the inventor.

An additional test was offered by subsequent federal courts which hoped to provide further guidance in determining obviousness. This test states that if there is no "teaching, suggestion, or motivation" to combine prior art references, then the invention would not be considered obvious.

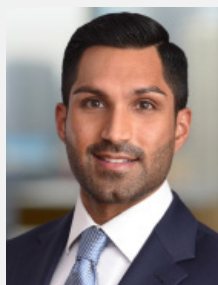
In 2015, the U.S. Supreme Court in *KSR v. Teleflex*, 550 U.S. 398 (2007), again stepped in to expand the definition of obviousness. The Court in this case held that the "teaching, suggestion, or motivation test" was too restrictive. It stated that whether something was obvious is a question of "common sense." Unfortunately, the Court did not define "common sense." Instead, suggesting that whether something is obvious is self-evident when considered in view of the prior art.<sup>3</sup>

While the question of obviousness appears to be arbitrary and subjective and the test continues to be debated and interpreted, one thing is certain. There is currently no standard or bright line definition as to whether or not an invention is obvious. This has led to the unfortunate fact that the over 8000 patent examiners at the USPTO who review utility patent applications and the many courts which adjudge the validity of patents, are not consistent in their interpretations of what is obvious and how the obviousness standard

should be applied. This, in turn, has left inventors and their attorneys who prepare patent applications with an air of uncertainty.

Thus, in order to provide the best probability of success that the "better mousetrap" will be accepted as a new and unobvious invention, thereby affording the inventor with valuable intellectual property rights under the patent statutes, several steps are required. There must be thorough knowledge of the prior art, resulting from a search of prior patents and related devices which are within the scope of the invention. The patent application itself should be prepared with this prior art in mind and it must be drafted in the greatest detail in order to disclose all anticipated and contemplated aspects of the invention, its construction, and operation. Only then will the arbitrary and subjective manner in which the obviousness standard is applied can be addressed and innovation, represented by the "better mousetrap," continue to provide inventors with patent protection and the accompanying incentive to invent.

### JURISDICTION, EH? ANALYSIS OF JURISDICTIONAL DISCOVERY BY THE SUPREME COURT OF TEXAS



**Vikas Bowry** is an Associate at **Ricci Tyrrell Johnson & Grey**.

On February 4, 2022, the Supreme Court of Texas issued a decision analyzing jurisdictional discovery as it related to a product liability suit in *In re Christianson Air Conditioning & Plumbing, LLC*, 2022 Tex. LEXIS 145. By way of a brief background, plaintiffs Christianson Air Conditioning and Plumbing, LLC and Continental Homes of Texas, LP filed suit against Indiana pipe manufacturer NIBCO. Plaintiffs alleged that NIBCO-branded piping leaked after being installed in thousands of Central Texas homes. Plaintiffs also brought claims sounding in strict products liability,

<sup>3</sup> This ruling could be considered akin to the Supreme Court's pornography opinion in *Jacobellis v. Ohio*, 378 U.S. 184 (1964) in which Justice Potter Stewart could not define hard-core pornography, but opined that "I know it when I see it."



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fraud, and negligence against Canadian engineering firm Jana Corporation (hereinafter "Jana"). In doing, plaintiffs alleged that NIBCO hired Jana to reformulate NIBCO's defective piping and to maintain certification of the pipe in Texas. In response, Jana contested personal jurisdiction, arguing that plaintiffs could not establish the existence of minimum contacts between Jana and Texas. This prompted plaintiffs to move to compel jurisdictional discovery. While the motions were pending, the parties entered into an agreement whereby Jana would make two of its executives available for corporate representative depositions in relation to jurisdiction. However, there was no definitive agreement as to the scope of the depositions.

During the hearing regarding plaintiffs' motion to compel, plaintiffs proposed a list of 30 deposition topics. Jana objected, arguing that the topics addressed the merits of the case. The trial court ultimately granted the motion to compel and ordered that the depositions cover all 30 topics. Jana proceeded to file a petition for writ of mandamus in the Third Court of Appeals in which it challenged nine of the deposition topics. In granting Jana's writ on eight of the nine topics, the Court of Appeals held that the trial court abused its discretion as jurisdictional discovery must exclusively relate to the jurisdictional question. Disgruntled by the ruling, plaintiffs then filed a petition for writ of mandamus. The crux of their argument was that it was not an abuse of discretion for the trial court to order jurisdictional discovery that overlapped with the merits. In the eyes of plaintiffs, the overlap was bound to occur when engaging in discovery with respect to a defendant's forum contacts.

The Texas Supreme Court began by noting that neither the Texas Rules of Civil Procedure nor prior cases suggested that jurisdictional discovery must exclusively relate to the jurisdictional question. In fact,

in addressing the issue in other cases, the Supreme Court had indicated that it was permissible for jurisdictional discovery to overlap with the merits of a matter in certain circumstances. The Court further stated that this was particularly true when a plaintiff was setting forth a theory of specific personal jurisdiction. As a result, the Court held that "information sought in jurisdictional discovery must be essential to prove at least one disputed factor that is necessary to the plaintiff's proposed theory or theories of jurisdiction."

Given that plaintiffs were asserting a theory of specific jurisdiction, each deposition topic was required to target discovery that was essential to prove either Jana's purposeful availment or the substantial connection between the forum and the litigation. Based on the Court's review of the deposition topics in dispute, there were some topics that included matters that were not essential to proving the aforementioned factors. Moreover, the Court found that certain topics were overbroad and duplicative. As a result, the Court concluded that the parties were to be given an opportunity to revise the deposition topics pursuant to its holding.

Finally, the Supreme Court addressed the appropriate relief given the circumstances of the matter. In doing so, the Court held that the Court of Appeals erred in deciding that discovery on eight of the nine disputed deposition topics should be denied. The basis for this being that discovery did not have to be related exclusively to the jurisdictional issue, as was held by the Court of Appeals. Consequently, plaintiffs were granted conditional mandamus relief and the Court of Appeals was directed to vacate its mandamus order. Additionally, the trial court was instructed to apply the standards set forth by the Court in order to resolve the deposition topics that remained in dispute.

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### IN THE COMMUNITY



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

**Ricci Tyrrell** is again a proud sponsor of the 2022 **Eagles Autism Challenge (EAC)**, which will be held on Saturday May 21, 2022. This is the 5<sup>th</sup> Annual EAC and RTJG has been a sponsor of the event for each of the five years. EAC provides participants the opportunity to choose from three cycling options, a 5K walk/run or sensory walk as their fund-raising effort. EAC is dedicated to raising awareness and funds for autism research and care programs. Participants join the Philadelphia Eagles in their cycling/running/walks.

For our Winter community service project RTJG hosted a drive for **Project HOME**, whose mission is to empower adults, children, and families to break the cycle of homelessness and poverty, to alleviate the underlying causes of poverty, and to enable all of us to attain our fullest potential as individuals and as members of broader society. RTJG reached 80% participation from the firm and raised almost \$1,000 for **Project HOME**. The money raised was used to purchase gift cards to benefit people who are experiencing homelessness or housing emergencies.

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 positively impact the communities that surround us. Our attorneys and support staff are always encouraged to seek out Pro Bono opportunities and have given their time and support to a number of local agencies including **Philadelphia VIP** and the

**Senior Law Center**. The firm plans to continue its recent collaboration with the **Penn Housing Rights Project (PHRP) at the University of Pennsylvania Carey School of Law** with new cases being assigned to Penn Law students and RTJG attorneys each fall. The two groups of students that were mentored by RTJG attorneys this past year both achieved favorable results for their clients before both the Philadelphia Housing Commission and in the Philadelphia County Municipal Court. The firm also continues its support of the **Pennsylvania Innocence Project** wherein small groups of RTJG attorneys and support staff evaluate cases and draft investigative reports to be reviewed by the Innocence Project's Case Review Committee.

RTJG Member **Tracie Bock Medeiros** worked with her children Zach, Naomi, and Nathan on Martin Luther King Jr. Day to select from their playroom and bedrooms toys, books, and clothes to donate to less fortunate children as part of **Har Zion Temple's** Martin Luther King Jr. virtual Day of Service.



Associate **Alexander Shaen** was married to Simmi Patel on March 5, 2022 in Mexico City. The traditional wedding was attended by Member **Patrick McStravick** and his wife Marianne and Managing Member **John Tyrrell** with his wife Kathy.