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## Home is Where the Confusion Is: Pennsylvania Formally Adopts the "Gist of the Action" Doctrine and Builds a House for Ambiguity in Bruno v. Erie Insurance Co.

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## Notes

HOME IS WHERE THE CONFUSION IS: PENNSYLVANIA FORMALLY  
ADOPTS THE “GIST OF THE ACTION” DOCTRINE  
AND BUILDS A HOUSE FOR AMBIGUITY IN  
*BRUNO v. ERIE INSURANCE CO.*

LAUREN ANTHONY\*

“If you can’t convince them, confuse them.”<sup>1</sup>

I. DRAWING THE FLOOR PLAN: AN INTRODUCTION TO THE  
CONTRACT–TORT DISTINCTION AND THE  
“GIST OF THE ACTION” DOCTRINE

The contract–tort distinction is fundamental to civil litigation in the United States.<sup>2</sup> While actions for breach of contract compensate the plaintiff for damages foreseeable at the time of a contract, tort claims remedy injuries resulting from the defendant’s conduct.<sup>3</sup> Nonetheless, the

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1. Harry S. Truman, *Address at the State Fairgrounds*, in MIRACLE OF ’48: HARRY TRUMAN’S MAJOR CAMPAIGN SPEECHES & SELECTED WHISTLE-STOPs 132, 139 (Steve Neal ed., 2003) (internal quotation marks omitted) (discussing phrase as political technique during campaign speech).

2. See *Erlich v. Menezes*, 981 P.2d 978, 982 (Cal. 1999) (“[T]he distinction between tort and contract is well grounded in common law, and divergent objectives underlie the remedies created in the two areas.” (alteration in original) (quoting *Hunter v. Up-Right, Inc.*, 864 P.2d 88, 90 (Cal. 1993)) (internal quotation marks omitted)).

3. See *Kearl v. Rausser*, 293 F. App’x 592, 604–05 (10th Cir. 2008) (illustrating contract–tort distinction regarding damages).

contract–tort distinction is often unclear and leaves courts to maintain this ambiguous legal boundary.<sup>4</sup>

This blurred boundary is complicated by plaintiffs' ability to recover additional forms of damages by bringing actions under tort law rather than under contract theory.<sup>5</sup> Some argue that plaintiffs attempt to disguise breach of contract claims as tort claims to receive a greater damage award.<sup>6</sup> Consequently, courts have imposed barriers for plaintiffs who assert tort claims against parties with whom they are in privity of contract.<sup>7</sup>

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4. See Charles Miller, Comment, *Contortions over Contorts: A Distinct Damages Requirement?*, 28 TEX. TECH L. REV. 1257, 1257–58 (1997) (discussing difficulty within judiciary in drawing distinction between tort and contract law); see also GRANT GILMORE, *THE DEATH OF CONTRACT* 98 (Ronald K.L. Collins ed., 2d ed. 1995) (acknowledging merger of contract and tort law). Courts around the country have also addressed the preservation of the contract–tort distinction. See, e.g., CMFG Life Ins. Co. v. Credit Suisse Sec. (USA) LLC, No. 14–cv–249–wmc, 2015 WL 4647000, at \*4 (W.D. Wis. Aug. 5, 2015) (discussing attempt by judiciary to preserve contract–tort demarcation); see also E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 867 (1986) (discussing need to preserve distinction between actions for breach of warranty and those in products liability context); Iron Mountain Sec. Storage Corp. v. Am. Specialty Foods, Inc., 457 F. Supp. 1158, 1165 (E.D. Pa. 1978) (stating Pennsylvania courts have sought to maintain contract–tort division).

5. See William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 630 (1999) (“Traditionally, punitive damages have not been available for breach of contract. The goal of contract remedies has been to compensate the promisee for the breach rather than to compel the promisor to perform.”). While punitive damages are generally unavailable in actions for breach of contract, they may be available to plaintiffs who seek recovery in tort. See Danielle Sawaya, Note, *Not Just for Products Liability: Applying the Economic Loss Rule Beyond Its Origins*, 83 FORDHAM L. REV. 1073, 1083 (2014) (discussing greater opportunity for increased damages in tort claims as compared to actions for breach of contract); see also *Erlich*, 981 P.2d at 982 (explaining general objectives of contract and tort damages). Although contract damages reflect the intent of the parties in regard to their contractual agreement, tort damages may involve elements of social policy. See *id.* (“Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate ‘social policy.’” (quoting *Hunter*, 864 P.2d at 90) (internal quotation marks omitted)).

6. See generally Amy G. Doehring, *Blurring the Distinction Between Contract and Tort: Courts Permitting Business Plaintiffs to Recover Tort Damages for Breach of Contract*, ABA BUS. TORTS J., Winter 2005, at 1, 1 (discussing potential for parties to seek tort damages for actions arising from breach of contract); Lisa T. Munyon, Alice L. Blackwell & Paul Sarlo, *Tort and Contract Actions: Strange Bedfellows No More in the Wake of Tiara Condominium*, 87 FLA. B.J. 41 (2013) (indicating that “talented lawyers” may use “intelligent pleading” to bring tort claims alongside contract actions despite barriers from courts).

7. See, e.g., *Reardon v. Allegheny Coll.*, 926 A.2d 477, 485–86 (Pa. Super. Ct. 2007) (stating that gist of action doctrine seeks to prevent “problematic” event when plaintiffs recover in both contract and tort); see also *Glazer v. Chandler*, 200 A.2d 416, 418 (Pa. 1964) (discussing caution among courts in permitting tort recovery when contracts exist between parties). There is noticeable reluctance among Pennsylvania courts to limit recovery in tort when a contract exists between the parties. See e.g., *Oak St. Printery, LLC v. Fujifilm N. Am. Corp.*, 895 F. Supp. 2d 613, 643 n.25 (M.D. Pa. 2012) (“Under Pennsylvania law, courts have been reluctant to allow tort recovery for what is essentially a breach of contract action.” (quot-

One such barrier is the “gist of the action” doctrine, a longstanding fixture in Pennsylvania common law that precludes a plaintiff from suing in tort when the “gist” of the plaintiff’s action is ultimately contractual.<sup>8</sup> The doctrine aims to prevent plaintiffs from reasserting a breach of contract claim under the guise of a tort action.<sup>9</sup> This doctrine has evolved into a standard defense and allows defendants to move for dismissal of a tort claim that is, in actuality, one for breach of contract.<sup>10</sup>

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ing C.P. Cook Coal Co. v. Browning-Ferris, Inc., No. 93-CV-7085, 1995 WL 251341, at \*4 (E.D. Pa. Apr. 26, 1995)); Sun Co. v. Badger Design & Constructors, Inc., 939 F. Supp. 365, 371 (E.D. Pa. 1996) (“In general, Pennsylvania courts have been reluctant to permit tort recovery for contractual breaches.” (quoting Wood & Locker, Inc. v. Doran & Assocs., 708 F. Supp. 684, 689 (W.D. Pa. 1989)) (internal quotation marks omitted)).

8. See *eToll, Inc. v. Elias/Savion Adver. Inc.*, 811 A.2d 10, 15 (Pa. Super. Ct. 2002) (“‘Gist’ is a term of art in common law pleading that refers to ‘the essential ground or object of the action in point of law, without which there would be no cause of action.’” (quoting *Am. Guar. & Liab. Ins. Co. v. Fojanini*, 90 F. Supp. 2d 615, 622–23 (E.D. Pa. 2000))). In *eToll*, the court ruled that the plaintiff’s fraud claim was barred under the doctrine, as the “gist” of the claim was contractual. See *id.* at 21 (“The fraud at issue was not so tangential to the parties’ relationship so as to make fraud the gist of the action.”). The gist of the action doctrine seeks to preclude plaintiffs from bringing tort claims if the “gist” or gravamen of the complaint is actually contract-based. See *Air Prods. & Chems., Inc. v. Eaton Metal Prods. Co.*, 256 F. Supp. 2d 329, 339 (E.D. Pa. 2003) (citing *Bash v. Bell Tel. Co.*, 601 A.2d 825, 829 (Pa. Super. Ct. 1992)) (stating purpose of doctrine is to prevent assertion of breach of contract claims under pretense of tort claims).

The gist of the action doctrine differs from the “economic loss” doctrine, which prevents recovery for financial loss in products liability scenarios. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 10-5, at 385 (Hornbook Ser. 4th ed. 1995) (“In some states this common law doctrine has achieved the status of the ‘economic loss doctrine[,]’ [ ] meaning that once loss is defined as ‘economic’ it cannot be recovered at least in negligence or strict tort and perhaps not in fraud or misrepresentation.”); see also *Economic-Loss Rule*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining *economic-loss rule* as “[t]he principle that a plaintiff generally cannot recover for financial harm that results from injury to the person or property of another”). Unlike the economic-loss rule, the gist of the action doctrine typically applies in non-products liability litigation. See *Bohler-Uddeholm Am., Inc. v. Ellwood Grp., Inc.*, 247 F.3d 79, 104 n.11 (3d Cir. 2001) (“The ‘gist-of-the-action’ test is a better fit for this non-products liability case.”); *Wilmington Fin., Inc. v. Am. One Fin. Inc.*, No. 06-5559, 2007 WL 2221424, at \*2 n.1 (E.D. Pa. July 31, 2007) (stating that gist of action doctrine is more appropriate than economic loss doctrine in non-products liability actions).

9. See *Hart v. Arnold*, 884 A.2d 316, 339 (Pa. Super. Ct. 2005) (describing purpose of gist of action doctrine as precluding plaintiffs from “re-casting ordinary breach of contract claims into tort claims” and acknowledging relationship between purpose of gist of action doctrine and goal of maintaining conceptual contract–tort boundary); *Pratter v. Penn Treaty Am. Corp.*, 11 A.3d 550, 558 (Pa. Commw. Ct. 2010) (stating that doctrine’s purpose is to prevent tort claims when “essence” sounds in contract, not tort (quoting *Sullivan v. Chartwell Inv. Partners, LP*, 873 A.2d 710, 718 (Pa. Super. Ct. 2005))).

10. See Corey J. Adamson, *Pennsylvania Supreme Court to Review the “Gist of the Action” Doctrine*, THOMAS, THOMAS & HAFFER, <http://www.tthlaw.com/index.php?id=492> [https://perma.cc/5LCE-ZTXP] (last visited Mar. 27, 2016) (describing significance of gist of action doctrine as defense in pleading stage of litigation); Maxwell S. Kennerly, *In Pennsylvania, “Gist of the Action” Precludes Identical Breach of*

Both lower Pennsylvania courts and federal courts have consistently invoked the doctrine to evaluate tort claims.<sup>11</sup> The Pennsylvania Supreme Court issued multiple opinions related to this doctrine throughout the late nineteenth and early twentieth centuries.<sup>12</sup> However, the Pennsylvania Supreme Court did not formally adopt the gist of the action doctrine until 2014.<sup>13</sup>

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*Contract and Negligence Claims, Not Simultaneous Contract and Tort Claims*, LITIG. & TRIAL (July 29, 2008), <http://www.litigationandtrial.com/2008/07/articles/the-law-for-lawyers/in-pennsylvania-gist-of-the-action-precludes-identical-breach-of-contract-and-negligence-claims-not-simultaneous-contract-and-tort-claims/> [https://perma.cc/5QRR-ALHR] (updated Sept. 21, 2013) (describing frequent use of gist of action doctrine by defendants). Defendants typically invoke the gist of the action doctrine to support a motion to dismiss certain tort claims asserted against them. See, e.g., *Vogelsberger v. Magee-Women's Hosp.*, 75 Pa. D. & C.4th 490, 503–04 (C.P. Allegheny 2005) (describing role of doctrine in determining whether certain claims prevail over defendant's motion to dismiss). Defendants also rely on the gist of the action doctrine frequently in support of preliminary objections. See, e.g., Defendant Gibbs Connors' Brief in Support of Preliminary Objections at 2–5, *Hanson Gen. Contracting, Inc. v. Connors*, No. 130703272, 2013 WL 10449749, at \*2–5 (C.P. Phila. Sept. 27, 2013) (stating preliminary objection should be granted and plaintiff's fraud claim should be dismissed pursuant to gist of action doctrine); Defendant AEC Grp., Inc.'s Brief in Support of Preliminary Objections to Complaint at 5–7, *Sima Prods. Corp. v. AEC Grp., Inc.*, No. G.D. 06-1485, 2006 WL 1502277, at \*5–7 (C.P. Allegheny Apr. 4, 2006) (arguing that plaintiff's conversion and negligence claims are contract-based and thus barred under doctrine).

11. See *Hart*, 884 A.2d at 339 (discussing Pennsylvania Superior Court's consistent application of gist of the action doctrine as means of preventing tort recovery in certain instances). The gist of the action doctrine also appears frequently at the district court level in Pennsylvania. See *Diodato v. Wells Fargo Ins. Servs., USA, Inc.*, 44 F. Supp. 3d 541, 554 (M.D. Pa. 2014) (holding that plaintiff's claim for fraudulent inducement was barred by doctrine because claim was based in contract); *Tender Touch Rehab Servs., LLC v. Brighten at Bryn Mawr*, 26 F. Supp. 3d 376, 406 (E.D. Pa. 2014) (holding that claim for civil conspiracy was not barred by doctrine because alleged tortious conduct was not based in parties' contract). The United States Court of Appeals for the Third Circuit has also acknowledged the gist of the action doctrine. See *Addie v. Kjaer*, 737 F.3d 854, 863 (3d Cir. 2013) (providing overview of doctrine's application within Third Circuit); *Air Products & Chems., Inc.*, 256 F. Supp. 2d at 340 (noting application of doctrine by district courts within Third Circuit).

12. See generally, e.g., *Horney v. Nixon*, 61 A. 1088, 1089 (Pa. 1905) (drawing distinction between instances when gist of action is breach of duty and when gist of action is breach of contract); *Zell v. Arnold*, 2 Pen. & W. 292, 294 (Pa. 1830) (introducing concept of "gist" of plaintiff's action and drawing contract-tort distinction). While these decisions do not reflect a formal application of the gist of the action doctrine, they demonstrate the beginnings of Pennsylvania's tradition of barring tort claims with contractual bases. See *Horney*, 61 A. at 1090 (holding that "only [available] remedy [is] assumpsit for [ ] breach of [ ] contract").

13. See Stephen J. Shapiro, *Pennsylvania Supreme Court Formally Adopts "Gist of the Action" Doctrine*, JD SUPRA BUS. ADVISOR (Jan. 7, 2015), <http://www.jdsupra.com/legalnews/pennsylvania-supreme-court-formally-adop-26221/> [https://perma.cc/W3X4-WB3N] (explaining that Pennsylvania Supreme Court had refrained from formally adopting doctrine despite its consistent application by other Pennsylvania courts and federal courts).

In *Bruno v. Erie Insurance Co.*, the court adopted the gist of the action doctrine and concluded that the plaintiffs' negligence claims were not barred under this principle.<sup>14</sup> Addressing the superior court's approach, the court held that the Brunos could proceed with their tort claim because they alleged the breach of a general social duty, rather than a contractual obligation.<sup>15</sup>

This Note asserts that in *Bruno*, the Pennsylvania Supreme Court missed a key opportunity to clarify the gist of the action doctrine.<sup>16</sup> Instead, the court put forth a questionable application of the doctrine, which failed to explain the analysis for determining the presence of a "social duty" and did not specify a category of defendants to which its holding potentially applies.<sup>17</sup> Additionally, this Note addresses the *Bruno* opinion's lack of interpretive guidance for lower courts applying the doctrine and the impact this ambiguity may have on future litigation.<sup>18</sup>

Part II of this Note details the history of the gist of the action doctrine in Pennsylvania and the legal landscape leading up to *Bruno*.<sup>19</sup> Part III describes the facts, procedural history, and analysis behind the Pennsylvania Supreme Court's decision in *Bruno*.<sup>20</sup> Part IV then critiques the court's analysis and examines the impact of the majority's holding on future litigation.<sup>21</sup> Part V concludes by recommending a judicial strategy for lower courts seeking to interpret *Bruno*'s ambiguous holding.<sup>22</sup>

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14. See *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 69 (Pa. 2014) (explicitly acknowledging support for duty-based approach to doctrine).

15. See *id.* at 68 ("The general governing principle which can be derived from our prior cases is that our Court has consistently regarded the nature of the duty alleged to have been breached . . . to be the critical determinative factor in determining whether the claim is truly one in tort, or for breach of contract."); cf. *Bash v. Bell Tel. Co.*, 601 A.2d 825, 829 (Pa. Super. Ct. 1992) (stating tort claims are permissible under doctrine if they are extra-contractual and arise from breach of socially imposed duty), *superseded by* PA. R. APP. P. 341, as stated in *Keefer v. Keefer*, 741 A.2d 808 (Pa. Super. Ct. 1999).

16. For a critique of the reasoning in *Bruno*, see *infra* notes 101–32 and accompanying text.

17. For a further discussion of issues within the *Bruno* court's analysis, see *infra* notes 108–32 and accompanying text.

18. For a further discussion of the problematic nature and impact of the holding of *Bruno*, see *infra* notes 133–39 and accompanying text.

19. For a further discussion of the gist of the action doctrine leading up to *Bruno*, see *infra* notes 23–50 and accompanying text.

20. For a further discussion of the factual background, procedural history, and reasoning in *Bruno*, see *infra* notes 51–100 and accompanying text.

21. For a further discussion of problems within the court's analysis of the gist of the action doctrine in *Bruno*, see *infra* notes 101–32 and accompanying text.

22. For a further discussion of potential recommendations for lower courts following *Bruno*, see *infra* notes 133–39 and accompanying text.

## II. LAYING THE FOUNDATION: THE GIST OF THE ACTION DOCTRINE IN PENNSYLVANIA BEFORE *BRUNO*

The gist of the action doctrine is relatively unique to Pennsylvania law.<sup>23</sup> Prior to *Bruno*, two primary frameworks emerged from the lower courts for interpreting the gist of the action doctrine.<sup>24</sup> Despite this doctrine's prominence and frequent usage by both the superior court and federal courts in Pennsylvania, the Pennsylvania Supreme Court lacked an official position on the gist of the action doctrine until *Bruno*.<sup>25</sup>

### A. *Working from the Ground Up: The History of the Gist of the Action Doctrine in Pennsylvania*

Pennsylvania's history regarding the gist of the action doctrine traces back to *Zell v. Arnold*.<sup>26</sup> In *Zell*, the Pennsylvania Supreme Court concluded the gist of a plaintiff's action was the "nature of the duty breached."<sup>27</sup> The court expanded on this duty inquiry and distinguished

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23. The doctrine has, however, appeared in a recent analysis by the Fourth Circuit. *See, e.g., Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 980 (4th Cir. 2015) (stating that application of doctrine under West Virginia law requires duty-based analysis). Other instances in which the doctrine appears outside Pennsylvania generally involve other state courts applying Pennsylvania law. *See, e.g., Khan v. Shamrock Partners, Ltd.*, 292 F. App'x 604, 605–06 (9th Cir. 2008) (applying Pennsylvania case law on doctrine due to Pennsylvania-based defendant); *Freay v. IM Wilson, Inc.*, No. 07-cv-269(DMC), 2007 WL 2300721, at \*2 (D.N.J. Aug. 7, 2007) ("Pennsylvania recognizes the 'gist of the action doctrine' and New Jersey does not."). Discussion of the doctrine at the state-court level outside Pennsylvania is limited. *See, e.g., FleetBoston Fin. Corp. v. Advanta Corp.*, No. Civ.A.16912-NC, 2003 WL 240885, at \*11 (Del. Ch. Jan. 22, 2003) (declining to apply doctrine to plaintiff's negligent misrepresentation claim); *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 746 S.E.2d 568, 577 (W. Va. 2013) (barring plaintiff's fraud claims on basis that they were intertwined with contract yet not explicitly applying the doctrine).

24. For a further discussion of the interpretive frameworks developed in the lower courts before *Bruno*, see *infra* notes 34–50 and accompanying text.

25. *See* Laura A. Wagner, Note, *The Economic Loss Doctrine: A Recommendation for the Supreme Court of Pennsylvania*, 72 U. PITT. L. REV. 825, 829 (2011) (describing lack of guidance for lower Pennsylvania courts for applying the doctrine). Other courts expressly noted the lack of formal approval of the doctrine by the Pennsylvania Supreme Court. *See, e.g., Vives v. Rodriguez*, 849 F. Supp. 2d 507, 516 (E.D. Pa. 2012) (noting Pennsylvania Supreme Court had yet to adopt doctrine despite Third Circuit and Pennsylvania Superior Court's prediction that it would do so).

26. 2 Pen. & W. 292, 295 (Pa. 1830).

27. *See Bruno v. Erie Ins. Co.*, 106 A.3d 48, 63 (Pa. 2014) (stating "*Zell* established that the *nature* of the duty breached . . . is determinative of the gist of the action . . ."). *Zell* laid the foundation for Pennsylvania's duty-based application of the doctrine. *See Zell*, 2 Pen. & W. at 295 ("In all cases where the action is not on the contract, but for the breach of a collateral duty, the *gist* is a personal *tort* . . ."). Moreover, *Zell* articulated a distinction between an action against a defendant for failing to perform a contractual obligation and one stemming from a defendant's negligent performance of the obligation; while the former gives rise to an action for breach of contract, the latter allows for an independent tort claim. *See id.* at

between breaches of contractual duties and breaches amounting to tortious conduct in *McCahan v. Hirst*.<sup>28</sup> Under this early analysis, a plaintiff could be barred from asserting a tort claim if the claim alleged the breach of a duty imposed by the terms of the parties' contract.<sup>29</sup>

Through the second half of the nineteenth century, the Pennsylvania Supreme Court continued to analyze the duty breached, applying the doctrine both explicitly and implicitly.<sup>30</sup> By seeking to determine whether the duty originated from the parties' contract, the court developed a duty-based inquiry for applying the gist of the action doctrine.<sup>31</sup> While the court subsequently continued drawing contract–tort distinctions when

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294 (“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*.”).

28. 7 Watts 175, 179 (Pa. 1838) (defining *nonfeasance* as non-performance of contractual duty and *misfeasance* as negligent performance of such duty).

29. *See id.* at 178 (finding plaintiff's claim was ultimately contractual because it derived from obligation set forth in parties' contract). While the Pennsylvania Supreme Court did not explicitly address the gist of the action doctrine in *McCahan*, language in the opinion indicates an early formulation of the concept. *See id.* (“Contract then being the foundation of the duty imposed upon the defendant, by his having become bailee, it is clear that a breach of the duty thereby imposed, which is the real cause of action here, must be regarded as *arising out of contract* . . .”).

30. *See Cook v. Haggerty*, 2 Grant 257, 258 (Pa. 1858) (evaluating plaintiff's claim as one for breach of contract rather than tort because duty breached was deemed contractual in nature). While *Cook* did not explicitly invoke the gist of the action doctrine, its analysis of the plaintiff's claim foreshadowed Pennsylvania's modern application of the doctrine. *See id.* (“That proper care is averred to have been *the duty* of the defendant under the contract, does not necessarily make the declaration sound in *tort*.”); *see also Bruno*, 106 A.3d at 64 (referencing *Cook* to demonstrate court's previous examination of relevant duty in analyzing plaintiffs' claims). Furthermore, the supreme court continued to invoke this analysis later in the nineteenth century. *See Krum v. Anthony*, 8 A. 598, 600 (Pa. 1887) (characterizing plaintiff's claim as one sounding in tort because gist of action was allegation of negligence). *McCahan* added to the distinction originally set forth in *Zell* by clarifying that a misfeasance, or legal wrong, is not contract-based. *See McCahan*, 7 Watts at 179 (“But a *misfeasance* is a *trespass* or *wrong* committed, which, in contemplation of law has no relation to a contract in any case.”). However, while *McCahan* included an early application of a duty-based inquiry, it is important to note that the court made this analysis for jurisdictional purposes. *See id.* (examining duty allegedly breached for purposes of deciding whether jurisdiction existed over defendant in cause of action for breach of bailment).

31. *See Horney v. Nixon*, 61 A. 1088, 1089 (Pa. 1905) (“When the gist of the action is a breach of duty and not of contract, and the contract is not alleged as the cause of action . . . the rules applying to actions *ex delicto* determine the rights of the parties.” (quoting *Frink v. Potter*, 17 Ill. 405, 412 (1856)) (internal quotation marks omitted)). Actions *ex delicto* are those that arise from a tort or legal wrong, but are not based in contract. *See Ex Delicto*, CORNELL U.L. SCH. LEGAL INFO. INST. [https://www.law.cornell.edu/wex/ex\\_delicto](https://www.law.cornell.edu/wex/ex_delicto) [https://perma.cc/Q6FC-V2Q5] (last visited Mar. 27, 2016) (defining *ex delicto*). In *Nixon*, the plaintiff had purchased tickets from defendant, the owner of a theater, and the court acknowledged the possibility that one may bring an action in tort despite being in privity of contract with the defendant. *See Nixon*, 61 A. at 1089 (stating tort remedy is available if defendant acted negligently in carrying out contractual duties).



evaluating duties owed to plaintiffs, Pennsylvania justices refrained from formally adopting the doctrine.<sup>32</sup> Despite the Pennsylvania Supreme Court's continued silence on the issue, the state's lower and federal courts consistently applied the doctrine and two approaches emerged.<sup>33</sup>

B. *Putting up the Walls: The Emergence of the Duty-Based Analysis and Additional "Inextricably Intertwined" Inquiry Within the Superior Court*

Prior to *Bruno*, a consistent analysis for applying the gist of the action doctrine emerged within superior court opinions.<sup>34</sup> The superior court examined whether the relevant duty stemmed from a contractual or social duty and subsequently, whether the contract and tort claims were "inextricably intertwined."<sup>35</sup>

1. *The First Floor: The Superior Court's Interpretation of the Gist of the Action Doctrine Begins with Bash*

The superior court generated a dual-layered approach for applying the gist of the action doctrine during the latter half of the twentieth century.<sup>36</sup> In the 1992 decision *Bash v. Bell Telephone Co.*,<sup>37</sup> the superior court distinguished between tort actions and breach of contract actions on the basis of their respective duties, stating that tort actions stem from duties

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32. See *Bruno*, 106 A.3d at 56 (acknowledging plaintiff's argument that Pennsylvania Supreme Court has applied doctrine despite not having formally adopting it). The court permitted actions in tort—despite any presence of a contractual duty—if it found the defendant had a broader, socially imposed duty. See, e.g., *Reitmeyer v. Sprecher*, 243 A.2d 395, 398 (Pa. 1968) (holding landlord had social duty to tenant that fell outside lease agreement and subsequently allowing for tort action); *Evans v. Otis Elevator Co.*, 168 A.2d 573, 575 (Pa. 1961) (stating defendant's contractual obligations may allow courts to find broader duty that extends beyond privity of contract).

33. See, e.g., *Bash v. Bell Tel. Co.*, 601 A.2d 825, 829 (Pa. Super. Ct. 1992) (citing *Iron Mountain Sec. Storage Corp. v. Am. Specialty Foods, Inc.*, 457 F. Supp. 1158 (E.D. Pa. 1978)) (stating tort actions correspond to duties imposed as matters of social policy while actions for breach of contract correspond to duties imposed by parties' contractual agreements), *superseded by* PA. R. APP. P. 341, *as stated in* *Keefer v. Keefer*, 741 A.2d 808 (Pa. Super. Ct. 1999). But see *eToll, Inc. v. Elias/Savion Adver. Inc.*, 811 A.2d 10, 18 (Pa. Super. Ct. 2002) (focusing gist of action inquiry on whether tort claim is too closely connected with parties' contract instead of the existence of social duty). For a further discussion of the prevalence of these two inquiries among the lower courts in Pennsylvania leading up to *Bruno*, see *infra* notes 34–50 and accompanying text.

34. See *Bash*, 601 A.2d at 829 (differentiating between contract and tort duties). But see *eToll*, 811 A.2d at 18 (examining nexus between tort claim and contract).

35. For a further discussion of the influence of *Bash* and *eToll* in *Bruno*, see *infra* notes 69–96 and accompanying text.

36. See *Bruno*, 106 A.3d at 66 (acknowledging role of superior court in developing jurisprudence on doctrine).

37. 601 A.2d 825 (Pa. Super. Ct. 1992), *superseded by* PA. R. APP. P. 341, *as stated in* *Keefer v. Keefer*, 741 A.2d 808 (Pa. Super. Ct. 1999).

“imposed by law as a matter of social policy,” while contract actions relate to “mutual consensus agreements between particular individuals . . . .”<sup>38</sup> In *Bash*, the court held that the plaintiff’s claim against a telephone company that agreed to provide advertising services in a phonebook was barred under the doctrine because the parties’ obligations were “a matter of private contract law.”<sup>39</sup> The court distinguished the parties’ relationship from one in which a party provides the other with a public utility, where its duties stem from “the larger social policies embodied in the law of torts.”<sup>40</sup> Following *Bash*, lower Pennsylvania courts generally applied the *Bash* court’s duty-based analysis of the doctrine; a plaintiff’s tort claim was barred under the doctrine if the defendant’s alleged breach stemmed from a duty that was ultimately based in the parties’ contract.<sup>41</sup> This duty-based view, as articulated in *Bash*, became the governing framework for the gist of the action doctrine until 2002.<sup>42</sup>

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38. *See id.* at 829 (alteration in original) (quoting *Iron Mountain Sec. Storage Corp. v. Am. Specialty Foods, Inc.*, 457 F. Supp. 1158, 1165 (E.D. Pa. 1978)). Richard Bash entered a contractual agreement with the defendant whereby the defendant would publish advertisements on his behalf through a yellow pages directory. *See id.* at 826. When the defendant failed to do so, Bash filed suit, seeking damages for breach of contract, negligence, and violation of the Unfair Trade Practices Act. *See id.* (describing procedural history of case). The court held that Bash was precluded from bringing his fraud claim because it was fundamentally contractual. *See id.* at 832.

39. *See id.* at 829 (examining nature of parties’ obligations under contract between plaintiff and defendant).

40. *See id.* at 830 (“[I]n this case, the parties’ obligations are defined by the terms of the contract, and not by the larger social policies embodied in the law of torts.”); *see also id.* at 829 (“Although certain services, such as alphabetical directory listings, are considered by the courts to be a public service, and thus governed by Public Utility regulations, contracts for the purchase of supplemental advertisement listings are considered to be a private contractual matter.” (citing *Felix v. Pa. Pub. Util. Comm’n*, 146 A.2d 347, 350 (Pa. Super. Ct. 1959))).

41. *See, e.g., Phico Ins. Co. v. Presbyterian Med. Servs. Corp.*, 663 A.2d 753, 757 (Pa. Super. Ct. 1995) (citing *Bash* for proposition that contract–tort distinction rests on source of duty allegedly breached). Prior to *eToll*, *Bash* was the prevailing guidance for Pennsylvania trial courts that applied the gist of the action doctrine. *See, e.g., White Oak Builders, Inc. v. E. Penn Mortg. Co. LLC*, 7 Pa. D. & C.5th 215, 219–20 (C.P. Monroe 2009) (citing *Bash* and holding plaintiff’s tort claim was barred under doctrine because it arose out of home construction contract between parties); *Honeywell Int’l Inc. v. Archdiocese of Phila.*, Nos. 2219, 081210, 2001 WL 1807938, at \*2–4 (C.P. Phila. Oct. 24, 2001) (stating superior court has followed *Bash* in applying gist of action doctrine while deciding defendant’s counterclaim for negligence was barred under doctrine because it stemmed only from contractual duty); *Chenot v. Metro. Life Ins. Co.*, 47 Pa. D. & C.4th 332, 335–36 (C.P. Butler 2000) (permitting tort claims under *Bash* because plaintiff did not seek remedy stemming from breach of parties’ contract); *Acad. Insulation Co. v. Bell Tel. Co.*, 24 Phila. 515, 517–18 (C.P. 1992) (stating plaintiff’s tort claim was barred under *Bash* because parties’ duties stemmed from their contractual relationship and not from social duties).

42. *See Pittsburgh Constr. Co. v. Griffith*, 834 A.2d 572, 581 (Pa. Super. Ct. 2003) (referencing *Bash* to explain tendency among courts to preclude recovery where tort claim may be “re-casting” of breach of contract claim).

2. *The Second Story: eToll Sets Forth Additional "Inextricably Intertwined" Inquiry*

The Pennsylvania Superior Court constructed an additional analytical framework in 2002 with *eToll, Inc. v. Elias/Savion Advertising, Inc.*<sup>43</sup> The court examined whether the gist of the action doctrine barred the plaintiff from asserting a fraud claim against an advertising company with whom the plaintiff contracted for marketing services.<sup>44</sup> Applying the gist of the action doctrine, the court added a layer to the *Bash* analysis by determining whether the duties giving rise to the fraud claim were so "inextricably intertwined" with the defendant's contractual duties as to be barred by the doctrine.<sup>45</sup> The court stated that the doctrine precludes tort claims in four scenarios: (1) when the duty breached arises from the parties' contract; (2) when the duties were "created and grounded in the contract itself"; (3) when liability results from the contract; or (4) when the tort claim is considered to be a duplicate or recasting of a breach of contract claim.<sup>46</sup> *EToll* thus provided an additional layer of scrutiny within the lower Pennsylvania courts, causing courts not only to examine the nature of the alleged duty, but also the proximity of the duty to the parties' contract.<sup>47</sup>

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43. 811 A.2d 10, 19–21 (Pa. Super. Ct. 2002) (discussing court's reasoning while introducing "inextricably intertwined" language).

44. *See id.* at 12–13 (explaining facts and procedural history). In *eToll*, the plaintiff, eToll, was a software development company that hired the defendant to advertise its product. *See id.* The plaintiff brought suit against the advertising company for fraud, breach of fiduciary duty, and professional negligence, claiming that it falsely represented itself as capable of promoting the software. *See id.*

45. *See id.* at 14 (citing *Bash* for proposition that viability of tort claim between parties in contractual privity rests on whether tort claim is gist of action). *EToll* expanded on the *Bash* analysis of the gist of the action doctrine by adding a focus on whether the tort claim and contract are "inextricably intertwined." *See id.* at 21 ("The fraud at issue was not so tangential to the parties' relationship so as to make fraud the gist of the action. Rather, we conclude that the fraud claims are *inextricably intertwined* with the contract claims." (emphasis added)).

46. *See id.* at 18 (internal quotation marks omitted) (stating existing case law appears to be concerned with whether fraud alleged took place in performance of duties set forth by the contract).

47. *See, e.g., Pittsburgh Construction*, 834 A.2d at 583–84 (applying "inextricably intertwined" standard to conversion claim and holding claim was barred because its validity rested on substance of parties' contract). The Pennsylvania Superior Court largely applied the "inextricably intertwined" standard after *eToll*. *See, e.g., Hart v. Arnold*, 884 A.2d 316, 340 (Pa. Super. Ct. 2005) (holding plaintiff's claims for fraud in performance of contract were barred under gist of action doctrine because alleged duties were grounded entirely in parties' contractual agreement).

Additionally, *eToll* influenced the application of the gist of the action doctrine within the Pennsylvania courts of common pleas. *See, e.g., Price v. Freeze & Frizz Inc.*, 11 Pa. D. & C.5th 486, 494 (C.P. Lancaster 2009) ("In this instance, Plaintiff's fraud claim is collateral to, and not intertwined with, the performance obligations created by a particular term of the Agreement."); *White v. George*, 66 Pa. D. & C.4th 129, 160 (C.P. Mercer 2004) (permitting tort claims based on finding that they are not impermissibly intertwined with contract).

Despite the addition of *eToll*, lower courts applied both gist of the action frameworks inconsistently.<sup>48</sup> Consequently, there was a clear lack of consensus regarding the applicable standard for evaluating tort claims under the doctrine prior to *Bruno*.<sup>49</sup> *Bruno* was the Pennsylvania Supreme Court's first significant opportunity following *eToll* to adopt the gist of the action doctrine formally and articulate a clear standard for its application.<sup>50</sup>

### III. FINISHING TOUCHES?: PENNSYLVANIA SELECTS A DUTY-BASED APPROACH BUT LEAVES THE DOOR OPEN FOR AMBIGUITY IN *BRUNO*

In *Bruno*, the Pennsylvania Supreme Court was tasked with resolving the longstanding ambiguity surrounding the gist of the action doctrine.<sup>51</sup> With over one hundred years since the court's last explicit examination of the doctrine, *Bruno* highlighted the divergent case law that emerged in the wake of *Bash* and *eToll*.<sup>52</sup> By holding the plaintiffs' negligence claim was not barred by the doctrine because the defendant owed the plaintiffs a duty as a matter of social policy and not as a result of the parties' contract,

48. See *Mirzio v. Joseph*, 4 A.3d 1073, 1080 (Pa. Super. Ct. 2010) (finding duty-based framework more persuasive than inquiry as to whether tort claims are impermissible intertwined with contract); *Reed v. Dupuis*, 920 A.2d 861, 867 (Pa. Super. Ct. 2007) (permitting plaintiff's tort claim against landlord on basis of landlord's duties to tenant as matter of social policy); *Sullivan v. Chartwell Inv. Partners, LP*, 873 A.2d 710, 718–19 (Pa. Super. Ct. 2005) (examining nexus between plaintiff's tort claims and parties' contractual agreement).

49. See *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 67 (Pa. 2014) (“Subsequent decisions of the Superior Court assessing whether a particular tort claim between contracting parties is barred by the gist of the action doctrine have taken varied approaches.”).

50. See Daniel E. Cummins, *Gist of the Action Doctrine Accepted for Review by Pennsylvania Supreme Court*, TORT TALK (Sept. 19, 2013, 9:00 AM), <http://www.torttalk.com/2013/09/gist-of-action-doctrine-accepted-for.html> [<https://perma.cc/3TR3-XQTH>] (acknowledging *Bruno* as opportunity for state supreme court to review doctrine); Kenneth J. Hardin, II, *Changes to the Gist of the Action Doctrine in Pennsylvania*, HARDIN THOMPSON PC (July 2, 2015), <http://www.hardinlawpc.com/blog/2015/07/changes-to-the-gist-of-the-action-doctrine-in-pennsylvania.shtml> [<https://perma.cc/94RL-FLS5>] (describing consistent use of doctrine as well as lack of formal acknowledgment within Pennsylvania courts).

51. See Fineman Krekstein Harris P.C., *Pennsylvania Supreme Court Issues Opinion on Gist of the Action Doctrine*, MARTINDALE (Mar. 5, 2015), [http://www.martindale.com/litigation-law/article\\_Fineman-Krekstein-Harris-PC\\_2194232.htm](http://www.martindale.com/litigation-law/article_Fineman-Krekstein-Harris-PC_2194232.htm) [<https://perma.cc/N6HN-V52F>] (stating that *Bruno* court “affirmed the existence” of doctrine and noting previous application of doctrine in lower courts). See generally Wagner, *supra* note 25, at 829 (describing ambiguity within Pennsylvania regarding gist of the action doctrine).

52. See *Bruno*, 106 A.3d at 64 (providing overview of court's precedent dealing with gist of the action doctrine and acknowledging court has had limited opportunities for examining doctrine); *id.* at 66 (“As the parties have discussed in their briefs, the Superior Court has fully embraced the gist of the action doctrine as a means of determining whether a putative tort claim is barred because its substance is, in actuality, a claim for breach of contract.”).

the court adopted an interpretation of the doctrine closer to that seen in *Bash*, as opposed to that in *eToll*.<sup>53</sup> While the court's decision to invoke a duty-based standard was an attempt to establish a uniform interpretation of the doctrine under Pennsylvania law, its broad holding allows for continued ambiguity surrounding the application of the doctrine and may ultimately increase the number of tort claims brought by plaintiffs who now can rely on the opinion's broad language.<sup>54</sup> While the majority invoked a broad interpretation of a social duty, Justice Eakin's concurrence addressed the breadth of the majority's holding and the problematic nature of its interpretation of the gist of the action doctrine.<sup>55</sup>

#### A. *Facts and Procedural History*

David and Angela Bruno began renovations on their Pennsylvania home in 2007 and discovered black mold growing within the basement walls.<sup>56</sup> Mr. and Mrs. Bruno notified their homeowners' insurance carrier, Erie Insurance Company, of the mold's presence.<sup>57</sup> Erie ultimately decided the mold was harmless and advised Mr. Bruno to proceed with his renovations.<sup>58</sup> In 2008, Mrs. Bruno's health began to deteriorate, which

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53. *See id.* at 71 (reversing order of superior court and holding plaintiffs' claim not barred by doctrine). *Compare id.* ("The policy in this instance merely served as the vehicle which established the relationship between the Brunos and Erie, during the existence of which Erie allegedly committed a tort."), with *Bash v. Bell Tel. Co.*, 601 A.2d 825, 829 (Pa. Super. Ct. 1992) (stating existence of contract between parties does not preclude possibility of actionable tort), *superseded by* PA. R. APP. P. 341, *as stated in* *Keefer v. Keefer*, 741 A.2d 808 (Pa. Super. Ct. 1999). *But see* *eToll, Inc. v. Elias/Savion Adver. Inc.*, 811 A.2d 10, 18 (Pa. Super. Ct. 2002) (stating focus of gist of action inquiry is whether tort concerned performance of duties under contract).

54. *See Bruno*, 106 A.3d at 76 (Eakin, J., concurring) (criticizing reach of majority opinion); *see also* Marshall J. Walthew, Sara B. Richman & John L. Schweder, II, *Gist of the Action Doctrine May Not Bar Tort Claims Arising from Negligent Performance of Contractual Duties*, COM. LITIG. ALERT (Pepper Hamilton LLP, Phila., Pa.), Jan. 6, 2015, at 2, available at <http://www.pepperlaw.com/resource/2092/24C0> [<https://perma.cc/Q8YY-7562>] ("Future cases will test the breadth of the *Bruno* ruling.").

55. *See Bruno*, 106 A.3d at 75 (Eakin, J., concurring) (stating majority opinion contains "troublesome language").

56. *See id.* at 51 (describing purchase of Brunos' home).

57. *See id.* (describing attempts by Brunos to notify defendant insurance carrier of mold discovery). The Brunos' homeowners' insurance policy specifically addressed the issue of mold and included a rider that required Erie Insurance to compensate the Brunos for up to \$5,000 in the event mold was found. *See id.* The policy held that Erie was required to compensate the Brunos for the "direct physical loss" resulting from the mold, any additional expenses suffered by the Brunos due to the mold's impact on their living situation, air testing to confirm the presence of mold, and the cost of mold removal. *See id.*

58. *See id.* at 51–52 (referring to plaintiff's complaint). Erie sent an engineer from a third-party source to inspect the Brunos' home. *See id.* at 51. In addition to erroneously advising Mr. Bruno that he could continue renovating his home and that the mold did not need to be removed, the adjuster refused to pay the requisite amount stipulated under the insurance policy. *See id.* Continuing his renovations, Mr. Bruno discovered additional mold in his home and consequently informed

prompted the Brunos to pay for the mold to be tested out-of-pocket.<sup>59</sup> The testing revealed the mold was toxic and dangerous to human health.<sup>60</sup>

The Brunos then demanded \$5,000 from Erie in January of 2008 to remove the mold, though Erie initially withheld payment, the company eventually compensated the Brunos pursuant to their homeowners' insurance policy in April of 2008.<sup>61</sup> Mrs. Bruno was later diagnosed with throat and esophageal cancer linked to the mold, and the Brunos later vacated and demolished their home after discovering the mold could not be removed.<sup>62</sup>

In 2010, the Brunos filed a twelve-count complaint against Erie, the engineer Erie initially sent to the home to investigate the mold, and the couple from whom the Brunos purchased the property, asserting a negligence claim against Erie but not a claim for breach of contract.<sup>63</sup> Erie and its engineer each filed preliminary objections to the Brunos' complaint, and Erie argued that the Brunos' negligence claim was barred by the gist of the action doctrine.<sup>64</sup>

The McKean County Court of Common Pleas granted Erie's preliminary objections, holding the gist of the action doctrine precluded the Brunos from asserting their tort claim.<sup>65</sup> The Brunos filed a direct appeal to

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Erie, who sent the same engineer to investigate the new mold. *See id.* at 52. While the engineer inspected and tested the mold, he did not discuss any potential health issues with the Brunos. *See id.* ("Even though the engineer performed tests of the mold, he did not disclose those results to the Brunos, nor did he or the adjuster apprise the Brunos of the true hazard to human health posed by the mold . . .").

59. *See id.* (listing negative effects on Mrs. Bruno's health including "severe coughing, difficulty breathing and clearing her throat, and intense headaches").

60. *See id.*

61. *See id.* (describing Brunos' attempts to seek payment from Erie to remove mold).

62. *See id.* (describing physicians' conclusions regarding Mrs. Brunos' cancer while stating Bruno family subsequently left their home due to gravity of mold situation).

63. *See id.* at 52–53 (referring to plaintiff's complaint and summarizing negligence claims asserted therein); *id.* at 52 n.3 ("The Brunos did not plead a breach of contract claim against Erie."). While the Brunos asserted multiple negligence claims against Erie, the court consolidated these claims when it discussed their viability under the gist of the action doctrine. *See id.* at 53 ("We will, hereinafter, refer to these allegations collectively as the Brunos' 'negligence claim.'").

64. *See id.* ("Both Erie and Rudick filed preliminary objections in the nature of a demurrer. The basis of Erie's demurrer was that the Brunos' negligence claim against it was barred by the 'gist of the action' doctrine . . .").

65. *See Bruno v. Erie Ins. Co.*, No. 1369 C.D. 2009, 2011 WL 9162714, at \*48 (C.P. McKean May 24) (dismissing Brunos' negligence claim under gist of the action doctrine), *amended*, 2011 WL 9162727 (C.P. McKean June 27, 2011), *aff'd in part, vacated in part*, 55 A.3d 131 (Pa. Super. Ct. 2012), *rev'd*, 106 A.3d 48 (Pa. 2014).

the superior court.<sup>66</sup> Declining to issue a written opinion, the superior court affirmed the holding of the court of common pleas and precluded the Brunos from asserting their negligence claim against Erie.<sup>67</sup> The Brunos subsequently filed an appeal to the Pennsylvania Supreme Court, and the court granted the appeal.<sup>68</sup>

B. *Interior Design: The Supreme Court Looks to the Superior Court and Adopts a Duty-Based Inquiry in Bruno*

On appeal, the Pennsylvania Supreme Court sought to determine whether the Brunos' negligence claim against Erie was barred by the gist of the action doctrine.<sup>69</sup> The court concluded that the doctrine did not bar the Brunos' negligence claim because Erie owed the Brunos a duty of

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66. See *Bruno v. Erie Ins. Co.*, 55 A.3d 131 (Pa. Super. Ct. 2012) (noting appeal from McKean County Court of Common Pleas). The Brunos cited multiple superior court opinions to demonstrate that Erie owed them an extra-contractual duty of care, claiming Pennsylvania has consistently recognized tort claims when a duty exists independently of a contract. See Appellants' Brief at 20, *Bruno v. Erie Ins. Co.*, 55 A.3d 131 (Pa. Super. Ct. 2012) (No. 1154 WDA 2011), 2012 WL 2165617, at \*20 (citing *Mirizio v. Joseph*, 4 A.3d 1073, 1080 (Pa. Super. Ct. 2010)).

This is not a cause of action in which the Insureds are asserting a contract claim dressed up in tort clothing. Rather, it is essentially a malpractice case, whereby having undertaken to investigate the mold infestation at the Brunos' home, the Insurer negligently failed to conduct a proper investigation and affirmatively misled and failed to apprise them of the dangers they were being exposed to.

*Id.* at \*16.

The Brunos specifically argued that, by carrying out the inspection of their home, Erie undertook a duty of care outside the scope of the policy and breached that duty by failing to address the home's mold problem and warn the Brunos of the accompanying health risks. See *id.* at \*22 (reiterating characterization of claim as "malpractice action against Erie"). Conversely, Erie urged the superior court to recognize that any duty owed to the Brunos stemmed from the homeowners' insurance policy, and any tort claim asserted by the Brunos was impermissible under the doctrine. See Brief for Appellee Erie Insurance Exchange at 19, *Bruno v. Erie Ins. Co.*, 55 A.3d 131 (Pa. Super. Ct. 2012) (No. 1154 WDA 2011), 2012 WL 2165618, at \*19 ("The trial court properly prohibited the Brunos from recasting a breach of contract claim as a tort claim merely by alleging that the Erie adjuster and/or the representative from Rudick was/were negligent during performance of duties under the insurance contract.").

67. See *Bruno v. Erie Ins. Co.*, 55 A.3d 131 (Pa. Super. Ct. 2012) (table decision) (affirming holding of trial court), *rev'd*, 106 A.3d 48 (Pa. 2014).

68. See *Bruno*, 106 A.3d at 50. The Pennsylvania Supreme Court also looked at whether the Brunos needed a certificate of merit to bring a claim against the engineer hired by Erie to inspect their home. This issue is unrelated to the analysis of the gist of the action doctrine that this Note examines. See *id.* at 75. For a further discussion of certificates of merit and their relevance to *Bruno*, see Jerrold P. Anders & Michael W. Jervis, *Pennsylvania Supreme Court's Ruling on Certificates of Merit and "Gist of Action" May Make It More Difficult for an Architect or Engineer to Seek an Early Dismissal*, CONSTRUCTION & SURETY ALERT (White & Williams, Phila., Pa.), Dec. 30, 2014, available at <http://www.whiteandwilliams.com/pp/alert-1327.pdf> [<https://perma.cc/7BMC-SLKW>].

69. See *Bruno*, 106 A.3d at 55.

a care as a matter of social policy.<sup>70</sup> As such, the court reversed the order of the superior court dismissing the Brunos' claim.<sup>71</sup> Importantly, the justices held that a duty-based inquiry governs the analysis for applying the gist of the action doctrine.<sup>72</sup> Nonetheless, the court's analysis of Erie's social duty to the Brunos did not set forth a specific standard for determining the viability of a tort claim under this duty-based approach.<sup>73</sup> The concurring justice agreed with the majority's holding with respect to the Brunos' negligence claim, but maintained that the court's interpretation of the gist of the action doctrine was impermissibly broad and deviated from the governing superior court analysis.<sup>74</sup>

1. *Going for the Duty-Based Look: The Majority Relies on the Superior Court and Holds That the Plaintiffs' Negligence Claim Is Not Barred by the Gist of the Action Doctrine*

*Bruno* gave the Pennsylvania Supreme Court an opportunity to affirm the lower Pennsylvania courts' belief that it would formally adopt the gist of the action doctrine.<sup>75</sup> Consistent with the lower courts' analysis, the Pennsylvania Supreme Court acknowledged the doctrine as a fundamental concept in Pennsylvania common law.<sup>76</sup> To that end, the court concluded that the gist of the action doctrine did not preclude the Brunos from bringing their negligence claim against Erie.<sup>77</sup>

The court began its analysis by noting that its discussion of the gist of the action doctrine had been specifically limited, but that it addressed issues "in which the distinction between the underlying action being a tort or contract claim was dispositive."<sup>78</sup> With this distinction in mind, the court harkened back to its decisions in *Zell* and *McCahan*.<sup>79</sup> The court

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70. *See id.* at 71 (concluding substance of Brunos' allegations concerned alleged breach of socially imposed duty outside scope of parties' contract).

71. *See id.* at 71 ("We, therefore, reverse the order of the Superior Court affirming the trial court's dismissal of the Brunos' negligence claim on the basis of its application of the gist of the action doctrine.").

72. *See id.* at 69 (describing duty-based approach as applicable standard in regard to gist of the action doctrine).

73. *See id.* (concluding Brunos' claims articulated alleged breach of general social duty by Erie).

74. *See id.* at 76 (Eakin, J., concurring) (criticizing majority's interpretation of existing case law on gist of action doctrine).

75. *See id.* at 56 (majority opinion) (referring to previous Third Circuit and superior court decisions that predicted gist of action doctrine was ready for review by Pennsylvania Supreme Court).

76. *See id.* at 68 (stating previous decisions of court demonstrate that gist of action doctrine and its underlying tenets "have long been an integral part of our Court's jurisprudence").

77. *See id.* at 71 (reversing lower court's dismissal of Brunos' claim due to gist of the action doctrine).

78. *See id.* at 60 (stating Pennsylvania Supreme Court has contemplated differences between tort and contract claims).

79. *See id.* at 63 (referring to *Zell* for proposition that "gist" of claim stems from duty allegedly breached and discussing *McCahan* to show court's previous



explained that these decisions demonstrated Pennsylvania's recognition of tort claims between parties in privity of contract if the duty allegedly breached was not contractual in nature.<sup>80</sup> The court noted its previous consistency in distinguishing contractual from extra-contractual duties, as well as the superior court's duty-based approach to evaluating tort claims, but the court also recognized its silence in regard to the gist of the action doctrine after the 1960s and thus turned to the superior court to decide the fate of the Brunos' negligence claim.<sup>81</sup>

The court began its examination of the superior court's approach by reviewing *Bash*.<sup>82</sup> Acknowledging *Bash* as a "leading case" on the gist of the action doctrine, the majority invoked its characterization of contract and tort claims based on their respective duties.<sup>83</sup> The court then recognized *eToll* as a subsequent decision that "seemingly added an extra consideration to the *Bash* analysis" by considering whether a tort claim is "inextricably intertwined" with the parties' contract.<sup>84</sup> The majority went

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acknowledgment of nonfeasance–misfeasance distinction when determining duty at basis of tort claim). While the *Bruno* court stated that the difference between a nonfeasance and misfeasance contributed to the history of the gist of the action doctrine, the nonfeasance–misfeasance distinction is beyond the scope of this Note. See *id.* at 63 (describing contribution of nonfeasance and misfeasance to history of gist of the action doctrine). For a general discussion of this concept within tort law, see Jean Elting Rowe & Theodore Silver, *The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries*, 33 DUQ. L. REV. 807, 809–27 (1995).

80. See *Bruno*, 106 A.3d at 63 (discussing court's recognition of tort claims among parties to contracts in *Zell* and *McCahan*). The *Bruno* court highlighted the distinction drawn between the breach of a contractual duty and the negligent undertaking of a contractual duty in *McCahan*, which warrants an action in tort. See *id.* ("[W]hereas, if the allegations substantially concern the defendant's negligent breach of a duty which exists independently and regardless of the contract—a misfeasance—then the action will be regarded as one in tort.").

81. See *id.* at 66 (noting prevalence of gist of action doctrine within superior court).

82. See *id.* (stating superior court took duty-based approach similar to that used in previous supreme court decision *Bash v. Bell Telephone Co.*, 601 A.2d 825 (Pa. Super. Ct. 1992)).

83. See *id.* at 65 (acknowledging holding of *Bash*). The *Bruno* court looked to *Bash* as authoritative in respect to determining whether a plaintiff's claim sounded in tort or contract. See *id.* (stating *Bash* court concluded parties' duties were contractual and plaintiff's claim was barred under gist of the action doctrine).

84. See *id.* (stating *eToll* offered additional inquiry to *Bash* analysis by introducing "inextricably intertwined" standard (internal quotation marks omitted)). The court described *eToll* as providing an additional inquiry following *Bash* to examine the proximity of the tort claim to the parties' contract. See *id.* at 67 (listing situations identified in *eToll* in which courts found the gist of the action doctrine barred a putative tort claim, including "(1) where the tort claim 'aris[es] solely from a contract between the parties'; (2) where 'the duties allegedly breached were created and grounded in the contract itself'; (3) where 'the liability stems from a contract'; or (4) where the tort claim 'essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract.'" (alteration in original) (quoting *eToll, Inc. v. Elias/Savion Adver. Inc.*, 811 A.2d 10, 19 (Pa. Super. Ct. 2002))). In stressing the importance of *eToll* as a framework

on to conclude that subsequent superior court decisions invoked the *Bash* duty-based analysis, despite some variance within the Pennsylvania courts on the appropriate inquiry.<sup>85</sup>

After reviewing the prevalence of both *Bash* and *eToll* within the lower courts, the majority concluded that Pennsylvania courts have “consistently” evaluated the duty underlying a given plaintiff’s tort claim.<sup>86</sup> Despite characterizing *eToll* as an elaboration on the inquiry set forth in *Bash*, the court declared that *eToll* and *Bash* could be reconciled and that *Bash* represented the appropriate governing analysis.<sup>87</sup> By holding a duty-based demarcation was the appropriate framework, the court formally acknowledged the gist of the action doctrine after decades of unofficial recognition by the lower courts and approved a duty-based framework for its application.<sup>88</sup>

Turning to the Brunos’ negligence claim, the court framed the issue as whether Erie breached a contractual duty set forth in the Brunos’ homeowners’ insurance policy, or rather breached “an independent social duty imposed by the law of torts.”<sup>89</sup> After reviewing Erie’s obligations under the policy, the court found that the Brunos’ negligence claim was premised on accusations that Erie and its third-party agents acted negligently while carrying out their duties under the policy and that the allegations therefore concerned the breach of a social duty outside the scope of

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for analyzing tort claims, the court added that other courts viewed *eToll* as the governing analysis on this issue. *See id.* at 67 n.14 (stating Third Circuit courts consider *eToll* controlling precedent on gist of action doctrine in Pennsylvania).

85. *See id.* (describing superior court decisions after *Bash* that also employ duty-based inquiry). The court also noted the lack of uniformity within Pennsylvania over the appropriate framework for applying the gist of the action doctrine, stating that the commonwealth court does not follow *Bash* but rather an analysis similar to the nonfeasance–misfeasance distinction used in *McCahan*. *See id.*

86. *See id.* at 68 (discussing synthesis of case law dealing with gist of action doctrine). The court found that, given the case law analyzing the gist of the action doctrine in Pennsylvania, the origin of the duty allegedly breached is the “critical determinative factor in determining whether the claim is truly one in tort, or for breach of contract.” *See id.*

87. *See id.* at 69 n.17.

With respect to the Superior Court’s *eToll* decision, we note that . . . its consideration of whether tort and contract claims brought together in the same action are ‘inextricably intertwined’ should be viewed in this context, i.e., as a determination of whether the nature of the duty upon which the breach of contract claims rest is the same as that which forms the basis of the tort claims.

*Id.*

88. *See id.* at 69 (“Although this duty-based demarcation was first recognized by our Court over a century and a half ago, it remains sound, as evidenced by the fact that it is currently employed by the high Courts of the majority of our sister jurisdictions to differentiate between tort and contract actions. We, therefore, reaffirm its applicability as the touchstone standard for ascertaining the true gist or gravamen of a claim pled by a plaintiff in a civil complaint.” (footnote omitted)).

89. *See id.* at 70 (stating intent of applying relevant gist of action precedent to case at bar).

the contract.<sup>90</sup> The court evaluated these contractual duties with respect to the Brunos' complaint and concluded that the Brunos' tort claim was not based on obligations imposed by their homeowners' insurance policy.<sup>91</sup>

The court found the basis for the Brunos' claim was the allegation that Erie was negligent while inspecting the mold in the Brunos' home, one of Erie's contractual duties imposed by the homeowner's insurance policy.<sup>92</sup> By looking to the allegations set forth in the complaint, the court emphasized that the Brunos alleged Erie was negligent for incorrectly determining that the mold was not a health hazard and advising the Brunos to continue the renovations on their home.<sup>93</sup> The court reiterated its focus on the "social duty," rather than a contractual duty, that formed the basis for the Brunos' claim.<sup>94</sup> The court also reiterated its intent to employ a duty-based analysis by finding the Brunos' homeowners' insurance policy acted as a "vehicle" for the relationship between the parties, "during the existence of which Erie allegedly committed a tort."<sup>95</sup> The court then reversed the superior court's decision to affirm the trial court's dismissal of the negligence claim and remanded the case to the superior court.<sup>96</sup>

2. *Design Differences: Justice Eakin's Concurrence Disagrees with Majority's Analysis of Gist of the Action Doctrine*

*Bruno* additionally produced a concurring opinion that exposed the flaws in the majority's application of the gist of the action doctrine.<sup>97</sup> In his concurrence, Justice Eakin agreed with the majority's conclusion that

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90. *See id.* ("The Brunos' claim against Erie for its alleged actions at issue in this appeal, quite simply, is not based on Erie's violation of any of these contractual commitments.").

91. *See id.* at 70–71 (discussing substance of Brunos' negligence claim).

92. *See id.* at 70 (reasoning Brunos' claim was "predicated on [ ] allegedly negligent actions" taken by Erie in fulfilling contractual duties pursuant to homeowners' insurance policy).

93. *See id.* (referring to plaintiffs' complaint). The court further recounted the details of the Brunos' negligence allegation, acknowledging that the Brunos claimed they proceeded with the renovations on their home and experienced serious health issues as a result of Erie's inspection and advice. *See id.* at 71 ("The Brunos further aver that, because of this advice and recommendation, they proceeded with the removal of the basement paneling, which later led to them suffering health problems from the mold exposure, and their entire house being rendered uninhabitable such that it had to be destroyed.").

94. *See id.* (concluding allegations were grounded in alleged breach of social duty).

95. *See id.* (describing insurance policy as vehicle for establishing relationship between Brunos and Erie).

96. *See id.* ("We, therefore, reverse the order of the Superior Court affirming the trial court's dismissal of the Brunos' negligence claim on the basis of its application of the gist of the action doctrine."). Because the trial court dismissed the Brunos' claim, the supreme court remanded the case to the superior court to allow consideration of other matters previously not discussed in the Brunos' case. *See id.*

97. *See id.* at 75–76 (Eakin, J., concurring).

the Brunos' claim was not barred under the gist of the action doctrine.<sup>98</sup> However, Justice Eakin departed from the majority in regard to its interpretation of the doctrine and sought to draw awareness to "troublesome language" in the majority's opinion.<sup>99</sup> Justice Eakin then called into question the majority's interpretation of *eToll*, arguing that the majority "painted with a broad brush," resulting in an overly broad holding.<sup>100</sup>

#### IV. CRITICAL ANALYSIS: *BRUNO* DEMONSTRATES "PAINTING WITH A BROAD BRUSH" AND PUTS FORTH ANALYSIS THAT WILL FURTHER COMPLICATE THE GIST OF THE ACTION DOCTRINE

Justice Eakin's concurring opinion draws much-needed attention to the breadth of the majority's holding.<sup>101</sup> In criticizing the majority's conclusion that a tort claim is permitted when the alleged breach is not grounded in the defendant's contractual duties, Justice Eakin alluded to two critical aspects of *Bruno*: the majority's failure to provide a clear articulation of the appropriate standard for applying the gist of the action doctrine and the breadth of its holding.<sup>102</sup> With Justice Eakin's comments in mind, one must acknowledge these aspects of *Bruno* and the potential ramifications of what Justice Eakin referred to as a "broad pronouncement."<sup>103</sup>

Rather than using its position as Pennsylvania's highest court to clarify the gist of the action doctrine, the *Bruno* court added extra ambiguity to this longstanding common law doctrine by holding that a tort claim may survive scrutiny under the gist of the action doctrine if the claim arises from a general social duty.<sup>104</sup> The court's interpretation of the gist of the action doctrine in *Bruno* is problematic for two reasons: (1) the

98. See *id.* at 75 (stating agreement with decision of majority regarding plaintiffs' negligence claim under gist of the action doctrine).

99. See *id.* ("[B]ut I write separately to caution against what I deem troublesome language."). Addressing the breadth of the majority's holding, Justice Eakin stated that the majority's reasoning appeared to "paint with a broad brush" by allowing negligence claims where the duty allegedly breached did not arise from the parties' contractual obligations. See *id.* at 76 (internal quotation marks omitted) ("To the extent that the majority is perceived to 'paint with a broad brush,' suggesting any negligence claim based on a contracting party's manner of performance does not arise from the underlying contract, I must disagree." (citation omitted)).

100. See *id.* at 76 (internal quotation marks omitted) (criticizing majority's analysis of precedent construing gist of the action doctrine). Justice Eakin argued the court's interpretation of *eToll* was overly broad because it contradicted the holding of the decision, which he called an "inherently circumstantial analysis." See *id.*

101. See *id.* (discussing departure from majority in respect to breadth of holding).

102. See *id.* (recounting conclusion of majority).

103. See *id.* (criticizing majority's holding). For a further discussion of the potential consequences of *Bruno*, see *infra* notes 125–34 and accompanying text.

104. For a further discussion of the ambiguity in *Bruno*, see *infra* notes 107–32 and accompanying text.

majority failed to explain its analysis for determining the presence of a “social duty”; and (2) the majority did not specify a category of defendants to which its holding potentially applies.<sup>105</sup> Thus, the court issued an ambiguous opinion that provides little guidance to lower courts for interpreting the gist of the action doctrine.<sup>106</sup>

A. *The Majority Does Not Provide an Analysis for Determining Whether There Is a Social Duty Owed to a Party*

In concluding that the Brunos’ negligence claim was not barred under the gist of the action doctrine, the court reasoned that the duty allegedly breached by Erie was not accounted for by the Brunos’ homeowners’ insurance policy.<sup>107</sup> Instead, the court concluded that Erie breached a social duty owed to the Brunos, independent of the terms of the insurance policy.<sup>108</sup> However, the court failed to explain *which* social duties would allow a tort claim to survive scrutiny under the gist of the action doctrine.<sup>109</sup>

The *Bruno* court claimed to follow the superior court in its analysis of the duty allegedly breached.<sup>110</sup> In both *Bash* and *eToll*, the superior court explained why the duties allegedly breached were either social or contractual in nature and articulated a basis for determining whether a relationship existed between the parties that extended beyond their contractual relationship.<sup>111</sup> Although the majority discussed the homeowners’ insur-

105. For a further critique of the *Bruno* court’s analysis, see *infra* notes 107–32 and accompanying text.

106. For a further discussion of the breadth of the holding in *Bruno*, see *infra* notes 133–39 and accompanying text.

107. See *Bruno*, 106 A.3d at 71 (describing source of Erie’s obligations to Brunos).

108. See *id.* at 70–71 (stating Brunos’ negligence claim was based in social duty and not contractual obligations under homeowners’ insurance policy).

109. See *id.* at 70 (stating alleged breach of social duty was source of Brunos’ tort claim against Erie). In discussing the Brunos’ negligence claim against Erie, the court distinguished between Erie’s duties as set forth in the insurance policy and those stemming from a “general social duty,” yet the court did not articulate an approach for determining whether such a duty exists. See *id.* (“Consequently, these allegations of negligence facially concern Erie’s alleged breach of a general social duty, not a breach of any duty created by the insurance policy itself.”).

110. See *id.* at 66–67 (noting key role played by superior court in developing jurisprudence on gist of action doctrine).

111. See *Bash v. Bell Tel. Co.*, 601 A.2d 825, 829 (Pa. Super. Ct. 1992) (stating defendant’s obligations were contractual because defendant did not provide what is considered to be a public service), *superseded by* P.A. R. APP. P. 341, *as stated in* *Keefer v. Keefer*, 741 A.2d 808 (Pa. Super. Ct. 1999). In *Bash*, the superior court held that the defendant’s duties were contractual because they stemmed from an agreement under which the defendant would print advertisements in a telephone book in exchange for payment by the plaintiff. See *Bash*, 601 A.2d at 826 (describing factual scenario giving rise to suit between contracting parties); see also *eToll, Inc. v. Elias/Savion Adver. Inc.*, 811 A.2d 10, 23 (Pa. Super. Ct. 2002) (stating existence of extra-contractual duties depends on presence of unique fiduciary relationship). In *eToll*, the court found that the existence of the allegedly breached

ance policy as a source of contractual duties in *Bruno*, the court did not identify a specific reason or set of factors that led to its conclusion that Erie owed the Brunos an extra-contractual social duty.<sup>112</sup> Furthermore, the majority did not provide a method for determining the presence of a social duty for lower courts to use when applying the doctrine.<sup>113</sup> Despite its goal of eliminating ambiguity in the doctrine's application that plagued the lower courts for decades, the majority left open the issue of deciding the presence of a social duty and therefore missed its chance to provide Pennsylvania courts with a clearer test for applying the doctrine.<sup>114</sup>

B. *The Majority Does Not Specify a Category of Defendants to Whom Its Holding Applies*

Furthermore, provided that the requisite social duty is present, the *Bruno* court did not identify a specific class of defendants against which a tort claim is permitted.<sup>115</sup> While the majority discussed the duty of care owed to the public by "common carriers" in its historical overview of the doctrine, it did not ask whether Erie fell within a specified category of potential defendants.<sup>116</sup> The court further deviated from the prevailing

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duty stemmed from a fiduciary relationship between the parties, and the plaintiff's tort claim was therefore barred because the facts did not indicate such a relationship existed between the plaintiff and defendant, who agreed to provide advertising services to the plaintiff. *Id.* at 22–23 ("Most commercial contracts for professional services involve one party relying on the other party's superior skill or expertise in providing that particular service."). Further, the court found that any evidence that the defendant possessed knowledge superior to that of the plaintiff was not sufficient to warrant a fiduciary duty. *See id.* at 24 (stating there was "no evidence" that parties' relationship was not so "markedly imbalanced" so as to impose fiduciary relationship).

112. *See Bruno*, 106 A.3d at 71 (stating only that Brunos' allegations "facially concern Erie's alleged breach of a general social duty").

113. *See id.* (finding allegation of breach of social duty). The *Bruno* majority did not discuss how lower courts should go about determining whether a plaintiff alleges a breach of a social duty; after finding that the Brunos did not allege a breach of contract, the court quickly moved to its order that the superior court's decision on this issue be reversed. *See id.*

114. *See id.* (restricting discussion of extra-contractual duty on part of Erie to statement that negligence claim was based on alleged breach of "general social duty").

115. *See id.* (omitting reference to Erie's status as homeowners' insurance carrier). The court discussed the relevance of the Brunos' insurance policy, but did not state that Erie owed the Brunos a duty of care as a matter of social policy because Erie is a homeowner's insurance provider. *See id.* Furthermore, the majority's analysis omitted any discussion of whether a defendant's identity should be taken into account when applying the gist of the action doctrine. *See id.* (allowing plaintiffs to proceed with tort claim based solely on duty-based interpretation of gist of the action doctrine).

116. *See id.* at 65 (discussing previous acknowledgment of common carriers in Pennsylvania for deciding whether to permit tort claim). The *Bruno* court explicitly acknowledged that the identity of the defendant played a role in past Pennsylvania decisions deciding whether to permit certain tort claims between parties in privity of contract. *See id.* ("We specifically contrasted this limited duty created

superior court decisions in this respect, as both *Bash* and *eToll* included analyses of the respective defendants' identities in relation to whether tort claims were permissible.<sup>117</sup> Given the superior court decisions that shaped the reasoning in *Bruno*, the majority's failure to restrict its holding to a specific category of defendants demonstrates a questionable application of the gist of the action doctrine.<sup>118</sup> In *Bash*, the type of defendant involved helped determine the permissibility of the plaintiff's tort claim.<sup>119</sup> The *Bash* court stated that since the defendant did not provide a public service, the plaintiff's claim against the defendant was based on a breach of a contractual duty and therefore barred under the gist of the action doctrine.<sup>120</sup> Such scrutiny of the defendant also appeared in *eToll*, where the superior court discussed the defendant's status as an advertising agency in determining whether the claim was contractual or social in nature.<sup>121</sup> Furthermore, the Pennsylvania Supreme Court's own precedent considered the identity or occupation of the defendant when analyzing a plaintiff's tort claim.<sup>122</sup>

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by the parties' contractual relationship with the general duty of service owed by a common carrier, such as a railroad or bus company, to the public, which duty is implied by law by reason of the relation of the parties." (internal quotation marks omitted)).

117. See *Bash v. Bell Tel. Co.*, 601 A.2d 825, 830–31 (Pa. Super. Ct. 1992) (discussing imposition of social duties on defendants providing public services), superseded by P.A. R. APP. P. 341, as stated in *Keefer v. Keefer*, 741 A.2d 808 (Pa. Super. Ct. 1999); see also *eToll, Inc. v. Elias/Savion Advert., Inc.*, 811 A.2d 10, 22 (Pa. Super. Ct. 2002) (stating mere existence of commercial contract between parties not sufficient to create special relationship giving rise to duty of care on part of defendant).

118. For a further discussion of the *Bruno* majority's deviation from the superior court in respect to consideration of the defendant when applying the gist of the action doctrine, see *infra* notes 123–32 and accompanying text.

119. See *Bash*, 601 A.2d at 829 (describing defendant as provider of advertising services).

120. See *id.* at 829–30 (citing *Behrend v. Bell Tel. Co.*, 363 A.2d 1152, 1167 n.16 (Pa. Super. Ct. 1976)) (distinguishing telephone advertising company from party providing "necessary services"). The *Bash* court specifically stated that the defendant's obligations were contractual because its agreement to provide advertising services for the plaintiff was not public and it was therefore not a provider of a public service. See *id.* (referring to previous decisions holding that Yellow Pages advertisements constituted private service).

121. See *eToll*, 811 A.2d at 22 (finding defendant "cannot be held to the standards of an agent" and therefore no fiduciary relationship existed so as to permit tort claim). To determine whether a fiduciary relationship was present, the *eToll* court inquired as to whether the defendant had authority to act on matters of "trust and confidence" that created a special trust between the plaintiff and defendant, so as to place the defendant in a superior position to exercise undue influence over the plaintiff. See *id.* at 13, 22 (rejecting plaintiff's claim that defendant was "'trusted advisor' with specialized expertise, skill and experience in the field of marketing").

122. See *Reitmeyer v. Sprecher*, 243 A.2d 395, 398 (Pa. 1968) (stating defendant-landlord owed broader social duty because landlords have inherently greater bargaining power than tenants); *Horney v. Nixon*, 61 A. 1088, 1089 (Pa. 1905) (distinguishing movie theater operator from common carrier in analyzing whether

C. Bruno *Invites Ambiguity and Hands over the Key to Litigants in Regard to the Gist of the Action Doctrine*

The gist of the action doctrine is intended to limit certain tort claims.<sup>123</sup> However, the *Bruno* holding may cause litigants to argue that their tort claims are not barred by the doctrine under the decision's duty-based inquiry.<sup>124</sup> Conversely, *Bruno* serves as a reference point from

duty allegedly breached was contractual). Furthermore, the Pennsylvania Supreme Court has considered the type of defendant when evaluating tort liability in other instances. *See, e.g.,* Thierfelder v. Wolfert, 52 A.3d 1251, 1253 (Pa. 2012) (examining whether medical general practitioner owes same duty of care as provider of mental health services and is therefore liable due to sexual relationship with patient). Moreover, the court has noted that, while the legal concept of duty is complex, a consideration of the actor accused of negligence may factor into this consideration. *See, e.g.,* Althaus *ex rel.* Althaus v. Cohen, 756 A.2d 1166, 1169 (Pa. 2000) (stating examination of duty "involves the weighing of several discrete factors" including social value of service provided by actor and public ramifications of finding duty).

123. *See* Marshall, Dennehey, Warner, Coleman & Goggin, *Limit Those Claims: Applying the Gist of the Action Doctrine to Remove Negligence, Fraud, Common Law Contribution and Indemnification Claims*, MARTINDALE (Feb. 13, 2009), [http://www.martindale.com/insurance/article\\_Marshall-Dennehey-Warner-Coleman-Goggin\\_616038.htm](http://www.martindale.com/insurance/article_Marshall-Dennehey-Warner-Coleman-Goggin_616038.htm) [<https://perma.cc/7PKH-4G84>] (stating that purpose of gist of action doctrine is to limit tort claims to preserve contract-tort distinction); *see also* *Gist of the Action Doctrine Used to Defeat Tort Claims in Construction Defect Case*, BENNETT, BRICKLIN & SALTZBURG (Winter 2008), <http://www.bbs-law.com/winter-2008-edition/> [<https://perma.cc/TS4D-8GSH>] ("The gist-of-the-action and economic-loss doctrines have increasingly been used by defendants in an attempt to defeat tort claims arising out of alleged construction defects."); Jennifer M. Horn, *Gist of the Action Doctrine Gains Traction in Pennsylvania*, CONSTRUCTION L. SIGNAL (Aug. 10, 2012), <http://www.constructionlawsignal.com/by-state/pennsylvania/gist-of-the-action-doctrine-gains-traction-in-pennsylvania/> [<https://perma.cc/LCD3-FS8U>] (stating that gist of the action doctrine "typically precludes plaintiffs from pursuing tort actions where the underlying 'gist' of the action is the breach of contractual duties"). Additionally, *Bruno* has sparked concern that Pennsylvania courts may now interpret the definition of *contractual duties* more narrowly and therefore hinder the limiting effect of the gist of the action doctrine. *See* Walthew et al., *supra* note 54, at 2 (describing potential impact of *Bruno* on ability for courts to differentiate between tort and contracts). Justice Eakin's critique of the majority's holding has also been cited in discussions of *Bruno*'s effect on the ultimate purpose of the gist of the action doctrine. *See, e.g., id.* (acknowledging Justice Eakin's description of majority opinion as including "troublesome language"); Jason Yarbrough, 'Bruno' Brings Broad Changes to Construction Law, LEGAL INTELLIGENCER (Aug. 11, 2015), <http://www.thelegalintelligencer.com/id=1202734098970/Bruno-Brings-Broad-Changes-to-Construction-Law> [<https://perma.cc/K2NT-R98B>] (describing *Bruno* as "significant interpretation of [the gist of action] doctrine that provides additional considerations for a trial court and expands the circumstances under which a breach of contract claim and tort claim can coexist").

124. *See, e.g.,* Defendants' Supplemental Memorandum of Law in Further Support of Their Motion to Dismiss Plaintiff's Unfair Competition Claim at 3, Sköld v. Galderma Labs., L.P., No. 14-CV-05280-TJS, 2015 WL 2092016 ("In *Bruno*, the duty to refrain from acting negligently existed separately from the contractual duty to inspect and remove the toxic mold."); *see also* Plaintiff, Piotr Nowak's Memorandum of Law in Opposition to Major League Soccer, LLC's Motion to Dismiss at 10, Nowak v. Major League Soccer, LLC, No. 2:14-cv-03503, 2015 WL 4386818 (citing *Bruno* for proposition that allegations of breach of social duty are not



which defendants may argue that the duties they are accused of breaching are inherently contractual and not social.<sup>125</sup> The *Bruno* court's inability to articulate a clear standard for applying the gist of the action doctrine will create additional ambiguity in the lower courts, as both defendants and plaintiffs may seek to use the broad duty-based approach to their benefit.<sup>126</sup> Such ambiguity demonstrates that the Pennsylvania Supreme Court missed an opportunity in *Bruno* to clarify the longstanding doctrinal confusion surrounding the gist of the action doctrine within the state.<sup>127</sup>

Plaintiffs' reliance on *Bruno* can be seen in discussions of the gist of the action doctrine at the trial-court level.<sup>128</sup> The impact of *Bruno* on lower courts has simultaneously proved worrisome for defendants seeking to assert the gist of the action doctrine as a defense to various tort claims.<sup>129</sup> However, the true impact of *Bruno* is the decision's ultimate

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barred by gist of action doctrine and stating duty allegedly breached was not contractual in nature and should therefore survive defendant's motion to dismiss).

125. See, e.g., Brief in Support of Defendants' Motion to Strike and/or Dismiss Plaintiff's Amended Complaint at 9, *Husaini v. Paul Revere Life Ins. Co.*, No. 2:14-cv-00636-DSC, 2015 WL 2198217 (likening plaintiff's claims to negligence claim made in *Bruno* and arguing that plaintiff's claims are grounded in parties' contract and therefore barred under the gist of action doctrine as articulated in *Bruno*); Memorandum at 41–42, *Lightstyles, Ltd. v. Marvin Lumber & Cedar Co.*, No. 1:13-CV-1510, 2015 WL 5253462 (citing *Bruno* for proposition that nature of duty allegedly breached is key factor in applying gist of the action doctrine and arguing plaintiff's claim is barred under gist of the action doctrine because plaintiff's breach of contract claim arises from same conduct giving rise to tortious interference claim).

126. See Walthew et al., *supra* note 54, at 1, 2 (stating that “*Bruno* does not upset the standard that has long been applied” and defendants still “have the gist of the action doctrine in their quiver” despite flexibility given to plaintiffs by *Bruno* holding); see also Betts Law Office, *Pennsylvania Supreme Court Decides Bruno v. Erie Insurance and Provides Guidance—but Not Clarity—Regarding the “Gist of the Action” Doctrine*, PITT. BUS. LITIG. LAW. BLOG (Dec. 27, 2014), <http://www.pittsburghbusinesslitigationlawyerblog.com/2014/12/27/pennsylvania-supreme-court-decides-bruno-v-erie-insurance-provides-guidance-clarity-regarding-gist-action-doctrine/> [<https://perma.cc/8JGE-WM8Q>] (“The decision does not provide any bright-line tests for application of the doctrine and the circumstances under which contracting parties may assert tort claims against each other will continue to be actively litigated in Pennsylvania courts in the wake of *Bruno*.”).

127. See *supra* note 50 (describing *Bruno* as opportunity for Pennsylvania Supreme Court to resolve gist of action doctrine).

128. For a further discussion of the impact of *Bruno* at the trial-court level, see *infra* notes 133–39 and accompanying text.

129. See, e.g., Anders & Jervis, *supra* note 68, at \*2 (“Nevertheless, defendants should take note that a plaintiff's tort and contract claims may be considered separately even if the alleged tortious conduct took place in the context of performance of a contract.”). Concern over the potential impact of *Bruno* is visible in client advisories that followed the Pennsylvania Supreme Court's decision. See, e.g., J. Benjamin Nevius, *Pennsylvania Supreme Court Rules Favorably for Plaintiff in Bruno v. Erie Insurance*, IN ZONE (Fox Rothschild LLP, Phila., Pa.), Jan. 2015, at 5, 5, available at <http://www.foxrothschild.com/content/uploads/2015/05/In-the-Zone-January-2015.pdf> [<https://perma.cc/3AHX-ECF9>] (stating that *Bruno* creates “pro-plaintiff course” in litigation by permitting tort claims alongside contract claims); *id.* (“Contracting parties should be aware that their actions and conduct in

effect of eroding the doctrine.<sup>130</sup> Because of its broad duty-based approach, the ultimate outcome of *Bruno* is that if a court concludes the defendant did not breach a “social duty,” the gist of the action doctrine does not apply.<sup>131</sup> *Bruno* thus contradicts the doctrine’s intent by granting broad deference to potential tort claims despite the doctrine’s historically underlying concern: to preserve the contract–tort distinction.<sup>132</sup>

## V. CONCLUSION

Because *Bruno* binds lower Pennsylvania courts to a broader, duty-based approach for applying the gist of the action doctrine, both plaintiffs and defendants may benefit from the ambiguity embedded in its holding.<sup>133</sup> Further, the breadth of the holding in *Bruno* may allow for more tort claims to survive application of the doctrine during the preliminary stages of litigation.<sup>134</sup> Because the available remedies vary greatly between actions for breach of contract and tort claims, an increased number of tort actions will likely alter the outcome of civil litigation in Pennsylvania’s lower courts.<sup>135</sup>

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the performance of an agreement may be subjected to heightened scrutiny in the future and may expose them to additional damages other than those set forth in the agreement.”).

130. See Christopher E. Ballod, *Parting Is Such Sweet Sorrow: Pennsylvania Bids Farewell to the Gist of the Action Doctrine, and Further Opens the Door to Insurance Coverage for Construction Losses*, CONSTRUCTION LEGAL EDGE (Pietragallo, Gordon, Alfano, Bosick & Raspanti, LLP, Phila., Pa.), Summer 2015, at 1, 1, available at [http://www.pietragallo.com/library/files/summer\\_2015\\_edition\\_of\\_the\\_construction\\_legal\\_edge.pdf](http://www.pietragallo.com/library/files/summer_2015_edition_of_the_construction_legal_edge.pdf) [https://perma.cc/244C-4NKW] (stating *Bruno* “significantly narrows the venerable gist of the action doctrine and signals permission by the courts to allow plaintiffs to pursue claims the parties never considered when negotiating their contract”).

131. For a further discussion of the holding of *Bruno* and the significance of its duty-based analysis, see *infra* notes 133–39 and accompanying text.

132. See *Reardon v. Allegheny Coll.*, 926 A.2d 477, 486 (Pa. Super. Ct. 2007) (quoting *Glazer v. Chandler*, 200 A.2d 416, 418 (Pa. 1964)) (discussing policy concerns regarding contract–tort distinction in support of applying gist of the action doctrine). But see *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 71 (Pa. 2014) (permitting Brunos’ tort claim upon finding that negligence allegation stemmed from broader social duty on part of Erie). Justice Eakin also noted this potential problem in his concurring opinion. See *id.* at 76 (Eakin, J., concurring) (“However, synthesizing case law to stand for such a broad pronouncement does not comport with the ‘gist of the action’ doctrine—an inherently circumstantial analysis.”).

133. See Walthew et al., *supra* note 54 (predicting questions surrounding *Bruno* holding will appear in future litigation); see also E. McCord Clayton, *Testing the Boundaries of the Gist of the Action Defense*, BAZELON, LESS & FELDMAN PC (June 18, 2015), [http://www.bazless.com/site/files/goa\\_limits\\_copy3.pdf](http://www.bazless.com/site/files/goa_limits_copy3.pdf) [https://perma.cc/862W-SU78] (discussing gist of action doctrine in litigation following *Bruno* and noting post-*Bruno* litigation has witnessed mixed results for defendants in respect to applicability of gist of action doctrine).

134. See *Bruno*, 106 A.3d at 75 (Eakin, J., concurring) (expressing caution regarding breadth of majority’s holding in *Bruno*).

135. See *Robinson Helicopter Co. v. Dana Corp.*, 102 P.3d 268, 281 (Cal. 2004) (Werdegar, J., dissenting) (criticizing permissibility of tort claims between

Lower courts would therefore benefit from taking measures to curb the effect of *Bruno*'s ambiguity on litigation between parties who are contractually bound to each other.<sup>136</sup> One such measure would be to examine the identity of the given defendant and assess whether tort law typically imposes a "social duty" on that category of defendant.<sup>137</sup> Doing so would add clarity to the gist of the action doctrine by creating a body of case law that has confronted this issue of ambiguity while still adhering to the holding of *Bruno*.<sup>138</sup> However, given the current lack of interpretive guidance for lower courts applying the gist of the action doctrine, Pennsylvania has no choice but to open the door to many potential changes in civil litigation.<sup>139</sup>

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contract parties due to fear that "every breach of contract claim can don tort clothes"); Steven M. Richman, *Focusing on Damages in Commercial Litigation*, 250 N.J. LAW. MAG. 61, 65 (2008) (describing uncertainty regarding preservation of contract-tort distinction in commercial litigation damage awards).

136. For a further discussion of the potential implications of *Bruno*, see *supra* notes 123–32 and accompanying text.

137. For a further discussion of the relevance of the defendant's identity or occupation in respect to the gist of the action doctrine, see *supra* notes 115–22 and accompanying text.

138. For a further discussion of instances in which courts examined the defendant's identity in applying the gist of the action doctrine, see *supra* notes 115–22 and accompanying text.

139. See Karl S. Myers, *More Tools in the Toolbox for Policyholder Plaintiffs?*, DISPATCH INS. NEWS (Stradley Ronon Stevens & Young, LLP, Phila., Pa.), Fall 2013, at 1, 3, available at [http://www.stradley.com/~media/Files/Publications/2014/Dispatch\\_October\\_2013.pdf](http://www.stradley.com/~media/Files/Publications/2014/Dispatch_October_2013.pdf) [<https://perma.cc/2Z84-LY3Z>] (discussing implications of Pennsylvania Supreme Court decision on doctrine for potential litigants and predicting *Bruno* would "significantly alter the landscape of insurance policyholder litigation in Pennsylvania").