

Quarterly

SIX WAYS TO MAKE THE RIGHT-TO-KNOW LAW WORK BETTER 207
Zachary N. Gordon

PARENT COMPANIES CAN'T HAVE THEIR CAKE AND EAT IT TOO:
UNDERTAKINGS AT SUBSIDIARIES' FACILITIES EXPOSE PARENT
COMPANIES TO LIABILITY FOR WORKERS' INJURIES 222
Bradley Smith

UNCOVERING THE LAWS GOVERNING COVERED BRIDGES
IN PENNSYLVANIA 235
Mark Podvia

JOHN SERGEANT (1779-1852): PHILADELPHIA CIVIC LEADER,
CONGRESSMAN, LAWYER 249
Joel Fishman



Your Other Partner

Parent Companies Can't Have Their Cake and Eat It Too: Undertakings at Subsidiaries' Facilities Expose Parent Companies to Liability for Workers' Injuries

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ABSTRACT

This article explores the liability of parent companies for injuries suffered by their subsidiaries' employees. Where a parent company takes an active role in the operations or safety of its subsidiary's facility, the parent company may be liable for a worker's injuries if it fails to exercise reasonable care in those undertakings. Such a fact pattern is increasingly common as corporate structures become more complicated and intertwined. This article explores when a parent company is liable for an injury to one of its subsidiary's workers and the divergent defenses raised by parent companies in such cases.

TABLE OF CONTENTS

I. RESTATEMENT (SECOND) OF TORTS SECTION 324A AND COMPLEX CORPORATE STRUCTURES	223	IV. PARENT COMPANIES' DEFENSES TO SUBSIDIARY EMPLOYEES' CLAIMS OF NEGLIGENCE	232
II. WHEN A PARENT COMPANY HAS A DUTY TO ITS SUBSIDIARY'S EMPLOYEES.....	226	V. CONCLUSION	234
III. PROVING PARENT COMPANY LIABILITY	231		

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I. RESTATEMENT (SECOND) OF TORTS SECTION 324A AND COMPLEX CORPORATE STRUCTURES

Parent companies that undertake supervision of operations or safety at a subsidiary's facility may become liable in tort for workers' injuries.

Workers suffering on-the-job injuries due to unsafe workplaces remains an all-too-common problem in Pennsylvania. Since Pennsylvania enacted its workers' compensation law in 1915, employers have been required to provide certain benefits to injured workers, but in exchange, employers received immunity from negligence suits brought by the injured workers. This workers' compensation bargain was in response to an increase in successful negligence suits brought by injured workers against their employers at the beginning of the twentieth century.² Employers still have immunity for tort claims brought by their employees,³ but a worker injured on the job may have other avenues of recovery, particularly where her injury is caused by a defective product or the negligence of a third party. Where the worker's injury is caused by an inadequately guarded machine or on the road by the negligence of another driver, the worker's path to third-party liability is straightforward and well understood. In certain circumstances, Pennsylvania law also allows an injured worker to pursue a third-party negligence action against her employer's parent company. This article will explore when a parent company can be held liable for an injury to one of its subsidiary's employees. Section 324A of the Restatement (Second) of Torts, published in 1965, provides workers with an avenue to pursue claims for an unsafe workplace if the employer's parent company has taken an active role in the safety of the subsidiary's facility.

Section 324A provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the

² David B. Torrey & Andrew E. Greenberg, PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE, § 1:16, p. 18 & n.11 (Thomson Reuters/West 3rd ed. 2008).

³ 77 Pa.C.S. § 481.

other or the third person upon the undertaking.⁴

This Restatement Section is often called the Good Samaritan Doctrine because it imposes liability on an actor who is undertaking to render services that in some way impacts the safety of third persons. The Pennsylvania Supreme Court officially adopted Section 324A in *Cantwell v. Allegheny County* in 1984, but had consistently applied the principles of the Good Samaritan Doctrine for decades prior.⁵ In Pennsylvania, Section 324A has often been relied upon by injured plaintiffs claiming that a defendant failed to perform certain contractual undertakings properly, especially where that undertaking was the performance of safety inspections, and that those failures led to the plaintiff's injuries.⁶ However, there is nothing in Section 324A that requires the defendant's undertaking be contractual.

As with most Restatement provisions, Section 324A is written to encompass a variety of fact patterns. With complex corporate structures becoming ever more common, Section 324A has been applied around the country to impose liability on parent companies that take a role in the safety and functions of their subsidiaries.⁷ Regardless of whether such efforts are performed altruistically, in an effort to lower insurance costs, or for any other reason, if the parent company merely pays lip service to lofty safety promises or otherwise fails to exercise reasonable care in its undertakings that impact safety at its subsidiary's facilities, the parent company can be held liable for an injury to a worker there. Such a remedy is separate from any workers' compensation benefits the injured

4 RESTATEMENT (SECOND) OF TORTS § 324A (1965). Section 324A stems from a 1922 New York Court of Appeals decision written by Justice Benjamin Cardozo. In *Glanzer v. Shepard*, Justice Cardozo and the New York Court of Appeals held a public weigher liable, despite a lack of privity, for misrepresenting the weight of a shipment of beans that was 11,854 pounds underweight. 135 N.E. 275, 276 (N.Y. 1922). The Court held that one owes a duty of reasonable care not only to those with whom he is bound by contract, but also to those who rely on the actor's performance of undertaken duties. *Id.* at 277.

5 See *Cantwell v. Allegheny County*, 483 A.2d 1350 (Pa. 1984) (officially adopting Section 324A); *Evans v. Otis Elevator Co.*, 168 A.2d 573, 575 (Pa. 1961) (imposing liability on a company for an injury to a third party as the result of the defendant company's negligent performance of a contractual duty; "[i]t is not the contract *per se* which creates the duty; it is the law which imposes the duty because of the nature of the undertaking in the contract"); *Pascarella v. Kelley*, 105 A.2d 70 (Pa. 1954) (finding liability as the result of a "gratuitous engagement" that was performed negligently).

6 See *Farabaugh v. Pa. Turnpike Com'n*, 911 A.2d 1264, 1283-84 (Pa. 2006) (holding a construction manager's negligent performance of a contractually required inspection created a duty under 324A, the negligent performance of which could establish liability for the plaintiff's injury); *Casselbury v. American Food Serv.*, 30 A.3d 510, 513-16 (Pa. Super. 2011) (overturning summary judgment upon finding that the defendant food service provider had undertaken a duty to safely dispose of cooking oil and should have recognized that its failure to do so could cause injury to others, including the plaintiff who slipped on the improperly disposed of oil).

7 See, e.g., *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655 (6th Cir. 1979) (finding parent company of coal mine subsidiary was not immune and that it could be held liable for its independent acts of negligence that led to a fatal mining disaster); *Peterson v. Trailways, Inc.*, 555 F. Supp. 827 (D. Colo. 1983) (denying parent company's motion for summary judgment in claim by subsidiary's injured employee); *Heinrich v. Goodyear Tire and Rubber Co.*, 532 F. Supp. 1348, 1356 (D. Md. 1982) (citing Section 324A, explaining that parent companies can be liable to subsidiary's employees for the parent company's negligence and that "parent corporations cannot expect to receive the benefits of the corporate veil without subjecting themselves to liability in tort for their own negligent conduct").

employee may be entitled to from her employer.

In *Kiehl v. Action Manufacturing Co.* (1987), the Pennsylvania Supreme Court recognized that modern corporate structures present this scenario more frequently: “Today, complex corporate entities...often conduct business through subsidiaries to protect the parent from the financial, contractual and tort liabilities of its subordinate units.”⁸ “Indeed, there are employees working for corporations where control is constantly changing as the result of merger, consolidation or creation of a new entity intended to take advantage of a tax privilege.”⁹ And while a parent company may create and maintain those corporate formalities to insulate itself in some instances, the parent company must also face the consequences of that decision when it independently engages in tortious conduct for which its subsidiary, as an employer, would otherwise be immune.¹⁰

Modern complex corporations with numerous subsidiaries are undeniably becoming more common. A study of 120 large American industrial, retailing, and service corporations found that those 120 corporations had 5,894 subsidiaries, an average of approximately 50 each.¹¹ The reasons parent companies create or maintain subsidiaries are wide and numerous, but include the avoidance of taxation, desire for limited liability, the difficulty in qualifying the parent company as a foreign corporation in a particular state, and avoiding complications upon the purchase of a company’s assets.¹² Ultimately, each of these rationales can be boiled down to attempting to maximize shareholder value. In such corporate structures, “[a]lthough the group members typically are individually incorporated, the lines of distinction between group units no longer remain clear.”¹³ One way in which these lines can be blurred is the parent company establishing safety policies across all its subsidiaries’ facilities or otherwise taking an active role in the subsidiaries’ procedures.

When a parent company takes an active role in any aspect of its subsidiary’s operations—whether it be in creating safety policies for its subsidiary’s facility or in the performance of the subsidiary’s contractual duties—the parent compa-

8 *Kiehl v. Action Mfg. Co.*, 535 A.2d 571, 574 (Pa. 1987).

9 *Mohan v. Publicker Industries, Inc.*, 222 A.2d 876, 879 (Pa. 1966).

10 *See Sams v. Redevelopment Auth.*, 244 A.2d 779, 781 (Pa. 1968) (holding “one cannot choose to accept the benefits incident to a corporate enterprise and at the same time brush aside the corporate form when it works to their (shareholders) detriment”).

11 Michael J. Gaertner, *Reverse Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways?*, 30 WM. & MARY L. REV. 667, 672 (1989) (citing BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS* § 1.01.1 at 464-70).

12 *Id.* at 673 (citing Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193 (1929)).

13 *Id.* at 674.

ny opens itself to potential liability.¹⁴ A parent company that takes an active role in the safety at its subsidiary's facility, such as by performing machine guarding audits or conducting safety training, can be liable under Section 324A if it does not perform those tasks with reasonable care and an injury to one of its subsidiary's employees occurs as a result.

While the corporate structure may be complex, the framework for the injured worker's claim is fairly simple: A parent company that takes an active role in the safety or operations of its subsidiary is undertaking a duty because it recognizes, or should recognize, that taking such an active role in its subsidiary's business is going to impact the safety of the workers at the subsidiary's facility. If the parent company is then negligent in the performance of its undertaking, it is liable if the subsidiary employee's injury occurred in any way because of that negligence.

It does not matter that the subsidiary, as the employer, may also have a duty to provide a safe workplace, so long as the parent company undertook to perform some service that was then implicated in a worker's injury. If the parent company's undertaking completely assumes its subsidiary's responsibility, it does not even matter if the parent company's negligence does not create any new risk or increase an existing risk.¹⁵

While the framework for Section 324A cases against parent companies may be straightforward, in practice these cases are fact-intensive and invoke questions of duty, causation, control, and immunity. The remainder of this article will examine when parent companies have been found to have assumed a duty to their subsidiaries' employees, what an injured worker must show in order to prevail, and how parent companies have tended to defend themselves against Section 324A claims, with varying degrees of success.

II. WHEN A PARENT COMPANY HAS A DUTY TO ITS SUBSIDIARY'S EMPLOYEES

Holding a parent company liable for injuries at its subsidiary's facility is not a novel concept, but there is relatively little Pennsylvania case law on the topic.¹⁶ Much of the Pennsylvania case law that exists deals with various defenses raised by parent companies, as set forth in Section IV below. That an injured worker has a viable cause of action against her employer's parent company

¹⁴ See, e.g., *Kiehl v. Action Mfg. Co.*, 535 A.2d 571, 571 (Pa. 1987) (finding a parent company may be liable to its subsidiary's injured employees for the parent company's independent acts of negligence in the operation of the facility where an explosion occurred); *Publiker Industries v. Roman Ceramics Corp.*, 652 F.2d 340 (3d Cir. 1981) (where a parent company involved itself in the negotiation, formation, and renegotiation of its subsidiary's contract, the parent company could be held responsible for the performance of the contractual duties even though the parent company was not a signatory to the contract).

¹⁵ RESTATEMENT (SECOND) SECTION 324A, comment d.

¹⁶ Nicole Rosenkrantz, *Parent Trap: Using the Good Samaritan Doctrine to Hold Parent Corporations Direction Liable for Their Negligence*, 37 B.C. L. Rev. 1061 (1996); Andrew J. Natale, Note, *Expansion of Parent Corporate Shareholder Liability Through the Good Samaritan Doctrine—A Parent Corporation's Duty to Provide a Safe Workplace for Employees of Its Subsidiary*, 57 U. CIN. L. REV. 717 (1988).

for the parent company's negligence has clearly been the case for decades, but Pennsylvania appellate courts have rarely had occasion to articulate the basis.

The seminal opinion in Pennsylvania outlining an injured worker's right to sue her employer's parent company for its independent acts of negligence is *Kiehl v. Action Manufacturing Co.*¹⁷ Without citing Section 324A, the Pennsylvania Supreme Court reversed the findings of the trial court and Superior Court and held that the injured workers were employed by the defendant's subsidiary and therefore the injured workers had a cause of action against the defendant parent company. The *Kiehl* plaintiffs were injured in an explosion at Amcom Incorporated, a wholly owned subsidiary of Action Manufacturing Company. Amcom manufactured load detonators. The injured workers sued their employer's parent company, Action, claiming it had failed to provide a safe work environment, failed to provide proper safety equipment, and provided negligent instruction and training of Amcom employees in the handling of explosives. Action took the position that it was the plaintiffs' employer and therefore immune. The plaintiffs received workers' compensation benefits from Amcom, although Amcom's workers' compensation insurance policy was issued jointly to Amcom and Action.

The relationship between the parent and subsidiary in *Kiehl* reflects a typical arrangement. The two corporations shared similar officers. Amcom, the subsidiary, had its own plant manager and managed the day-to-day operations of its facility, including hiring and firing employees, but Action, the parent, made all major policy decisions and controlled all purchases and sales. Amcom, in fact, did not have any of its own contracts or customers—all business flowed through Action. Importantly, Action had set up Amcom as a separate entity and in many respects the corporate boundaries were maintained: Amcom had its own payroll, revenues, and deductions for costs of business.

In light of these facts, and applying the functional analysis test set forth in *Mohan v. Continental Distilling Company*, the Pennsylvania Supreme Court found that Amcom, not Action, was the plaintiffs' employer and that the plaintiffs could pursue their claim that Action had independently committed acts of negligence that caused the explosion that left these workers with permanent disabilities. "*Mohan* makes it clear in Pennsylvania a parent corporation and its subsidiary must be regarded as separate entities in regards to the Workmen's Compensation Act."¹⁸ The Pennsylvania Supreme Court considered that, by arguing that Action and Amcom were essentially a single entity and thus a single employer, both entitled to immunity, Action was asking the Court to pierce Action's own corporate veil. This, the Court would not allow. To essentially pierce the parent company's corporate veil "would permit a parent company to assert itself as an immune unit if sued by an employee of any of its subsidiaries for

¹⁷ *Kiehl*, 535 A.2d at 571.

¹⁸ *Id.* at 574.

independent acts of negligence, and project itself as a separate entity if sued by a member of the general public for the same conduct.”¹⁹ In other words, parent companies cannot have it both ways.

Because the parent company in *Kiehl* defended the case by asserting it was immune as a joint employer with its subsidiary, rather than asserting it lacked a duty, the Pennsylvania Supreme Court did not focus its attention on this fundamental question. Since *Kiehl*, there has been little appellate case law in Pennsylvania involving claims against a parent company for injuries to its subsidiary’s employee. However, when courts have examined such cases, they have consistently followed *Kiehl* and considered parent and subsidiary companies distinct. Where parent companies have challenged whether a duty even existed as to its subsidiary’s employee, Pennsylvania courts have looked to *Kiehl* and Section 324A.

Just two years after *Kiehl*, a parent company took up this fight and filed a motion for summary judgment, asserting it did not owe a duty to its subsidiary’s employee. In *Bucks v. Pennfield Corp.*,²⁰ the plaintiff injured her hand on a chicken breast skinning machine that had been designed and built by her employer, which was immune. The plaintiff brought suit against her employer’s parent company, asserting that it committed various independent acts of negligence relating to the parent company’s duty to oversee safety. Relying on *Kiehl*, the trial court determined the defendant, Pennfield, and its subsidiary, Grimes, were separate entities for purposes of workers’ compensation immunity and that the “parent corporation may be liable for its independent acts of negligence even though the employee is barred from suing the subsidiary/employer and has been compensated under the Workmen’s Compensation Act.”²¹ However, Pennfield argued that it did not meddle in its subsidiary’s operations and therefore did not undertake any duty: the machine at issue had been wholly designed and manufactured by Grimes, the decision to make such a machine had been made by Grimes, and the assembly and maintenance of the machine had been performed by Grimes. Pennfield further argued that while it had a safety committee in place at the time of the accident, its subsidiary Grimes had a separate safety committee. Allegedly, the parent safety committee did not concern itself with specific machinery at the subsidiary’s location or inspect the subsidiary facility.

Through the deposition of a single former employee of the parent company, however, the plaintiff presented evidence in response to the defendant’s motion for summary judgment “that the ultimate responsibility for safety at the subsidiaries rested with the division manager who was an employee of defendant” and the parent safety committee oversaw the subsidiary’s safety committee.²² Such evidence was sufficient to create an issue of fact that required denying the

19 *Id.* at 575.

20 *Bucks v. Pennfield Corp.*, 4 Pa. D. & C.4th 474 (Pa. Com. Pl. 1989).

21 *Id.* at 476.

22 *Id.* at 480.

parent company's motion for summary judgment, as there was support in the record to show the parent company made an undertaking. "It will be for the jury to determine where ultimate responsibility for safety rested and whether the duty of the corporate safety committee to oversee was a specific undertaking."²³ In so holding, *Bucks* followed *Kiehl* and Section 324A to their logical conclusion. The fact pattern in *Bucks* and the trial court's analysis remain representative of a typical Section 324A claim against a parent company in Pennsylvania.

While it was not until after *Kiehl* that Pennsylvania courts began applying Section 324A to claims against parent companies for negligent acts and omissions at their subsidiaries' facilities, such claims had previously been successfully made in other jurisdictions around the country.²⁴

Perhaps because there remains little Pennsylvania appellate law on point, challenges are still made by parent companies to the very notion of their being sued by a subsidiary's employee. In response, trial courts have been forced to articulate the justification for such claims, as the Eastern District of Pennsylvania did in 2015. In *McNeal v. ArcelorMittal USA, Inc.*,²⁵ three plaintiffs, who were union members, brought claims against their employer's parent company after an explosion caused each of them to suffer severe burns. There, the defendant parent company removed the case to federal court on the basis that the plaintiffs' claims were inextricably intertwined with their union's collective bargaining agreement, which was governed by federal law, and that the plaintiffs had disguised their actions as common law tort claims. In doing so, the defendant parent company argued that it had no duty to oversee safety at its subsidiary's facility, meaning no viable state law claim existed, and therefore only federal claims remained. In ruling on the plaintiffs' motion to remand their claims to state court, the Eastern District of Pennsylvania had to determine whether Pennsylvania recognized negligence claims against a parent company for alleged safety failures at its subsidiary's plant. If Pennsylvania recognized such a claim, the *McNeal* matter needed to be remanded to state court.

Pointing to *Kiehl*, the Eastern District explained, "Under Pennsylvania common law, ... a parent company does have a duty in some circumstances to provide a safe workplace for the employees of a wholly-owned subsidiary."²⁶ *McNeal* then walked through the basis for such claims, including *Cantwell's* adoption of Section 324A in 1984. Likely because of the dearth of appellate law on the issue and the archetypical fact pattern it presented, the Eastern District looked back to the *Bucks* trial court opinion 25 years earlier. Because the *McNeal* plaintiffs had pled that the parent company undertook a duty to provide a safe work environment, the plaintiffs had an "'avenue' to proceed against" their

²³ *Id.* at 481.

²⁴ See N. Stevenson Jennette III, *Providing Safety Services to Subsidiaries: A Liability Trap for Parent Corporations*, 1990 DET. C.L. REV. 713 (1990) (collecting cases).

²⁵ *McNeal v. ArcelorMittal USA, Inc.*, 143 F. Supp. 3d 241 (E.D. Pa. 2015). The author's law firm represented two of the three plaintiffs in this matter.

²⁶ *Id.* at 247-48.

employer's parent company.²⁷

The central question in determining whether a parent company has a duty to its subsidiary's employees is whether the parent company made an undertaking. What, then, constitutes an undertaking? This non-exhaustive list provides examples of actions that Pennsylvania courts and other jurisdictions have found constitute undertakings by the parent company so as to create a duty that these undertakings be performed with due care: when a parent company issues safety standards to be implemented at the subsidiary's facility;²⁸ when it promises a safe work environment for its subsidiary's employees;²⁹ where it creates a safety committee to oversee safety at the subsidiary's facility;³⁰ when the parent company performs inspections at the subsidiary's facility and provides accident prevention services;³¹ when it performs simulated OSHA inspections;³² when it analyzes the job safety of the subsidiary employee's position;³³ when it participates in the day-to-day management of the subsidiary;³⁴ where it effectively provides the safety personnel for the subsidiary;³⁵ where it trains subsidiary employees;³⁶ and where it owns or controls the facility itself.³⁷ With facts showing any of these undertakings, the plaintiff will very likely survive a summary judgment challenge regarding the existence of a duty. However, the Section 324A analysis does not end there.³⁸

III. PROVING PARENT COMPANY LIABILITY

Typically, establishing a duty by showing evidence of an undertaking is the biggest hurdle that a plaintiff will face in a lawsuit brought against her parent company. While the plaintiff must of course still show that a breach of that undertaken duty occurred

²⁷ *Id.* at 248-49.

²⁸ *Johnson v. Abbe Engineering Co.*, 749 F.2d 1131, 1133-34 (5th Cir. 1984).

²⁹ *Rick v. RLC Corp.*, 535 F. Supp. 39 (E.D. Mich. 1981).

³⁰ *Bucks v. Pennfield Corp.*, 4 Pa. D. & C. 4th 474, 480 (Pa. Com. Pl. 1989).

³¹ *Smith v. Atlantic Richfield Co.*, 814 F.2d 1481 (10th Cir. 1987).

³² *Canipe v. National Loss Control Serv. Corp.*, 736 F.2d 1055, 1063-1064 (5th Cir. 1984).

³³ *Id.*

³⁴ *Kiehl*, 535 A.2d at 574.

³⁵ *Johnson*, 749 F.2d at 1134.

³⁶ *Kiehl*, 535 A.2d at 572 n.1.

³⁷ *Barnes v. Alcoa, Inc.*, 2014 WL 8396226 (Pa. Com. Pl. Oct. 14, 2014).

³⁸ It is indisputable that Pennsylvania law permits injured workers to bring claims against their employer's parent company under Section 324A. However, as with any cause of action, the plaintiff must present sufficient evidence to show a prima facie case. A parent company only has a duty when the plaintiff presents evidence that shows the parent company made an undertaking. Where, after discovery, the evidence is uncontroverted that all operational and safety functions were performed by the employer with no involvement from the parent company, courts will find there was no undertaking and thus no duty. *See Grimsley v. Manitowoc Co.*, 792 Fed. Appx. 168, 171 (3d Cir. 2019) (finding the "uncontroverted evidence shows that [the subsidiary employer] developed and implemented the policies used at the...facility"). However, while the existence of a duty is generally a legal question, where the plaintiff presents enough evidence to show a dispute of fact as to whether an undertaking occurred, summary judgment will be denied. *See Bucks v. Pennfield Corp.*, 4 Pa. D. & C.4th 474, 481 (Pa. Com. Pl. 1989) (finding an issue for the factfinder where one witness testified ultimate safety responsibility rested with the division manager of the parent company); *Barnes*, 2014 WL 8396226 (denying summary judgment where the plaintiff presented evidence that the parent company exercised some control over the subsidiary facility, including reviews of safety incidents).

and that the breach caused the plaintiff's injury, this evidence tends to be more easily gathered. Whether there was a breach and causation can depend greatly on the scope of the undertaking. A broad undertaking eases the showing of causation, in some instances to the point where the plaintiff need not even show that the parent company's negligence caused the danger or increased the risk to the injured worker. A narrow undertaking by the parent company, on the other hand, will make the showing of breach and causation more difficult and require greater precision from the plaintiff.

Section 324A establishes not just a duty, but also multiple avenues to proving causation. Where a parent company's negligent performance of its undertaken duties causes or increases the risk of harm, a plaintiff will have proven causation.³⁹ A common example of such an undertaking increasing the risk of harm would be if the parent company performed a machine guarding audit at its subsidiary's facility and failed to identify a poorly guarded machine, which later injured a worker. But Section 324A eases the showing of causation when the undertaking is more complete. For instance, a parent company that fully takes on the role of overseeing safety at a subsidiary's facility may be held liable even if its undertaking does not create any new risk or increase an existing one. "Even where the negligence of the actor does not create any new risk or increase an existing one, he is still subject to liability if, by his undertaking with the other, he has undertaken a duty which the other owes to the third person."⁴⁰ Because an employer has a duty to provide a safe workplace to its employees, a parent company that takes over that responsibility will be liable for any unsafe condition in the workplace that causes an injury, even if the parent company did not create it or exacerbate it.⁴¹ Section 324A(c) likewise imposes liability if the subsidiary relies on the parent company to perform some safety function and therefore does not perform that function itself.

Where the parent company's undertaking is more narrow, showing breach and causation is more difficult, but by no means impossible. Generally, the parent company will only be held accountable for the scope of its undertaking.⁴² In other words, if the parent company only undertook to assist with the safety of one specialized portion of the subsidiary's facility, but the worker was injured due to a leaky refrigerator in the break room, the plaintiff will have a difficult time establishing the parent company is liable.

Once the plaintiff has demonstrated the scope of the parent company's undertaking, the plaintiff will often use an expert witness to explain how the parent company breached its duty and caused the plaintiff's injuries. What type of expert is required depends on the nature of the work being performed at the time of the injury, but an industrial hygienist or certified safety professional can often assist plaintiffs in articulat-

³⁹ RESTATEMENT (SECOND) § 324A(a).

⁴⁰ *Id.* at comment d.

⁴¹ See *Johnson v. Abbe Engineering Co.*, 749 F.2d 1131 (5th Cir. 1984) (in a classic example of a 324A claim against a parent company for a subsidiary employee's workplace injury, affirming a jury's verdict in favor of the plaintiff and holding that the parent company's safety manager made safety directives and recommendations that created a broad duty of maintaining safe conditions at the subsidiary's worksite that lulled the subsidiary into a false sense of security).

⁴² See *Reeser v. NGK North American, Inc.*, 14 A.3d 896, 900 (Pa. Super. 2011) (explaining the scope of Section 324 is measured by the scope of the undertaking).

ing what the proper safety measures would have been once the duty was undertaken.⁴³

IV. PARENT COMPANIES' DEFENSES TO SUBSIDIARY EMPLOYEES' CLAIMS OF NEGLIGENCE

The two most common defenses raised by parent companies facing allegations of negligence are strikingly different: while some parent companies claim to be so removed from their subsidiary's operations that no duty exists under Section 324A, other parent companies claim to be one entity with their subsidiary and thus entitled to immunity under the Pennsylvania Workers' Compensation Act. Because of how diametrically opposed these two defenses are, the parent company usually stakes out one position or the other from the outset of litigation.⁴⁴

Initially, the more popular defense raised by parent companies appeared to be a claim of immunity. Section 303 of the Pennsylvania Workers' Compensation Act provides that an individual's exclusive remedy against her employer is the benefits conferred through that Act; in other words, the employer is immune from tort claims.⁴⁵ A parent company sued for negligence can escape without liability if it can show it was actually the employer. That was the approach taken by the defendant in *Kiehl*. However, *Kiehl* and other Pennsylvania cases following it have made parent companies' claims of immunity much more difficult.⁴⁶

Kiehl, discussed at length above, relied heavily on an earlier Pennsylvania Supreme Court decision, *Mohan v. Publiker Industries, Inc.*,⁴⁷ which set forth the functional analysis test for determining whether the parent or subsidiary

43 It is important to note, however, that while an expert witness can help describe the breach and causation, evidence of an undertaking must be elicited separate from the expert's testimony. See *Grimsley v. Manitowoc Co.*, 792 Fed. Appx. 168, 171 (3d Cir. 2019) (explaining that the expert's assumption that the parent company controlled the work at the subsidiary's facility did not create an issue of fact as that statement was not otherwise supported in the record).

44 This is not always the case. Some defendants will attempt to straddle the line of these two opposite approaches for the entire litigation. In *Barnes v. Alcoa*, the parent company argued through summary judgment that it was both immune as plaintiff's employer and that it had no duty because it had no involvement at its subsidiary's facility. 2014 WL 8396226, at *2 (Pa. Com. Pl. Oct. 14, 2014). The Philadelphia Court of Common Pleas disagreed and found there were disputed facts on both issues.

45 The entity that paid workers' compensation benefits is not necessarily the employer entitled to tort immunity. See, e.g., *Gardner v. MIA Products Company*, 189 A.3d 441 (Pa. Super. 2018) (reversing summary judgment and finding a question of fact existed as to the identity of the employer, despite noting one of the entities in question had paid workers' compensation benefits). The court will still have to perform a functional analysis. From a practical standpoint, however, the injured worker's workers' compensation counsel and third-party negligence counsel, if different, should discuss identifying the proper entity as employer.

46 The long-standing general rule in Pennsylvania is that an employee can only have one employer. *Adison v. Wanamaker*, 39 A. 1111, 1111 (Pa. 1898). Under limited special circumstances, particularly in the trucking industry where there can be contractual joint employment, Pennsylvania courts have discussed the possibility of there being two employers. However, when it comes to a parent-subsidiary relationship, Pennsylvania Courts have always sought to determine *which* of the two entities is the employer through the functional analysis test and then the other traditional indicia of control. By its very nature, the functional analysis test does not entertain joint employment. See *Kiehl v. Action Mfg. Co.*, 535 A.2d 571, 574 (Pa. 1987); *Mohan v. Publiker Industries, Inc.*, 222 A.2d 876, 878-79 (Pa. 1966); *Joyce v. Super Fresh Food Markets, Inc.*, 815 F.2d 943, 946 (3d Cir. 1987).

47 *Mohan*, 222 A.2d 876.

actually employed the injured party. In *Mohan*, a worker was fatally injured by a machine that was owned, maintained, operated, and controlled by Continental for the purpose of sealing cases of whiskey. Continental's parent company was Publiker. At trial, the plaintiff proceeded against only Continental and argued that Publiker, the parent company, was the employer entitled to immunity.⁴⁸ The plaintiff contended Publiker was the parent company because Publiker was listed on the decedent's W-2 and income tax returns as her employer, she required Publiker's permission for time off, and her lay-off and return to work notices were provided by Publiker.

The Pennsylvania Supreme Court, however, found that these facts, while relevant factors when looking at traditional indicia of control for the right to control test of employment, were not determinative in the context of a parent-subsidiary relationship. "We recognize that in a situation wherein the issue is *which* of two corporations, one of which is a wholly-owned subsidiary of the other, is the employer of an injured employee, the problem of determining the question of control can properly be resolved only by a consideration of the functions performed by every interested party — each corporation and the injured employee — in addition to other indicia of control."⁴⁹ In applying the test of which corporation the decedent's work was furthering, the Court found it significant that the machine involved was used for sealing cases of alcohol intended for consumption, which was part of Continental's business, whereas Publiker produced only industrial alcohol and chemicals.

Mohan's functional analysis became the basis for *Kiehl* and the touchstone for how issues of immunity are decided in claims brought against a parent company.⁵⁰ For purposes of Section 324A claims against parent companies brought by a subsidiary's employee, the facts of *Mohan* diminish its utility. *Mohan's* legacy for purposes of such claims is its determination that parent and subsidiary companies must staunchly be considered separate entities and a functional analysis should be conducted to determine *which* of the two entities was the employer at the time of injury.⁵¹ Pennsylvania courts have consistently found that a parent company and its subsidiary must be regarded as separate for purposes of

48 Where there is potential confusion over which entity actually employed the injured worker, the plaintiff can name both the parent and subsidiary as defendants and allow it to be sorted out in discovery. See *McNeal v. ArcelorMittal USA, Inc.*, 143 F. Supp. 3d 241, 249 (E.D. Pa. 2015). This tactic, along with precedential case law in *Kiehl*, forces the defendants to identify the employer with at least some degree of clarity. The plaintiff in *Mohan* sued both the parent and subsidiary but prior to trial voluntarily dismissed the parent, a decision that ultimately backfired when the evidence at trial showed the subsidiary to be the employer, and therefore immune.

49 *Mohan*, 222 A.2d at 879 (emphasis added).

50 See *Joyce v. Super Fresh Food Markets, Inc.*, 815 F.2d 943, 946 (3d Cir. 1987) and *Thompson v. Fare*, 173 F. Supp. 2d 368 (E.D. Pa. 2001) (explaining and applying the functional analysis for related corporations).

51 *Joyce*, 815 F.2d at 946; see also *Kiehl*, 535 A.2d at 574.

workers' compensation immunity.⁵² To give immunity to a subsidiary and its parent would render *Mohan's* functional analysis test meaningless.⁵³

Whereas the immunity defense raised by parent companies is essentially the parent company saying it was so involved in its subsidiary's business that it became a joint employer, parent companies have also defended Section 324A claims by distancing themselves entirely from their subsidiary. Similarly situated companies have taken completely opposite approaches to defending themselves. Which approach a defendant parent company advances will likely be dictated by the particular relationship with its subsidiary. By arguing there is a strict separation between the entities, parent companies attempt to deprive plaintiffs of the necessary factual predicate for establishing a duty under Section 324A.⁵⁴ As a practical matter, plaintiffs' counsel will need to endeavor to have factual evidence of the parent company's undertaking prior to filing suit whenever possible.

V. CONCLUSION

With modern complex corporate structures seemingly here to stay, it is very likely that allegations of parent companies' negligence will rise. For whatever benefits corporations receive by maintaining their subsidiaries as separate entities and then meddling in those subsidiaries' operations or safety functions, those parent companies must be prepared to also accept the consequences if they do not properly perform their undertaken duties. Meanwhile, workers (and their attorneys) who perhaps previously believed they only had workers' compensation benefits available to them, should investigate whether the employer is part of a complex corporate structure and whether the parent company took an active role in the employer's operations or safety.

⁵² The lone outlier opinion appears to be *Barker v. Tyson Foods, Inc.*, a case that dealt with a worker's death after allegedly contracting Covid at a meatpacking plant. 2021 WL 5769538 (E.D. Pa. Dec. 6, 2021). The plaintiff sued both a subsidiary and its parent company. The court declined to follow *Kiehl* and *Mohan* and held both a parent and subsidiary could be employers under the Pennsylvania Workers' Compensation Act. Notably, the *Barker* decision granted a motion to dismiss, not a motion for summary judgment, and the court did not seem to engage in the required functional analysis test in keeping with *Kiehl*. *Barker* was also the second time the judge addressed the issue in that litigation: after first dismissing the subsidiary employer, the court asked for further briefing as to the immunity of the parent company and found that the plaintiff "almost ignored my Order, and instead repeated the factual allegations she made in her Complaint." In finding that the plaintiff essentially pled the parent company was also the employer based on the extensive control asserted, the trial court did not engage with Section 324A or the case law discussing the framework for such claims against parent companies. Other courts have not seemed to follow the *Barker* opinion. The *Barker* decision is also at odds with another Eastern District of Pennsylvania opinion, *Thompson v. Fare*, which explained, "As *Kiehl* makes clear, the fact that the sole function of a subsidiary is to service the parent's business needs does not collapse the companies' functions for the purpose of the workmen's compensation act." 173 F. Supp. 2d at 375 n.4.

⁵³ See *Grimsley v. Manitowoc Co.*, 2019 WL 367167, at *7 n.4 (E.D. Pa. Jan. 30, 2019), aff'd, 792 Fed. Appx. 168 (3d Cir. 2019) (rejecting parent company's argument that both it and its subsidiary were the plaintiff's employer at the time of injury because that argument would "render[] the functional analysis meaningless").

⁵⁴ See, e.g., *Grimsley*, 792 Fed. Appx. 168; *McNeal v. ArcelorMittal USA, Inc.*, 143 F. Supp. 3d 241 (E.D. Pa. 2015); *Bucks v. Pennfield Corp.*, 4 Pa. D. & C.4th 474, 481 (Pa. Com. Pl. 1989).