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In the Supreme Court of Pennsylvania

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ANTOINE POTEAT,
Appellee

v.

GARY ASTEAK and NINO V. TINARI,
Appellant and Appellee.

Appeal from the December 11, 2025 Opinion of the *En Banc* Superior Court, reversing the February 7, 2023 Order of the Court of Common Pleas of Lehigh County at No. 2022-C-02045

BRIEF FOR *AMICI CURIAE*,
Pennsylvania Coalition for Civil Justice Reform, Insurance Federation of Pennsylvania, American Property Casualty Insurance Association, Pennsylvania Medical Society, Chester County Medical Society, The Chamber of Commerce of the United States of America and The Pennsylvania Chamber of Business and Industry

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INTERESTS OF AMICI CURIAE

The Pennsylvania Coalition for Civil Justice Reform (“PCCJR”) is a statewide, nonpartisan alliance of organizations and individuals representing health care providers, professional and trade associations, businesses, nonprofit entities, taxpayers, and other perspectives. PCCJR is dedicated to bringing fairness to litigants by elevating awareness of civil justice issues and advocating for reform.

The Insurance Federation of Pennsylvania ("IFP"), a non-profit organization, is Pennsylvania’s leading insurance trade association and represents over 200 insurance companies in Pennsylvania. The IFP’s members encompass insurers of all sizes and issue all types of insurance policies. The aforesaid membership represents approximately half of the insurance premium volume written in the Commonwealth of Pennsylvania. The IFP is committed to ensuring a balanced and fair insurance environment in Pennsylvania and routinely serves as the voice of the insurance industry in litigation in the Commonwealth where the industry’s interests are implicated. The IFP enjoys a well-earned reputation for integrity in the pursuit of its members’ interests.

American Property Casualty Insurance Association ("APCIA") is a leading national trade association for home, auto, and business insurers. With a legacy dating back 150 years, APCIA promotes and protects the viability of private competition to benefit consumers and insurers. APCIA's member companies represent 70.8 percent of the Pennsylvania property-casualty insurance market, including 78.7 percent of the commercial lines market. On issues of importance to the property and casualty insurance industry and marketplace, APCIA advocates sound public policies on its members' behalf in legislative and regulatory forums at the state and federal levels, and files amicus briefs in significant cases before federal and state courts. This allows APCIA to share its broad national perspective with the judiciary on matters that shape and develop the law. APCIA's interests are in the clear, consistent, and reasoned development of law that affects its members and the policyholders they insure.

The Pennsylvania Medical Society (the "Medical Society"), is a Pennsylvania non-profit corporation, representing physicians of all medical specialties and advocates on behalf of the Commonwealth's physicians and their patients. The Medical Society, as Pennsylvania's largest physician organization, regularly participates as an *amicus curiae* before this Honorable Court in cases addressing important health care issues, including issues that have the potential to adversely impact the quality of medical care. Chester County Medical Society ("CCMS") is an independent, non-profit, membership organization for physicians. Its members include D.O.s, M.D.s, medical residents and fellows, active and retired physicians. It is open to all physician specialties and is the only physician organization in Chester County. It is also the oldest medical society in the state of Pennsylvania. The mission of CCMS is to support and advocate for all physicians who work or live in Chester County and their patients. To that end, CCMS is involved in political advocacy at the county and state levels, the continuing education of their physician members, providing access to practice management resources and assistance, physician leadership programs, and ensuring the health of the Chester County community. Together with the other counties across the state and with the Pennsylvania Medical Society, CCMS provides a powerful voice of unity, awareness and strength for the medical profession.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the

Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Pennsylvania Chamber of Business and Industry ("PCBI") is the largest broad-based business association in Pennsylvania. It has over 13,000 member businesses throughout Pennsylvania, which employ more than half of the Commonwealth's private workforce. Its members range from small companies to mid-size and large business enterprises across all industry sectors in the Commonwealth. The Pennsylvania Chamber's mission is to advocate on public policy issues that will expand private sector job creation, to promote an improved and stable business climate, and to promote Pennsylvania's economic development for the benefit of all Pennsylvania citizens. The Chamber works to create a fair, balanced, and common-sense civil litigation system that gives predictability and certainty and achieves greater efficiencies and unbiased justice.

Pursuant to *Pa. R.A.P. 531(b)(2)*, *Amici Curiae* state that no person, other than the above-referenced organizations, their respective members, and their respective counsel, paid for or authored this brief, in whole or in part.

SUMMARY OF THE ARGUMENT

For centuries, Pennsylvania has recognized a bright-line distinction between tort claims and contractual claims. The distinction is a matter of common sense: the claims have different elements, allow for different forms of recovery and are governed by different statutes of limitations. The "gist of the action" doctrine was developed to ensure that these distinctions remain intact. Embraced by this Honorable Court in Bruno v. Erie Insurance Co., 106 A.3d 48 (Pa. 2014), the doctrine is a bilateral rule that places substance over label. It applies evenly to 1) a claim pled as a tort but seeking recovery for a contractually agreed upon promise without an independent social duty; and 2) a contractual claim that, in truth, rests on nothing but an ordinary social duty of reasonable care applicable to a tort and not expressly contemplated by the contractual terms. The doctrine asks a single question regardless of how a plaintiff captions the claim: is the duty breached one that is recognized as a social duty to the public or is it one created under an express contractual provision?

The Superior Court inexplicably abandoned Bruno's bilateral test by finding that "contract claims never were, and are not now, subject to the gist-of-the-action doctrine." In doing so, the Superior Court effectively wrote the "gist of the action" doctrine out of existence in Pennsylvania.

The Superior Court's decision allows future claimants to blur the distinctions between contractual and tort claims as they see fit. Doing so cannot be reconciled with Bruno, precedential authority that distinguishes tort and contract claims, nor the sound expectations of Pennsylvania defendants recognized under the rules of civil procedure. Simply put, the "gist of the action" doctrine is a procedural necessity that ensures against improper conversion of claims.

If an implicit expectation to perform, standing alone, can support a freestanding contract claim, then ordinary negligence claims arising anywhere a contract happens to exist can be repackaged as contract claims at will, thereby defeating the two-year tort limitations period, the certificate-of-merit requirement for licensed professionals and the different damages available under the relative claims all in one stroke. Doing so frustrates the expectations of defendants relying on these limitations as well as the insurers that must underwrite, reserve, assess coverage and litigate these claims. Yet this is precisely what the Appellee urges this Court to allow. *Amici* thus respectfully request that the Superior Court's decision be reversed and the gist of the action doctrine be re-affirmed with emphasis detailing the bilateral nature of the Bruno test, accordingly.

ARGUMENT

I. "Gist of the Action" Doctrine is a Procedural Necessity

A. Generally

The differences between contractual claims and tort claims are vast, ranging from a difference in their elements, available damages, and temporal limitation. *See e.g.* Hart v. Arnold, 884 A.2d 316, 339 (Pa. Super. 2005) ("Although they derive from a common origin, distinct differences between civil actions for tort and contractual breach have been developed at common law. Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals.")

These distinctions dictate rejection of a given plaintiff's attempt to convert one cause of action into another. The prohibition on morphing the two causes of action into one another dates back centuries. For example, in Zell v. Arnold, 2 Pen. & W. 292 (Pa. 1830), the plaintiff contracted with the defendant to build a clover mill and to dig a trench meant to divert a stream to the mill. The defendant's construction was faulty and failed to grade the land around the trench in a manner that made the mill functional. Id. The plaintiff brought suit alleging that the defendant had "negligently, carelessly, and unskillfully, graded and laid off" the construction so as to make the improvements useless. Id. After the court awarded costs, a remedy only available for tort actions, the defendant appealed.

The Zell Court explained that the mere existence of a contract does not shield a defendant from all tort claims. Rather, Zell explained that "the gist of an action on the case like the present, is not a failure to *perform,* but a failure to perform in a workmanly manner, which is a tort." Id. at 294.[1]

While Zell recognized that "there are sometimes concurrent remedies," it is the "gravamen" of the action that governs the proper cause of action allowed to go forward. Id. Zell in many ways foreshadowed this Honorable Court's decision in Bruno by explaining that a cognizable tort claim is not negated merely by the existence of a contract between the parties where a defendant holds an independent collateral duty to diligently preform and fails to do so.

Three years later, in McCahan v. Hirst, 7 Watts 175 (Pa. 1838), this Honorable Court clarified Zell by considering the inverse situation. In McCahan, the defendant failed to properly store clover seed as agreed upon with the plaintiff under contract. Despite the presence of averments of

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[1] *Amici* underline the fact that, contrary to the Superior Court's *en banc* decision in Swatt, *infra*, consideration of the "gist of the action" or "gravamen" of the claim alleged, regardless of its actual label, was being considered by this Honorable Court as early as 1830 in Zell. *See also* Krum, *infra* at 600 ("This negligence is the very gist of the action.")

negligence, the McCahan Court held that "the contract is the real foundation of the cause of action, which must be considered as arising immediately from the breach of it." Id. at 178. Because the allegations included a failure to perform the contractual duty, rather than an affirmative, collateral, negligent act committed during the performance of a contract, the McCahan Court refused to convert the contractual claim to one of tort. The gravamen of the action was a breach of contract regardless of how the plaintiff labeled it.

For the sake of completeness, *Amici* note that in the subsequent century of litigation, this Honorable Court has repeatedly explained the distinctions between tort claims and contract claims, prohibiting conversion of one into the other. *See e.g.* Cook v. Haggarty, 36 Pa. 67, 1859 WL 8877 (Pa. 1859) (allowing contractual defenses to proceed despite averments pleading tot claims, where the duty breached stemmed from a contractual undertaking); Krum v. Anthony, 8 A. 598, 600 (Pa. 1887) (finding that mere existence of a contract does not convert a tort claim into a contract claim, where the parties' respective negligence, and not the defendants' failure to perform a contractually required duty, was "the very gist of the action."); Horney v. Nixon, 61 A. 1088, 1089 (Pa. 1905) (barring averred tort claim where defendants had only undertaken a purely contractual duty to furnish the plaintiff with theater seats and no collateral social duty created by law to do so existed.)

These early decisions evidence that Pennsylvania's embrace of the gist of the action doctrine is not a recent innovation. It roots back centuries, and for good reason. The need for distinguishing tort claims from contractual claims to allow for proper measure of the viable causes of action and defenses thereto, as well as the expectations of the respective parties as to the breadth and limitations of those actions. Further, the above-referenced cases forbid conflating the claims and morphing them into one another, whether tort-into-contract or contract-into-tort.

While the Pennsylvania Rules of Civil Procedure do not expressly reference the gist of the action doctrine as grounds for dismissal of a given claim, the doctrine's application is analogous to testing the legal sufficiency of a claim under *Pa.R.Civ.P. 1028(a)(4)* as a form of demurer to determine the correct source of the duty allegedly breached. A litigant may urge application of the gist of the action to distinguish one type of claim from another and, where appropriate, the doctrine may be used to argue that a cause of action is deficient as a matter of law. While both early and later decisions have discussed the doctrine in passing[2], this Honorable Court's decision in Bruno cemented it as a recognized defense in Pennsylvania.

B. Bruno v. Erie Confirmed Bidirectional Test for Doctrine

In Bruno, *supra*, the plaintiffs alleged that their insurer's agents acted negligently by advising that the mold in plaintiff's home was harmless and without health consequences while investigating a claim under their homeowners policy. Id. at 51-52. In reliance on these assurances, and without being provided with the toxic testing results conducted by the insurer, the plaintiffs continued to live in the home and proceeded with renovations. After ultimately developing significant health issues and securing independent testing, the plaintiffs found that the mold was in fact toxic and the insurer paid the contractual insurance limits available to remediate the mold. Id. at 52-53.

The plaintiffs filed suit against both the insurer and its agent. The Complaint omitted breach of contract claims by virtue of the contractual limits being paid, but included numerous negligence claims against the insurer for "failure to recognize the nature and severity of the mold problem at the

[2] *See e.g.* McShea v. City of Philadelphia, 995 A.2d 334, 339 (Pa. 2010) (Internal citations omitted) ("Appellants add they were precluded by the 'gist of the action' doctrine from suing the City in tort. This doctrine 'maintain[s] the conceptual distinction between breach of contract claims and tort claims[,]' and precludes plaintiffs from recasting ordinary breach of contract claims as tort claims.")

premises"; "misleading [the Brunos] concerning the nature of the mold problem in general and as it related to their health and home"; "minimizing the dangers and consequences of the mold infestation when it knew or should have known otherwise"; and the "creation or exacerbation of a dangerous condition." Id. at 52. The Complaint likewise contained a claim for professional negligence against the agent alleging "that it was negligent for: delaying and then improperly conducting mold testing of the Bruno home; failing to properly read, interpret, and analyze the test results; delaying the reporting of the test results to the Brunos; failing to recognize and report to the Brunos the danger to their health and to the premises created by the mold; and minimizing the dangers and consequences posed by the mold infestation, when it knew or should have known otherwise." Id. at 53.

Both defendants filed preliminary objections urging, *inter alia*, that the cause of action in the complaint, although sounding in tort, is in truth a claim against the party for breach of its contractual obligations. This Honorable Court granted review to determine, in relevant part, whether the trial court properly applied the gist of the action doctrine to bar the tort claims.[3]

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[3] The relevant question presented accepted for review was styled:

Does the "gist of the action" doctrine bar recovery on the Brunos' negligence claim against Erie Insurance Company ("Erie" or "Insurer") where their claim was not based on the underlying insurance contract or Erie's obligations thereunder, but instead upon independent, affirmative, and gratuitous acts and omissions of the Insurer and its expert

The Bruno decision synthesized that long line of authority prohibiting the conversion of tort and contractual claims into one another, explaining that centuries of precedent "has consistently regarded the nature of the duty alleged to have been breached, as established by the underlying averments supporting the claim in a plaintiff's complaint, to be the critical determinative factor in determining whether the claim is truly one in tort, or for breach of contract. In this regard, the substance of the allegations comprising a claim in a plaintiff's complaint are of paramount importance." Bruno expressly held that the plaintiff's labeling of a claim as being a tort or a contractual matter is "not controlling." Id. at 68.

Instead, Bruno created a test to determine when such conversion is prohibited, holding that "the nature of the duty breached, as alleged in the plaintiff's pleadings, is determinative of the gist of the action; hence, actions arising 'directly' from an alleged breach of a contractual duty were to be regarded as being in contract; whereas, those actions based on an alleged breach of a contracting party's separate 'collateral' duty to perform a contractual obligation with skill and diligence were to be considered as being

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agent/contractor when they summarily and without analysis or testing told Mr. Bruno that the mold infestation in the home was not dangerous and described the dangers of mold as a media exaggeration?"

Bruno, *supra* at 55.

in tort." Id. at 63. Thus, where the contract acted "merely as the vehicle, or mechanism, which established the relationship between the parties, during which the tort of negligence was committed," the cause of action remains one of tort. Id. at 69.

Boiled down to its simplest form, Bruno held that the mere existence of a contract between the parties does not give rise to a viable contractual claim much in the same way as the existence of damages as a result of a defendant's actions does not in and of itself give rise to a tort claim. The proper measure is whether the alleged duty breached is imposed by an explicit provision in the contract or by legal duties owed to society as a whole.

C. Superior Court Misapplied the Bruno Test

The Superior Court in this case erred in its interpretation of the Bruno test. Relying on its decision in Swatt v. Nottingham Vill., 342 A.3d 23 (Pa. Super. 2025) (en banc), appeal denied, 352 A.3d 452 (Pa. 2025), the Superior Court held that "'contract claims never were, and are not now, subject to the gist-of-the-action doctrine'" and that "'[t]he doctrine does not extinguish contractual rights, simply because the defendant's conduct may also be a tort.'" Poteat v. Asteak, 350 A.3d 198, 202 (Pa. Super. 2025) (en banc), appeal granted, 2026 WL 2015737 (Pa. July 13, 2026) (quoting Swatt). This one-directional rule attributed to the gist of the action doctrine is contrary to Bruno, a host of precedential decisions refusing to allow conversion of a tort claim into a contractual claim, and sheer common sense.

Contrary to the Superior Court's interpretation, Bruno describes the test in bidirectional terms, as follows:

> If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract — i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract — then the claim is to be viewed as one for breach of contract. If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort.

Id. at 68. (Internal citations omitted).

Both halves of that sentence are operative. The doctrine bars a plaintiff from re-pleading an ordinary tort as "breach of contract" to reach a longer limitations period or different remedies much in the same way that it bars contractual claims from being re-pled as standard negligence claims. Bruno simply does not hold, either implicitly or explicitly, that the gist of the action doctrine is a one-directional test that can never, under any circumstances, bar a plaintiff from converting a tort claim into a contractual one in an effort to be afforded an extended statute of limitations. This case presents an opportunity for this Honorable Court to cement the bidirectional nature of the

Bruno test and erase any remaining confusion as to the breadth of the gist of the action doctrine.

This Court confronted this exact scenario in Ash v. Continental Insurance Co., 932 A.2d 523 (Pa. 2007), holding that a claim styled as a breach of the insurance contract, but "based on tort-like standards of care," actually sounds in tort and is governed by the two-year limitations period that governs tort claims, not the longer period available for breach of contract. Id. at 528–29. Ash thus applied the very same substance-over-label principle that the Superior Court's reasoning would foreclose, applying that principle to bar a plaintiff from using a contract label to escape the consequences of pursuing what was, in truth, a tort claim. *See also* Krum, *supra* (rejecting the existence of a contract between the parties serving to create a contractual breach where the gist of the action was based in tort).

In fact, a litany of Superior Court panel decisions following Bruno have applied the test to contractual claims in the same context as the instant appeal. *See e.g.* Johnstone v. Raffaele, 241 A.3d 479 (Pa. Super. 2020) (non-precedential); Corliss v. Lee A. Ciccarelli, PC, 272 A.3d 457 (Pa. Super. 2022) (non-precedential); Outerlimits Techs., LLC v. O'Connor, 311 A.3d 569 (Pa. Super. 2023) (non-precedential); Meksin v. Glassman, 2019 WL 2183809 (Pa. Super. 2019) (non-precedential). Indeed, all of the above decisions involved courts applying the gist of the action doctrine to bar a claimant's legal malpractice tort claim from being recast as a contractual claim merely due to the fortuitous existence of a contract between the parties. This is because the contracts lacked any *express* contractual promise that was breached and thus merely served as a vehicle to establishing a relationship between the parties as outlined in Bruno.

The above-referenced Superior Court panels were comprised of a combined eight different Superior Court judges, all of whom applied the gist of the action doctrine to prevent the plaintiff from recasting a tort claim as a contractual breach by merely re-labeling the cause of action. Indeed, the "implied" contractual duty existed in the same manner in these cases, yet these Superior Court panels refused to allow such an implied duty to create a separate and distinct breach of contract claim where no express promise within the contract was breached. They correctly recognized that where there *is* no express contractual term *to* breach in the retainer agreement, there can *be* no "breach of contract" claim. The gravamen, or gist, of the claim remains one founded in tort.[4]

[4] The Superior Court in Swatt spilled much ink detailing the origins of the doctrine and the definitions of the word "gist" to describe its allegedly improper application by prior panels. But the term "gist of the action" is merely a name appended by courts to the practice of rejecting the conversion of one type of claim into another. The *name* of the practice is immaterial; we can call it "gist of the action," "gravamen of the claim" or by any other

But the *en banc* Superior Court in this case simply overruled all of these panel decisions as wrongly decided. Apparently finding that eight different appellate judges[5] improperly analyzed Bruno, the *en banc* Superior Court rejected the bidirectional approach in favor of a singular, one-way application of the "gist of the action" doctrine that could never, under any circumstances, apply to breach of contract claims. It erred in doing so.

D. Superior Court Misinterpreted Bailey v. Tucker

The Superior Court largely relied on Bailey v. Tucker, 621 A.2d 108 (Pa. 1993) in concluding that a client filing suit against former criminal defense attorneys can validly claim a breach of contract based solely on the attorneys' "implied duty" to provide competent legal services. The Superior Court suggested that there was no need for the client to allege a violation of any specific and express contractual promise because the "implied duty" to perform the contract, alone, created an "enforceable contractual right" to seek contractual damages for an attorney's failure "to represent a client in a

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name. It is the method of *applying* this practice evenly by the courts to maintain the legal distinction between tort and contract claims that is material to this appeal.

[5] Judge Stabile authored the dissenting opinion at the *en banc* level in the instant case, thereby raising the total tally to nine Superior Court judges that have applied Bruno in a bidirectional manner and refusing to allow the recasting of a tort claim as a contractual one under materially identical facts. Three more Third Circuit appellate judges did the same in N.Y. Cent. Mut. Ins. Co. v. Edelstein, 637 F. App'x 70, 73–74 (3d Cir. 2016) (applying Bruno and the gist of the action doctrine to determine that a legal malpractice claim against attorneys hired by an insurer was tort rather than contract in nature, despite the contractual framing).

manner that comports with the professional standards of the legal profession." Poteat v. Asteak, 350 A.3d 198, 203-204 (Pa. Super. 2025) (en banc), appeal granted, No. 23 MAL 2026, (Pa. July 13, 2026).

The issue with the Superior Court's reliance on Bailey is that Bailey pre-dated Bruno and the bilateral test established therein. Without the benefit of the Bruno-test, the Bailey decision does not address the current state of the law and is of questionable authority, if not outright overruled by Bruno.

Moreover, the reasoning relied upon by the Superior Court from Bailey is inapplicable as non-binding *dicta* relating to the issue at hand. In Bailey, this Honorable Court considered two consolidated cases in which the plaintiffs were former criminal defendants who were suing their attorneys for malpractice under theories of both negligence and breach of contract. Id. at 110-12. The attorneys sought dismissal pursuant to the statutes of limitation; they also argued generally that criminal defense attorneys should be immune from malpractice claims on social policy grounds. Id. The Court found partial merit in the argument that the practice of criminal law should expose attorneys to less liability than those practicing civil law. The request for immunity was rejected, but the Court set forth different sets of elements for negligent malpractice in the context of criminal and civil law.

The Court stated that, to "bring a trespass action against a criminal defense attorney, ... the plaintiff ... must establish ... [r]eckless or wanton disregard of the defendant's interest on the part of the attorney." Id. at 114-115. This differed from the standard given for negligence in a civil malpractice action: "The failure of the attorney to exercise ordinary skill and knowledge[.]" Id. at 112. It was in that context that the Bailey Court then briefly discussed the elements of a breach of contract (assumpsit) malpractice action:

> **ACTIONS IN ASSUMPSIT**
>
> We now turn our attention to the second type of malpractice issue: an assumpsit claim based on breach of the attorney-client agreement. This claim is a contract claim and the attorney's liability in this regard will be based on terms of that contract. Thus, if an attorney agrees to provide his or her best efforts and fails to do so an action will accrue. Of course an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large.
>
> Thus, this cause of action proceeds along the lines of all established contract claims. It does not require a determination by an appellate court of ineffective assistance of counsel, nor does the client need to prove innocence. However, in anticipation of potential problems it is necessary to comment on the aspect of recoverable damages in such an action; quite simply, such damages will be limited to the amount actually paid for the services plus statutory interest. Our reasons for imposing this limitation are

> the same as those discussed above; to allow consequential damages in such a situation will engender the same problems as those we sought to limit above [in the discussion of actions in trespass for negligent malpractice].

Id. at 115.

The Superior Court in this appeal selectively read the above portion of Bailey, quoting only the part that states, "if an attorney agrees to provide his or her best efforts and fails to do so, an action will accrue. Of course, an attorney who agrees for a fee to represent a client **is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large**." Poteat, *supra* at 203 (Emphasis retained). But in doing so, the Superior Court omitted, or outright ignored, the prefatory language emphasized by the Bailey Court that "[t]his claim is a contract claim and the attorney's liability in this regard ***will be based on terms of that contract***. Thus, if an attorney agrees to provide his or her best efforts and fails to do so an action will accrue." Bailey, *supra* at 115 (Emphasis added).

The Bailey Court indeed referred to an express promise by the attorney to provide his or her best efforts. It was only after stating that basic principle that Bailey remarked further, "[o]f course an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large." Id. Bailey did not hold that this implied obligation, alone, would be enough to sustain a breach of contract claim. It merely observed that an attorney takes on an implied duty of professionalism when engaged by a client to provide legal services.

Had the Bailey Court intended to overrule all of this Court's prior precedent, it would have discussed the established law requiring the breach of an express contractual undertaking to sustain a breach of contract, and then clarified why that precedent was no longer viable. Indeed, any suggestion that Bailey off-handedly abrogated a century of established law in a single sentence that had nothing to do with the ultimate holding of the case is puzzling. "The fact that some decisions of the Court apply loose language cannot mean that the Court must always do so going forward, as this would institutionalize an untenable slippage in the law. Indeed, various principles governing judicial review protect against such slippage, including the axiom that the holding of a judicial decision is to be read against its facts. Oliver v. City of Pittsburgh, 11 A.3d 960, 966 (Pa. 2011) (internal citations omitted). Yet applying "loose language" is precisely what the Superior Court did while relying on Bailey to come to its decision in this appeal.

The evident focus of the holding in Bailey was not on explicating the difference between tort and contract claims arising out of legal malpractice. The plaintiffs' respective malpractice claims were all filed beyond both the applicable two-year limitations period for negligence claims and four-year statute of limitations period for contractual claims. On that sole basis, the complaints were barred as untimely. Id. at 116-17. The Bailey Court's reference to an implied duty in contracts for legal services was completely divorced from its holding, making that portion of the opinion non-binding *dictum*. There was nothing novel about Bailey's description of implied duties for a breach of contract claim by its own terms. The holding's allusion to an attorney's implied duty only underscored an already existing proposition that there is a difference between an attorney's failure "to follow specific instructions ... [in] a specific provision of the contract" and an attorney's failure "to exercise the appropriate standard of care." *See* Storm v. Golden, 538 A.2d 61, 65 (Pa. Super. 1988). The former conduct would sound in contract, while only the latter conduct would sound in tort.

The Superior Court's decision simply cannot be reconciled with Bruno, Ash, and Krum, among others. If, moving forward, it is accepted that "contract claims were never, and are not now, subject to the gist-of-the-action doctrine," then such rulings cannot stand independently: any plaintiff or insured seeking to bypass the application of the gist-of-the-action doctrine to a tort-like claim would only need to frame the claim and outline its elements as "breach of contract" or breach of an implied covenant — a tactic that Ash previously found insufficient. A doctrine that can be nullified every time by simply choosing a different label is effectively meaningless. Bruno's "nature of the duty" test must function in both directions; otherwise, it loses the purpose it has long served, as recognized by this Court and the Superior Court's prior decisions applying Bruno to legal-malpractice claims.[6]

The Superior Court's decision creates a clear conflict that presents two incompatible rules: this Honorable Court's dual-directional "nature of the duty" test from Bruno, and the newer, unidirectional rule adopted by the Superior Court that categorically excludes contract claims from the scope of the gist of the action doctrine. Clarification to resolve this conflict from this Honorable Court would provide much needed guidance. In light of the gist of the action doctrine's history, as well as the implications of conflating tort and contract claims without the doctrine, *Amici* respectfully request that this Honorable Court reverse the Superior Court, re-affirm the gist of the action

[6] *Arguendo*, even if Bruno did not *explicitly* hold that the gist of the action doctrine applied in a bidirectional fashion, this Honorable Court should extend the Bruno test and now hold that it extends bidirectionally in this appeal.

doctrine's applicability in Pennsylvania and provide guidance as to the proper application of the bidirectional Bruno test.

Specifically, *Amici* respectfully submit that clarification of the Bruno test is warranted to determine how to properly analyze when a duty is one that is rooted in 1) laws imposed on society and thus qualifying as a tort; 2) contractual obligations and thus qualifying as a breach of contract; or 3) both. The importance of this clarification serves to both cement the gist of the action doctrine in Pennsylvania but also provide the respective parties with guidance on how to properly plead their claims and defenses.

II. Practicalities Independently Compel Affirmance

A. Generally

The gist of the action doctrine is both solidified in Pennsylvania procedure and bars conversion of a time-barred tort claim into a contractual claim merely due to the fortuitous existence of a contract between the parties. Beyond the above-referenced precedent on the issue, maintaining the distinctions between the two types of claims, regardless of the label included in the complaint, serves the reasonable expectations relating to the standards, available damages, statutes of limitations, and ultimate exposure for Pennsylvania defendants and their insurers.

B. Superior Court Decision Erases Expectations of Parties

The flaw in the Superior Court's refusal to adhere to the bright-line distinctions between tort and contract claims is underlined when the practical realities of its decision are considered. Tort and contract claims each have distinct standards of proof, remedies, and procedural timelines. These distinctions are vast under Pennsylvania law, and defendants reasonably expect that claims against them will be governed as such.

As an illustrative example, tort claims are subject to a two-year statute of limitations while a breach of contract claim is subject to a four-year statute of limitations. *See 42 Pa.C.S. §§ 5524; 42 Pa.C.S. §§ 5525.* Tort claims allow for recovery of punitive damages while contractual claims do not. Professional negligence tort claims require a certificate of merit for certified professionals while contractual claims against these defendants would not. *See Pa.R.C.P. 1042.1-1042.3.* Pennsylvania defendants rely on these distinctions in ascertaining both their exposure as well as the applicable defenses available. More importantly, the significant differences in the respective statutes of limitations between tort and contract claims provide defendants with reasonable expectations of finality for when a given claim will be barred, whether in the professional negligence context or otherwise.

The Superior Court's decision blurs the line between tort and contract claims. In doing so, it erases a previously held understanding of certain protections afforded to defendants they have come to reasonably expect while simultaneously minimizing the pleading standards for claims against them. The decision effectively eliminates the distinction Bruno made between duties "created by the parties through their contractual agreement" and "broader societal duties owed to all individuals," which exist "independent of any contract." Id. at 68.

The obligation to perform "competently"— which involves applying the skill, care, and diligence expected within the profession or trade — is the classic tort standard of care. It is not a promise negotiated between parties. It is not "a specific promise to do something that a party would not normally be obligated to do absent the contract." Id. Every professional and tradesperson owes this same duty of competent performance to the public, regardless of contractual arrangements. This principle underpins Pennsylvania's approach to addressing breaches through the tort of professional negligence, which is limited by a two-year statute of limitations and, for licensed professionals, requires a certificate of merit screening.

Nothing in the Superior Court's reasoning is confined to attorneys. Insurance agents and brokers have the same duty of reasonable care to their principals and clients when securing the coverage they request; medical professionals have a duty to provide reasonable and competent care to their patients; even insurers themselves are frequently subject to lawsuits concerning how they investigate, assess, and settle claims as illustrated in the Bruno case itself.

All of these relationships are initially founded on contractual agreements, be it an insurance agency/broker contract, a medical engagement or an insurance policy. Each contract implicitly expects a standard of competent performance. If such an unstated expectation of competence alone is adequate to support a standalone breach of contract claim that is immune from gist-of-the-action review, then any dissatisfied party could avoid pleading in tort altogether. Nearly every professional negligence claim between parties in a contractual relationship could be framed as a breach of contract, allowing the claimant to benefit from the four-year contract statute of limitations rather than the two-year period applicable to tort claims, and to bypass the certificate-of-merit requirement designed specifically to evaluate the merit of professional negligence claims before they proceed. This would be despite plaintiffs not being able to point to a single contractual provisions that was actually breached.

The fatal flaw in the Superior Court's reasoning is the failure to recognize that its decision effectively eradicates the "gist of the action" doctrine in Pennsylvania as a whole. If an "implied" duty within any given contract can morph a tort claim into a contractual one, the gist of the action doctrine cannot apply to any tort claims masquerading under the label of "breach of contract." Yet the inverse applies in the same manner. A plaintiff may simply label a tort claim as negligent performance *of* a service otherwise contracted for, as opposed to a *failure* to perform that very same contractual service. By casting the claim as negligent affirmative performance, rather than a failure to perform, plaintiffs would effectively convert contractual claims into tort claims, thereby opening up additional avenues of recovery via punitive damages, costs and other forms of exposure.

But labels and legal conclusions assigned to a given cause of action in the complaint are to be disregarded as an immaterial form of "artful pleading." Mut. Benefit Ins. Co. v. Haver, 725 A.2d 743, 745 (Pa. 1999). If such a small change in the verbiage of the pleadings serves to morph a contractual claim into a tort claim, the "gist of the action" doctrine becomes obsolete. For this reason, *Amici* submit that clarification of the Bruno decision is necessary to guide how to properly test whether a given duty arises solely from the contractual relationship, solely from a social obligation under the law, or both.

C. Insurance Considerations Support Reversal

Lastly, the Superior Court's willingness to analyze torts and contract claims interchangeably, and without regard to the Bruno test, strains insurance underwriting practices and associated rating of the risk involved. This issue is not merely academic. Insurers assess risk, establish reserves, and handle claims litigation based on the expectation that negligence-based claims will be pursued within the two-year window established by the General Assembly, and that claims of professional negligence against licensed professionals will undergo screening through the certificate-of-merit requirement before moving forward. Allowing any such claim to be reclassified as a four-year contract claim simply by identifying an implied duty of competent performance that tort law already recognizes for all professionals and tradespeople creates the very unpredictability, risk of stale claims, and weakening of professional-negligence screening that Bruno's bidirectional test was intended to prevent.

Predictability in this area is crucial to insurers, as it is priced into underwriting, reserving, and claims-handling practices across the Commonwealth that are ultimately borne by Pennsylvania policyholders. When underwriting and rating insurance policies, "there is a correlation between the premiums paid by the insured and the coverage a claimant could reasonably expect to receive.'" Est. of O'Connell ex rel. O'Connell v. Progressive Ins. Co., 79 A.3d 1134, 1139 (Pa. Super. 2013); *See also* Hall v. Amica Mut. Ins. Co., 648 A.2d 755, 761 (Pa. 1994). Put simply, the insurance industry functions where underwriters demand higher premiums to insure against higher risk and associated exposure. Old Guard Ins. Co. v. Houck, 801 A.2d 559, 567–68 (Pa. Super. 2002).

As outlined above, the distinctions between tort and contract claims differ in the extent of exposure, the types of damages that are recoverable as well as the appropriate statute of limitations period for when they may be brought. The insurance industry factors this potential exposure, as well as the timing when the exposure is cut off, into its underwriting practices while setting rates for Pennsylvania policy holders.

The Superior Court's decision suggests that, going forward, *any* liability claim sounding in tort may simply be recast as a breach of an implied contractual duty as a result of the fortuitous existence of a contract between the parties. Doing so would double the statute of limitations and associated exposure for any given defendant and, in turn, their insurer. This becomes more problematic in the professional liability context, where insurers underwrite risks both prospectively on occurrence-based policies as well as retroactively on claims-made policies. If, as the Superior Court suggests, *any*[7] professional liability claim for negligence can be recast as a contractual breach of an implied duty to double the length of the statute of limitations, the length of the appreciable exposure for insurers would double. Moreover, retired professionals would be required to maintain claims-made policies following retirement with extended retroactive dates to account for a longer statute of limitations for potential exposure.

Such an increase in potential risk for all professional liability insurers, both prospectively and retroactively, is a change not previously contemplated in Pennsylvania and would put significant upward pressure on rates. It should thus be considered in measuring the Superior Court's attempt to distance Pennsylvania from both Bruno and the distinctions between tort and contractual claims that were previously recognized by this Honorable Court as a matter of course.

CONCLUSION

For the reasons set forth above, *Amici Curiae*, Pennsylvania Coalition for Civil Justice Reform, Insurance Federation of Pennsylvania, American Property Casualty Insurance Association, Pennsylvania Medical Society,

[7] As professional services are typically undertaken under a contract in all instances, it is a factual impossibility that the claim would be limited to a tort where no contract of any kind exists. In turn, the Superior Court's reasoning serves to permanently extend the statute of limitations on all professional negligence claims.

Chester County Medical Society and The Chamber of Commerce of the United States of America, respectfully request that this Honorable Court reverse the Superior Court's decision.

Respectfully submitted,

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DATED: September 23, 2026

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 2135, I certify the following:

This brief complies with the type-volume limitation of Rule 2135 and contains 6,508 words, excluding the parts to the brief exempted by Rule 2135(b).

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF SERVICE

Glen Shikunov, Esquire, hereby certifies that a copy of the Brief of *Amici Curiae* was served on the date noted below via electronic filing, addressed as follows:

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