Ricci Tyrrell Johnson & Grey
ATTORNEYS AT LAW

QUARTERLY NEWSLETTER
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Volume 27

In This Issue:

News and Events

RTJG was again recognized on **Best Lawyers and U.S. News & World Report's Best Law Firm Rankings**. RTJG was named in the category-2023 Pennsylvania Tier 1 in Products Liability, Defendants.

John E. Tyrrell
Managing Member

Ricci Tyrrell Managing Member **John E. Tyrrell** recently served as a guest on the first episode of Sports Law Expert, the new podcast from Hackney Publications. Earlier this year, Hackney Publications, the nation's leading publisher of sports law periodicals, selected RTJG as one of its "100 Law Firms with Sports Law Practices You Need to Know About." To read more about Mr. Tyrrell's appearance in the podcast episode, click here: https://bit.ly/3V6N8YJ

Fran Grey
Member

Member **Fran Grey** was a panel member addressing Cross Examination of Technical Experts at **Pennsylvania Bar Institute**'s Persuasion Skills for Trial Success Program on 9/13/22

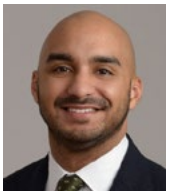
Bill Ricci
Member

Bill Ricci, Member, taught a class in taking and defending expert depositions at the **Temple Law School LLM**. in Trial Advocacy on 10/4/2022. Mr. Ricci is an adjunct professor at the law school. He also served as a panelist for "Lessons From Dumb Mistakes: How To Recover And How To Avoid" at the Fourth Annual 'Masters in Litigation Program' on 11/12/2022.

Mr. Ricci also served as a panelist with Honorable Mike Snyder and Bar Chancellor-Elect Jennifer Coatsworth at **Harris Bock's Annual Personal Injury Practicum** on 10/27/22. Mr. Ricci's topic was "Mental Health Awareness for Attorneys."

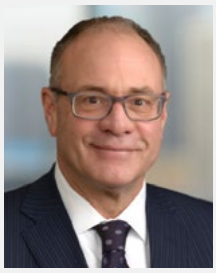
RTJG welcomed new associates **Gabrielle A. Outlaw** and **Joshua I. McDoom** to the firm respectively on 10/26/2022 and 2/6/2023.

Gabrielle A. Oulaw
Associate



Joshua I. McDoom
Associate

RICCI TYRRELL SECURES DEFENSE VERDICT FOR BOBCAT COMPANY



John Tyrrell is the Managing Member of **RTJG**

12 jurors in Harris County, Texas (Houston) returned a defense verdict on February 1, 2023 in favor of long-time Ricci Tyrrell client Clark Equipment Company d/b/a Bobcat Company in a products liability suit. The case was tried for Bobcat Company by Ricci Tyrrell Managing Member John E. Tyrrell. The verdict came after 8 trial days. In the suit, the family of Ricardo Garza sought damages for his death which occurred in a 2017 accident. The jury unanimously found in favor of Bobcat Company on all claims against it.

INVENTION PROMOTION COMPANIES: DO THEY REALLY ASSIST INVENTORS?

Stuart M. Goldstein, Esq. is the head of **RTJG's Intellectual Property Practice**

It is sad, but not unexpected in this anything for a buck society, that there continues to be companies which make exaggerated claims that they can assist inexperienced inventors in patenting and commercially developing their products. The television commercials and printed advertisements of these companies are compelling, as they offer clients the enticing possibility of striking it rich with their inventions. But, as a practical matter, how trustworthy are companies which advertise these types of invention promotion services? Unfortunately, in the majority of cases, invention promotion companies take advantage of unsuspecting inventors, entrepreneurs, and even companies who wish to pursue their product ideas.

All invention promotion companies who offer assistance to inventors are certainly not unscrupulous. However, inventor success stories with promotion companies are minuscule, especially when compared to the thousands of consumers who have employed these companies. The overwhelming majority spend substantial money with little or nothing to show for it.

Invention promotion companies routinely request substantial upfront payments from prospective clients, who are virtually never dissuaded from the notion that theirs is the next million-dollar invention. Unfortunately, the companies are usually quite aware that many of these inventions are either not patentable or not new, or, most significantly, not commercially viable. Yet, invention promotion companies will almost always encourage the inventor to proceed. Turning away a potential client is rare.

In these situations, the company itself is the only entity guaranteed to make money, since it has the inventor's upfront payment. In exchange, the inventor usually receives a binder or booklet containing generic, boilerplate information, which is generally available to anyone who surfs the internet. The inventor is given little else and is certainly not guaranteed of anything.

While most of these tactics are technically not illegal, they are obviously unethical and immoral. Over the years of my personal practice, I have had too many clients come to me with the same, sad story. They have each paid invention promotion companies ranging anywhere from $500 to $15,000, yet they have never received a patent or even a tailored marketing plan to assist in the development of their particular product.

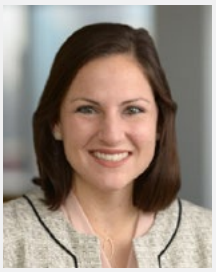
The novice inventor can avoid losing substantial money and, possibly, the actual patent rights to his or her invention, by simply following a few basic practices:

1. Inventors should not be taken in by success story advertisements of invention promotion companies. It is not as easy as these companies make it sound to successfully manufacture, market, and sell a product. In fact, while it certainly can be done, and there are examples of product successes, the road to developing a successful product is often long and arduous and it requires diligent and faithful guidance.

2. One should never pay an invention promotion company money upfront. Instead, the inventor should offer to pay the company a percentage of the profits from the sale of the product. By doing this, the company has a stake in the success of the venture and will need to use its best efforts towards making the product a success. The company which receives money upfront has no incentive to ensure the product is brought to market. It has already received its money.

3. Finally, it is always good practice to consult with a bona fide, patent attorney, duly registered before the United States Patent and Trademark Office (USPTO). A list of the registered patent attorneys can be found in the USPTO website at www.uspto.gov. These attorneys can assist in assessing the veracity of invention promotion companies and advise whether they are even necessary.

CHALLENGING THE INCLUSION OF A MANAGER IN A PREMISES LIABILITY LAWSUIT



Kelly Woy is an Associate at **RTJG**

Being personally named as defendant in a premises liability lawsuit can be stressful (and maybe even scary) for a manager of a store or other business. A plaintiff may name both the business entity owner and the manager as defendants for various reasons, including to destroy diversity and avoid removal to federal court, despite the manager's lack of personal involvement with the subject incident and potentially his or her complete absence from the premises leading up to the occurrence of the incident. Fortunately, absent a certain type of involvement by the manager, a plaintiff's inclusion of the manager as a defendant can be successfully challenged under Pennsylvania law based on legally insufficient allegations in the pleading phase of the litigation.

By way of background, under Pennsylvania law, "[p]ossessors of land owe a duty to protect invitees from foreseeable harm." *Carrender v. Fitterer*, 503 Pa. 178, 469 A.2d 120, 123 (Pa. 1983) (emphasis added). "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm for such invitees, and (b) Should expect that they will not discover or realize the danger, or fail to protect itself against it, and (c) fails to exercise reasonable care to protect them against the danger." Restatement (Second) of Torts § 343 (1965); *Carrender*, 469 A.2d at 123. Accordingly, it follows that when there is a defective condition on a business premises, the risk of

liability is with the possessor/owner of the premises, and not on an individual employee.

It is well settled in Pennsylvania that an employer is vicariously liable for the negligent acts of his employee which causes injury to a third party, provided that such acts were committed during the course of and within the scope of employment. *Costa v. Roxborough Mem'l Hosp.*, 708 A.2d 490, 493 (Pa. Super. 1998). Conduct classified as "within the scope of employment" for the purposes of vicarious liability includes conduct which (1) "is of a kind and nature that the employee is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the employer; and (4) if force is intentionally used by the employee against another, the use of force is not unexpected by the employer." *Id.* (citing the Restatement (Second) of Agency § 228) (other internal citations omitted).

In Pennsylvania, the "participation theory" is a basis of liability for a manager of a business as an actor as opposed to an owner, and provides that a corporate officer/manager can be held personally liable for participating in the tortious activity of the company, but only where the manager "specifically direct[s] the particular act to be done or participate[s], or cooperate[s] therein." *Wicks v. Milzoco Builders, Inc.*, 470 A.2d 86 (Pa. 1983). Accordingly, when determining whether a plaintiff plead a basis of liability for negligence against an individual store manager for a premises liability incident, Pennsylvania courts have interpreted the requirement of an officer or employee participating in the allegedly wrongful acts "to permit liability for an agent's misfeasance, but not for 'mere nonfeasance'". *Reese v. Pook & Pook, LLC,* 158 F. Supp. 3d 271, 300 (E.D. Pa. 2016) (quoting *Wicks*, 470 A.2d at 90). "Misfeasance" is the improper performance of an act, as compared to "mere nonfeasance," which is the omission of an act which a person ought to do. *Brindley v. Woodland Village Rest.*, 652 A.2d 865, 868 (Pa. Super. Ct. 1995).

In *Wicks*, the seminal Pennsylvania Supreme Court case, the plaintiff homeowners sued the individual officers of the development company for damages caused by periodic flooding, claiming that the officers "were aware, or should have been aware, of potential drainage problems at [the development] and, therefore, were negligent in failing to take appropriate measures to eliminate, or at least minimize, such problems." 470 A.2d 86, 88 (Pa. 1983). Explaining and applying the participation theory, the Court found that the plaintiffs sufficiently alleged the personal participation of the development's officers, specifically their alleged actual knowledge of the condition, but cautioned that "the mere averment that a corporate officer should have known the consequences of the liability-creating corporate act is subject to a motion to strike for impertinence and proof of that averment alone is insufficient to impose liability." *Id.* at 90. The Court found that "the pertinent averments in these complaints can be read as setting forth, generally, that the individual [officers] actually knew that the location of the proposed…Development created, at least, an unreasonable risk of the drainage problems, which occurred and that, having the power to do so, they deliberately ordered the work to proceed." *Id.*

Pennsylvania federal courts have applied the participation theory of liability against managers in the context of retail stores, finding that the plaintiffs in those cases did not set forth sufficient allegations for a finding of liability against the store manager under Pennsylvania law, including *Wicks*.

In *Kane v. Wal-Mart Stores E., LP*, the plaintiff slipped and fell on a puddle of water in a Wal-Mart store in Pennsylvania and sued various Wal-Mart entities and the store manager, claiming that the manager was negligent in failing to train the employees under his supervision in various respects, and failing to properly monitor and supervise the employees. 2018 U.S. Dist. LEXIS 217772, *3 (E.D. Pa. Dec. 31, 2018). Defendants removed the case to federal court based on fraudulent joinder of the individual store manager (which the plaintiff did not oppose), and subsequently moved to dismiss the claims against the manager. *Id.* at *2-3. Applying *Wicks* to determine whether the plaintiff plead a basis of liability for negligence against the manager, the Court granted the motion to dismiss, finding that the plaintiff "has not plead anything more than the store manager failed to act in training the Wal-Mart employees to instantaneously clean up every spill in the superstore regardless of the manager's knowledge or store history with spills in the certain store area which may alert him to a need to more specifically monitor

risks of slipping." *Id.* at 13-14 (emphasis added).

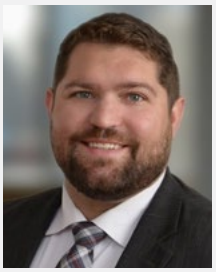
In *Jackson v. Burlington Coat Factory*, the plaintiff was injured in a Burlington Coat Factory when he attempted to walk up an escalator that was not running, and he sued the store and the individual store manager. 2017 U.S. Dist. LEXIS 131233, *2 (E.D. Pa. Aug. 17, 2017). The defendants removed to federal court based on fraudulent joinder, and the plaintiff moved to remand. *Id.* at *3. Applying *Wicks*, the Eastern District of Pennsylvania provided the following explanation regarding a store manager's liability:

> The precise issue here…is whether Plaintiff has alleged sufficient facts to show that [the manager] committed misfeasance, rather than mere nonfeasance. If only nonfeasance has been alleged, ***i.e.***, [the manager's] mere omission or failure to act, Plaintiff has not alleged a viable claim against [the manager]. A careful review of the amended complaint reveals that it is devoid of any allegation that the existing dangerous condition, *i.e.*, the broken escalator, was the "result of an active, knowing participation by" [the manager]… At most, the amended complaint alleges that as the manager in charge of the store, [the manager] was responsible for its condition…, and that he had either actual or constructive knowledge of the broken escalator…The complaint includes a laundry list of allegations or actions which [the manager] failed or omitted to take…For example, Plaintiff alleges that [the manager]:
>
> > fail[ed] to exercise all measures necessary… fail[ed] to timely and adequately inspect…fail[ed] to timely and adequately maintain…fail[ed] to timely and adequately conduct necessary repairs…fail[ed] to timely and adequately repair, replace, remedy and warn…fail[ed] to block rope off and prevent…
>
> While Plaintiff's list contains additional alleged "failures," such failures or omissions constitute, at best, nonfeasance on the part of [the manager]. Nowhere, does Plaintiff allege that [the manager] "specifically directed the particular act" or acts that caused Plaintiff's injuries…. Plaintiff alleges only that it was Defendant [manager]'s lack of action or omissions that led to the broken escalator or Plaintiff's exposure to it. Such allegations do not rise to the requisite level of actionable misfeasance under Pennsylvania law to support personal liability under the participation theory.

2017 U.S. Dist. LEXIS at *10 (internal citations omitted) (emphasis added). *But see Ahearn v. BJ's Wholesale Club, Inc.*, 2020 U.S. Dist. LEXIS 47320 (E.D. Pa. March 18, 2020) (explaining that "[o]nly if Defendants prove fraudulent joinder may [the Court] disregard [the manager's] citizenship and exercise diversity jurisdiction over this case", and citing Pennsylvania federal court cases recognizing that negligence claims against a store manager relating to a slip and fall incident are colorable under Pennsylvania law for purposes of the fraudulent joinder analysis).

Accordingly, where a plaintiff in a premises liability action names a store manager personally as a defendant, but does not allege any specific, affirmative actions by the manager which caused and/or contributed to the occurrence of the incident, the plaintiff's allegations should be challenged.

SUFFICIENT PLEADING OF GROSS NEGLIGENCE AND PUNITIVE LAWYERS IN PENNSYLVANIA



Nicholas Sulpizio is an Associate at **RTJG**

Motions to Dismiss, specifically Rule 12(b)(6) Motions, are commonplace in federal court practice. Common issues often asserted in a Motion to Dismiss are the plaintiff's pleading of gross negligence and praying for punitive damages against defendants. A recent United States District Court for the Eastern District of Pennsylvania decision, *Dragone v. PEW*, 2022 U.S. Dist. LEXIS 145078 (E.D.Pa. August 15, 2022) reviewed the requisite pleading standard as required under the *Twombly* and *Iqbal* line of authority.

By way of brief review, the *Twombly* and *Iqbal* authorities require that factual allegations asserted in a complaint are scrutinized under Rules 8(a) and 12(b)(6) to determine if the allegations and inferences proposed from those allegations are plausible. *See Ashcroft v. Iqbal*, 556 U.S. 662, 683, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *See id* at 678 (quoting *Bell AtL Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). To plead gross negligence and punitive damages, we then must examine the conduct under Pennsylvania law. A defendant is considered to be "grossly negligent" under when he fails to exercise even scant care and his conduct amounts to an extreme departure from ordinary care. *Feleccia v. Lackawanna Coll.,* 215 A.3d 3, 20 (Pa. 2019). Unlike recklessness, however, gross negligence, does not involve a conscious disregard of the risk of harm. A claim for punitive damages is imposed only in those circumstances in which the actions of a defendant "shows either an evil motive or reckless indifference to the rights of others." *Banner v. Miller,* 701 A.2d 232, 242 (Pa. Super. 1997). It is of utmost importance to note that negligent or even grossly negligent misconduct, without establishing reckless indifference, does not warrant the imposition of punitive damages. *Martin v. Johns-Manville,* 508 Pa. 154, 172 (1985). It must be noted that punitive damages are not independent causes of action under Pennsylvania law. As provided by the Supreme Court of Pennsylvania, "[i]f no cause of action exists, then no independent action exists for a claim of punitive damage since punitive damages is only an **element** of damages."*Kirkbridge v. Lisbon Conttractors, Inc*. 555 A.2d 800. 802 (Pa. 1989). If punitive damages were alleged as a separate cause of action, it is required to be dismissed under Pennsylvania law. With this backdrop, we now turn to the pleading of gross negligence and punitive damages relative to the *Dragone* decision.

As background to the decision, on September 16, 2019, Dragone was driving in the right eastbound lane of the Schuylkill Expressway, a known hazardous Philadelphia highway, when he slowed down due to traffic. Behind him, Pew was driving an overloaded tractor-trailer that weighed roughly 52,000 pounds. Pew's tractor-trailer hit Dragone's vehicle, pushing it into another vehicle ahead and severely injuring Dragone. Pew was cited for driving at an unsafe speed. Dragone alleged that Jersey Devil Trucking and Pew were negligent and grossly negligent in addition to punitive damages as a result of the accident.

The Court determined that Dragone sufficiently pled gross negligence against both defendants. As to Pew himself, plaintiff alleged a plausible claim of gross negligence, that he was driving an overloaded and oversized tractor-trailer at an unsafe speed on a dangerous roadway despite seeing brake lights and failing to give himself enough time and space to apply the brakes on the oversized vehicle. As to Jersey Devil Trucking, plaintiff asserted that Pew was fatigued, unqualified, and not properly trained to operate the tractor-trailer. These allegations alone, the Court decided, were sufficient to assert a plausible claim for negligence and gross negligence under the circumstances. The Court also determined that Dragone also sufficiently pled punitive damages against both defendants as plaintiff plausibly alleged that Pew and Jersey Devil Trucking knew their conduct risked harming others and acted in conscious disregard of that risk.

The *Dragone* decision exemplifies the Court's reluctance to grant Motions to Dismiss based on the allegations set forth by plaintiffs, even if those allegations teeter the line of sufficiency. Courts in Pennsylvania are more likely to give the benefit of the doubt to plaintiff's pleadings, in favor of continued discovery and decision on an eventual Rule 56 Summary Judgment Motion.

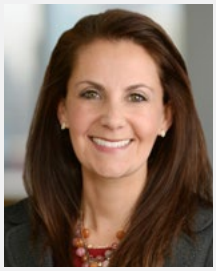
GETTING TO KNOW RTJG

DID YOU KNOW...

RTJG Member **Jacqueline Zoller** and her husband Josh welcomed their first child, Rory Blake, to the world on 11/23/2022. Our RTJG family celebrated with a baby shower and gifted her the first ever RTJG onesie. Wishing Jackie a lifetime of happiness with her husband and their daughter.

RTJG Associates **Jacob Kratt and Nicholas Sulpizio** were recently engaged. Wishing Jacob and his fiancé Abby Dingle and Nicholas and his fiancé Tara Carlin a lifetime of love, laughter, and health. Associate **Josh McDoom** will be celebrating his marriage to Zoe Moore on 3/4/2023.

IN THE COMMUNITY



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

As October was **Breast Cancer Awareness Month**, RTJG's Fall Community Project was raising funds for **Susan G. Komen Philadelphia,** an organization that is funding more breast cancer research than any other nonprofit while providing real-time help to those facing the disease. Throughout the month of October, RTJG sold raffle tickets for various prizes and the Fall Community Project culminated with a **Go Pink for Pizza** luncheon on October 31, 2022. RTJG Associate **Nicholas Sulpizio** drew the name of the raffle winner in honor of his mother Denise, a breast cancer survivor.

On September 22, 2022, RTJG Associate **Kelly J. Woy** and her husband attended the **Boys & Girls Clubs of Philadelphia's** annual fundraising event, the **Coach's Private Reserve Dinner** at **The Union League**. **Boys & Girls Clubs of Philadelphia's** mission is to "enable all young people, especially those who need us most, to reach their full potential as productive, caring, responsible citizens."

Kelly Woy, Associate and husband Jon

RTJG's final Community Project of the year was collecting goods and raising money for veterans currently residing at the **New Jersey Veterans Homes in Vineland.** RTJG Member **Monica Marsico's** nephew, Luke Pennisi, created this service project **in memory of Lt. Dennis W. Zilinski, II,** and asked that we all join him in assisting those who bravely and selflessly served our country. Luke Pennisi's grandparents and father are all Veterans (Army, Air Force, Navy and Marines). As a junior at **Christian Brothers Academy,** Luke self describes himself as part of the next generation who must continue to honor, remember and assist our veterans.

On July 18, 2022, RTJG served as a Birdie Sponsor of the Inaugural **Barristers' Golf Classic** at **Talamore Country Club**. Member **Tracie Bock Medeiros** and Associates **Kelly J. Woy** and **Matthew Cioeta** participated in the golf

outing and brought home a few trophies. Established in 1950, The **Barristers' Association of Philadelphia, Inc.'s** purpose, then and now, has been to address the professional needs and development of black lawyers in the City of Philadelphia through programs such as seminars, cultural events, and publications. The work of the organization continues years later with ongoing efforts to support its mission. Since the early years of its establishment, the **Barristers' Association** has also recognized the need, and its obligation, to be a proactive advocate for the cause against injustice. The **Barristers' Association** theme for this year was "Meaningful Engagement and True Service".

Matt Cioets, Associate, Tracie Medeiros, Partner and Kelly Woy, Associate

On September 24, 2022, RTJG Founding Member and talented guitarist **Bill Ricci** and his band **The O'Fenders** donated their time to play at the 3rd Annual **Denise McAloon Shut Out Cancer Day** at the **American Legion** in Havertown, PA. The event raised **over $40,000**. The **Cathy Miller Cancer Fund (CMCF)** partnered with the family and friends of **Denise McAloon** to create this fundraising event. The **CMCF** was founded in 2006 to raise funds to provide comfort, care and support to help minimize the hardships endured while undergoing cancer treatments and to perpetuate Cathy's wish to "Help Another Person." The team's goal for the annual **Shut Out Cancer Day** was to increase cancer awareness and to work diligently to promote volunteerism, donations and provide financial support for **CMCF, Coaches vs. Cancer, and the AstraZeneca Hope Lodge.**

RTJG Member **Tracie Bock Medeiros** served as a 2022-2023 Sponsor to the **Saint Joseph's University** dance team. The team has a big goal each year – to attend the **UDA College Dance Team National Championship** competition and cannot get there without donations and fundraising. In addition to serving as a Sponsor, Tracie assisted in the team's fundraising efforts to secure additional donations. The **Saint Joseph's University** dance team is meaningful to Tracie as her #1 after school babysitter who provides energetic, fun, and reliable daily care for her 3 children is a member of the team.

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