Ricci Tyrrell Johnson & Grey

ATTORNEYS AT LAW

QUARTERLY NEWSLETTER

July 2023
Volume 28

In This Issue:

News and Events

RTJG congratulates Members **Bill Ricci, Francis Grey and Michael Droogan** for selection to the **SuperLawyers®** list and associate **Jacob Kratt** for his selection to the **Rising Star™** list.

Bill Ricci
Member

Fran Grey
Member

Mike Droogan
Member

Jacob Kratt
Associate

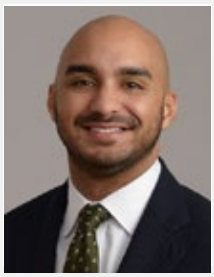
Managing Member **John Tyrrell** and associate **Kimberly Collins** have authored an article in an upcoming edition of **Sports Facilities and the Law**. You can access that article here: **Learn More**

John E. Tyrrell
Managing Member

Kimberly Collins
Associate

Ricci Tyrrell welcomes newly hired associates **Kimberly Collins** and **Michael Rosenthal** to the firm. Ms. Collins is a graduate of the University of Scranton (B.S.) and Temple University Beasley School of Law (J.D.). She clerked for the Honorable Sallie Updyke Mundy and the Honorable James J. Fitzgerald, III, at the Pennsylvania Superior Court and was a Judicial Law Clark for Judge Mundy at the Supreme Court of Pennsylvania. Mr. Rosenthal received his Juris Doctor from Rutgers Law School. He obtained his undergraduate B.A. from Pennsylvania State University.

PERMISSABILITY OF AN EXPERT'S RELIANCE ON INTERNATIONAL SAFEFY STANDARDS



Joshua I. McDoom is an Associate at **Ricci Tyrrell Johnson & Grey**

Courts play an active role in shaping the admissibility of expert testimony. Their gatekeeping function is intended to ensure that any and all scientific testimony or evidence admitted is relevant and reliable. An expert's testimony must "fit" the facts of the case, meaning that proffered testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Recently, the United States District Court for the Eastern District of Pennsylvania analyzed whether an expert's reliance on international safety standards fit the facts of an action predicated on injuries sustained in Pennsylvania. Rossano v. Maxon, Civ. No. 5:21-cv-01353, 2023 WL 2351878 (E.D. Pa. Mar. 3, 2023).

In Daubert, the Court considered four factors to determine the admissibility of expert testimony: 1.) Whether the theory can and has been tested; 2.) Whether it has been subject to peer review; 3.) The known or expected rate of error; and 4.) Whether the theory or methodology employed is generally accepted in the relevant scientific community. Under Daubert's progeny, scientific expert testimony is admissible when the testimony meets the following three-part test: 1.) The proffered witness must be an expert. i.e., the witness must be qualified; 2.) The expert must testify about matters requiring scientific, technical, or specialized knowledge; and 3.) The expert's testimony must assist the trier of fact. See Kannankeril v. Terminix Int'l Inc., 128 F.3d 802, 806 (3d Cir. 1997).

Rossano is a product liability action where the plaintiff alleged he sustained an injury while attempting to lower and then manually unfold the lift gate from the trailer portion of the truck, which he claimed was defective. Following his injuries, the plaintiff sued the liftgate designer, the liftgate installer, and the truck's lessor.

In developing his opinion on the design of the liftgate and its required use of force, the plaintiff's biomechanical expert inspected and measured the liftgate at issue and researched several push-pull force standards including European and Canadian standards. Ultimately the plaintiff's expert concluded that lift gate required an excessive force to operate and thus created an increased risk of injury to users. The designer of the liftgate moved to preclude plaintiff's expert, arguing that the expert's use of international guidelines did not satisfy Daubert's fit component as the international guidelines were not applicable to the underlying facts.

The Court determined that the plaintiff's biomechanical expert's reliance on international safety standards was permissible because instead of attempting to opine on whether the lift gate satisfied the international standards, he used the standards to determine an appropriate use of force needed to operate a liftgate, and ultimately, whether the liftgate at issue was defective in the amount of force it required.

WRAP IT UP: ENFORCEABILITY OF INTERNET AGREEMENTS

Jacob F. Kratt is an Associate at **Ricci Tyrrell Johnson & Grey**

While the Internet is hardly new, there is still some level of uncertainty regarding enforcing consumer agreements over the Internet, as was illustrated in the recent opinion issued by the Superior Court of New Jersey, Appellate Division, on April 3, 2023 in the case of Santana v. Smile-DirectClub, LLC, 2023 N.J. Super. LEXIS 36 (App. Div. April 3, 2023). Santana involved a patient who sued SmileDirectClub, LLC (SDC) alleging that the clear aligners he purchased from SDC caused him personal injuries. 2023 N.J. Super. LEXIS 36 at *2. SDC offers a telemedicine platform to enable consumers to obtain these aligners from affiliated dentists and orthodontists. Id. at *1. Users such as Mr. Santana had to create an account in order to receive treatment and aligners. Id. As part of the sign-up process, users were required to click a box that stated, "I

"I agree to SmileDirectClub's Informed Consent and Terms & SmilePay Conditions." Id. Certain text was blue against a white background indicating that it was a hyperlink, and each hyperlink would take the user to a new webpage containing the complete documents referenced. Id. The "Informed Consent" document contained a mandatory arbitration provision among its terms. Id. at *2.

SDC moved to dismiss Mr. Santana's complaint, arguing that plaintiff's claim was subject to the mandatory arbitration provision contained in the Informed Consent document. Id. The plaintiff argued that the arbitration agreement was hidden from his view and thus unenforceable. Id. The Law Division agreed with plaintiff and denied SDC's motion to dismiss on the grounds that the hyperlink was not enlarged or in bold print and did not use terms such as "arbitration" or "waiver of right to sue," and that plaintiff could click the "I agree" button without ever viewing the hyperlinked documents. Id. at *3. Because of these factual circumstances, it found that "[t]he arbitration clause was not clearly or conspicuously presented to [p]laintiff and thus not enforceable." Id.

On appeal, the Appellate Division reviewed the law related to online contracts and examined the facts and circumstances of plaintiff's creation of an account, in particular the above-recited facts of how the terms and conditions were presented to the plaintiff. In contracts generally, arbitration agreements are favored by New Jersey courts, so long as "the consumer has reasonable notice of its existence." Wollen v. Gulf Stream Restoration & Cleaning, LLC, 259 A.3d 867, 875 (N.J. App. Div. 2021). Of course, a party may not avoid the obligations of a contract by failing to read it, and when one enters into a written contract without fraud or imposition, he/she is conclusively presumed to understand and assent to its terms and legal effect. Skuse v. Pfizer, Inc., 236 A.3d 939, 948 (N.J. 2020).

from his view and thus unenforceable. Id. The Law Division agreed with plaintiff and denied SDC's motion to dismiss on the grounds that the hyperlink was not enlarged or in bold print and did not use terms such as "arbitration" or "waiver of right to sue," and that plaintiff could click the "I agree" button without ever viewing the hyperlinked documents. Id. at *3. Because of these factual circumstances, it found that "[t]he arbitration clause was not clearly or conspicuously presented to [p]laintiff and thus not enforceable." Id.

On appeal, the Appellate Division reviewed the law related to online contracts and examined the facts and circumstances of plaintiff's creation of an account, in particular the above-recited facts of how the terms and conditions were presented to the plaintiff. In contracts generally, arbitration agreements are favored by New Jersey courts, so long as "the consumer has reasonable notice of its existence." Wollen v. Gulf Stream Restoration & Cleaning, LLC, 259 A.3d 867, 875 (N.J. App. Div. 2021). Of course, a party may not avoid the obligations of a contract by failing to read it, and when one enters into a written contract without fraud or imposition, he/she is conclusively presumed to understand and assent to its terms and legal effect. Skuse v. Pfizer, Inc., 236 A.3d 939, 948 (N.J. 2020).

Internet contracts come in different types, including "scrollwrap," "sign-in wrap," "clickwrap," or "browsewrap," and hybrid versions of these. Wollen, 259 A.3d at 874-75. "Browsewrap" contracts are those in which the online host dictates that assent is given merely by using the site, not requiring users to manifest assent. Id. at 496. The critical question in browsewrap agreements is whether the terms or a hyperlink to those terms is conspicuous on the webpage. Id. In contrast, clickwrap agreements require users to click a dialog box in order to proceed with an internet transaction. Skuse, 236 A.3d at 953 n.2. Where a clickwrap agreement is concerned, no evidence of actual notice is required; all that is required is that a reasonably prudent user would be on inquiry notice of the disputed terms. Meyer v Uber Techs, Inc., 686 F.3d 66, 74-75 (2d Cir. 2017).

Applying these concepts to the Santana facts, the court found that the contract at issue was a "clickwrap" agreement and therefore the question was whether or not a reasonably prudent user would be on inquiry notice of the arbitration clause. Id. at *9. Plaintiff's argument can be distilled down to that since he did not have to click the links in order to give consent, he should not be bound by terms in the linked documents of which he was unaware, including the arbitration clause. See id. at *3. However, the court found that the title of the hyperlinked document (i.e., "Informed Consent") put plaintiff on reasonable inquiry notice that he was agreeing to the terms contained in that document. Id. at *12. Within the Informed Consent

Within the Informed Consent document, the arbitration agreement was clearly labeled "**AGREEMENT TO ARBITRATE,"** the only fully capitalized and emboldened text in that document. Id. at *12-*13. Without clicking the "I Agree" box, plaintiff could not have completed the sign-up process, further indicating that the referenced documents were assented to by the plaintiff. Id. at *13-*14.

Agreements such as those at issue in Santana are now ubiquitous with so many transactions taking place over the Internet. As in Santana, the minimum best practice for a business seeking to implement terms and conditions for users is to use a "clickwrap" agreement where the consumer must manifest assent by affirmatively clicking a box. In addition to requiring the box to be clicked, the web host can add an extra layer of protection by requiring the consumer to click a link to the terms and conditions document itself to proceed. If a "clickwrap agreement" is not feasible, care should be taken to ensure that the desired terms are reasonably conspicuous to the consumer on the webpage and not easily missed or bypassed. As illustrated by the Court's analysis of the facts and circumstances of SDC's sign-up process in Santana, regardless of the type of agreement it is, the factual circumstances are important and therefore care should be taken to ensure that users have reasonable notice of the terms to which the web host seeks to bind users.

INSUFFICIENT CONTACTS TO WARRANT VENUE BASED ON BIG-BOX RETAIL SALES

Michael G. Watson, et. al. v. Baby Trend, Inc., et. al. **Philadelphia County Court of Common Pleas, Case No. 210802189**

Matthew S. Cioeta is an Associate at **RTJG**

On December 16, 2022, the Philadelphia Court of Common Pleas issued an Opinion and Order affirming the court's previous decision to sustain the Defendants' Preliminary Objections to Venue which sought transfer from Philadelphia County to Bucks County. The court held that there is no precedent for determining a party's contacts in a county to be sufficient to warrant proper venue based solely on an unaffiliated, third-party big-box retailer selling their products there.

FACTUAL BACKGROUND

Plaintiffs brought a products liability action in Philadelphia County alleging that Defendant, Baby Trend, Inc.'s, car seat was defective and caused the death of their 11-month-old child.

DEFENDANTS' PRELIMINARY OBJECTIONS TO VENUE

The Defendants filed Preliminary Objections to Plaintiff's Amended Complaint seeking to transfer venue to the Bucks County Court of Common Pleas. Id. at 2. In response to Plaintiffs' opposition to the Defendant's Preliminary Objections, the Court issued a Rule to Show Cause, directing each party to conduct discovery strictly on the issue of venue. Id. After denying Motions to Compel certain sales data from Baby Trends, Inc., Walmart and Target and a Motion to Overrule filed by Plaintiffs, the court sustained Baby Trends, Inc.'s Preliminary Objections and directed the case be transferred to Bucks County. Id. at 2. Plaintiffs filed an Appeal to the Superior Court of Pennsylvania, to which the Philadelphia Court of Common Pleas filed a 1925(b) Order compelling Plaintiffs to file a Statement of Errors Complained of on Appeal. Id. at 4. Plaintiffs argued that Defendants' Preliminary Objections were improperly sustained, in addition to errors regarding other discovery motions. Id.

PRODUCT MANUFACTURERS' SUFFICIENT CONTACTS TO WARRANT VENUE

In Pennsylvania, actions may be brought against out of state corporations in counties where they regularly conduct business. Id. at 5 (quoting Pa. R.C.P. 2179(a)). While each determination regarding venue is fact-specific, courts must determine whether a corporation is regularly conducting business in a given county. Id. at 5 (citing Monaco v. Montgomery Cab Co., 208 A.2d 252, 256 (Pa. 1965). Courts must apply a quantity-quality analysis which measure acts that directly further their business objectives, and exclude incidental acts. Id. at 6 (citing Monaco). For corporate defendants, many factors must be considered such as the size of the corporation and

their percentage of sales in a given area. Id. at 6 (citing Hangey v. Husqvarna Prof. Prods., Inc., 247 A.3d 1136, 1142 (Pa. Super. 2021)).

The Court noted that the defendant's sales were primarily through big-box retail chains Target and Walmart in addition to less than one percent of sales being made directly to consumers through Baby Trends' website, and only .0018% of its total sales were in Philadelphia County. Id. at 6-7. The defendants claimed no control over where their products are sold to consumers once they are sold to the big-box retailers and that they did not specifically target or advertise to the Philadelphia market in their direct-to-consumer sales. Id. at 7. Plaintiffs argued Baby Trends, Inc.'s contacts with Philadelphia County were sufficient because their products were available in six Target store and four Walmarts. Id. Baby Trends Inc. owned no property or performed any other operations in Philadelphia County. Id.

In sustaining the Baby Trends, Inc.'s Preliminary Objections to Plaintiff's Amended Complaint, the Court noted that the corporation's contacts with Philadelphia County failed both the quality and the quantity prongs of the analysis. Id. at 8. The Court considered Baby Trends' direct to consumer sales to be miniscule and incidental compared to its overall company operations. Id. Additionally, big-box retailers selling or marketing Baby Trends' products was considered incidental acts by the manufacturer. Id. at n 4. The Court noted that its decision to sustain the Defendant's Preliminary Objections was consistent with recent Pennsylvania Supreme Court decisions which similarly sustained venue objections by corporations who had miniscule sales in certain counties and did not operate facilities, own property, or hire employees in the county. Id. at 8-9.

WATCH OUT FOR TRADEMARK SCAMMERS!

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

A significant aspect of my intellectual property practice is the prosecution of trademark registration applications and then, once registrations are allowed, to monitor the registrations to ensure that they are renewed in a timely manner. As I am attorney of record before the United States Patent and Trademark Office (USPTO) in such matters, I alone receive the communications from the USPTO regarding any actions which are required for applications or registration renewals.

However, there are all too many instances when I am contacted by a client who tells me that he or she has received a notice by email or snail mail from an agency, company, or business claiming to be or implying that they are with the USPTO. These notices routinely have almost the identical logo as the USPTO and ominously warn that the USPTO will deny or cancel the application for registration or the registration itself unless a fee is paid. Other official looking notices come from entities which appear to be affiliated with the USPTO and, in this capacity, they solicit fees to help file a trademark registration application, continue the prosecution of an application, or renew the trademark registration itself. Individuals who are taken in by such solicitations and make the requested payments usually receive nothing in return and, in most cases, never hear from the companies again. These types of misleading solicitations and trademark registration filing notices in which scammers attempt to impersonate the USPTO or claim varying forms of endorsements from the USPTO are a real problem, especially to unknowing trademark registrants or applicants.

The USPTO itself has taken a number of steps to protect trademark applicants and registrants from being victimized by scammers, including posting a list of scammers on the USPTO website (https://www.uspto.gov/trademarks/protect/caution-misleading-notices). In addition, the USPTO issues clear warnings about businesses and companies who attempt to confuse and defraud owners of trademark registrations with documents that are intended to look like official USPTO correspondence, whenever the USPTO sends newly issued trademark registration documents to registrants. The USPTO also works with law enforcement when necessary and sanctions businesses which violate USPTO rules.

For example, an individual was recently sentenced to more than four years in federal prison and ordered to pay

over $4.5 million in restitution after pleading guilty to mail fraud in a multi-million dollar scheme to defraud owners of United States trademark registrations. This individual had established and operated companies identified as "Patent and Trademark Office, LLC," and "Patent and Trademark Bureau, LLC." These entities gave the false impression that they were, in fact, the USPTO, scamming more than 2,900 U.S. trademark registrants out of millions of dollars for inflated, and often fake renewal fees.

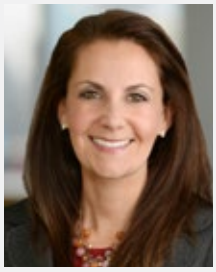
The attorney of record of trademark registration applications and trademark registrations is the only individual who will receive communications from the United States Patent and Trademark Office. As a result, if a trademark registration applicant or trademark registrant receives any document, mailing, or email related to his or her trademark registration or application, an immediate red flag should be raised about the legitimacy of such

GETTING TO KNOW RTJG

DID YOU KNOW...

- RTJG Associate **Kelly J. Woy** and her husband **Jon** are expecting their first child in August.
- The first album RTJG Member **Mike Droogan** bought was **Led Zeppelin IV**. Mike has become an avid fan of Get The Led Out, a Led Zeppelin tribute band. Recently, Mike attended his 20th GTLO show in Collingswood, NJ, with his son, Michael. In February, Mike and some Led heads from RTJG client Wakefern Food Corp. (some First Timers and some Repeat Offenders) attended a GTLO show in Rahway, NJ. For those of you who are in need of ear candy, Mike highly recommends an evening with GTLO; you, too, will become a Repeat Offender.

IN THE COMMUNITY



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

On **May 20, 2023,** over 20 members of Team RTJG participated in the **6th annual Eagles Autism Challenge (EAC**). EAC is dedicated to raising funds for innovative research and programs to help unlock the mystery of autism. EAC is a one-day bike ride and family friendly 5K Run/Walk that begins and ends at Lincoln Financial Field. RTJG has been a sponsor of all 6 EAC events. See photographs of select members of EAC Team RTJG. Also, as part of our Spring fundraiser, RTJG organized **March Madness 50/50** brackets to benefit the **Eagles Autism Foundation.**

On **May 9, 2023**, RTJG served as a sponsor for **The 26th Annual Perlman Cup**, a golf outing for women to benefit Special Olympics New Jersey that was held at Forsgate Country Club.

On **Tuesday June 6, 2023** RTJG employees volunteered to prep and serve dinner at **The Philadelphia Ronald McDonald House (PRMH)**. The PRMH 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.

RTJG employees purchased **4 golf balls** for **The Philadelphia Ronald McDonald House's (PRMH) 2023 Hit 'em for the House Ball Drop**. **On July 10th, 200** golf balls will be dropped from a helicopter and the purchaser of the ball that lands closest to the 18th hole will win $10,000, with $10,000 going back to help support the families staying at PRMH.

Founding Member **Bill Ricci** has been involved in the following recent community projects:

• Participant and personal sponsor of the **May 8th Cystic Fibrosis benefit** in Somers Point, NJ;

• Bill and his musical enterprise **The O'Fenders** remain regular supporters of the Delaware County ALS chapter and their various charity events; and

• **Bill** and his musical enterprise were both sponsor and volunteer workers for the annual **American Legion Havertown, Manoa** Post annual golf tournament and benefit dinner on **May 5, 2023**. The event raises significant monies for wounded and disabled veterans and their families.

Managing Member **John Tyrrell** joined his brothers **Sylvester McClearn** and **Barry Weisblatt** in again sponsoring college scholarships for a deserving male and female senior athlete at **Valley Central High School** in Montgomery, NY. The scholarships honor the memory of the late, great **Billy Cathell McClearn**.