ADAPT OF PHILADELPHIA V. PHILADELPHIA HOUSING AUTHORITY: THE THIRD CIRCUIT CORRECTLY DETERMINED PREMATURELY APPEALED DISCOVERY ORDERS COULD NOT LATER RIPEN WITH SUBSEQUENT ENTRY OF FINAL JUDGMENT BUT FAILED TO EXAMINE THE VALIDITY OF THE CRITICIZED *CAPE MAY GREENE* RULE

INTRODUCTION

By statute, the United States federal appellate courts only have jurisdiction to hear appeals from final judgments.[1] However, Federal Rule of Appellate Procedure 4(a)(2) ("Fed. R. App. P. 4(a)(2)") allows certain prematurely filed appeals from nonfinal orders to become effective upon the subsequent entry of final judgment in the case if the final judgment is entered before a hearing on the appeal.[2] In 1991, the United States Supreme Court determined the case of *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*[3] and limited the application of Fed. R. App. P. 4(a)(2) to those situations in which the appealed order would have been appealable if immediately followed by final judgment.[4] But, prior to the Supreme Court's interpretation of Fed. R. App. P. 4(a)(2) in *FirsTier*, the United States Court of Appeals for the Third Circuit created the *Cape May Greene* rule, which like Fed. R. App. P. 4(a)(2), worked to save premature appeals.[5] After the Supreme Court's ruling in *FirsTier*, several circuits abrogated their rules similar to the *Cape May Greene* rule.[6] Unlike other circuits, the Third Circuit determined in *Lazy Oil Co. v. Witco Corp.*[7] the *Cape May Greene* rule was not overruled by *FirsTier*.[8]

1. 28 U.S.C. § 1291 (2000).
2. *See* FED. R. APP. P. 4(a)(2).
3. 498 U.S. 269 (1991).
4. FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 269, 276 (1991).
5. Cape May Greene, Inc. v. Warren, 698 F.2d 179, 179, 185 (3d Cir. 1983).
6. *See* United States v. Cooper, 135 F.3d 960 (5th Cir. 1998) (overruling its rule similar to the *Cape May Greene* rule—the *Jetco-Alcorn-Alcom* rule); Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156 (D.C. Cir. 2005) (overruling its rule similar to the *Cape May Greene* rule on premature appeals and also addressing the validity of the *Cape May Greene* rule itself); Serine v. Peterson, 989 F.2d 371 (9th Cir. 1993) (acknowledging the Circuit's rule similar to the *Cape May Greene* rule that was in existence prior to *FirsTier*, but did not apply the rule).
7. 166 F.3d 581 (3d Cir. 1999).
8. Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 586-87 (3d Cir. 1999).

In *Adapt of Philadelphia v. Philadelphia Housing Authority*,[9] the Philadelphia Housing Authority ("PHA") and Resident Advisory Board, Inc. ("RAB") appealed several discovery orders upon their entry and prior to any final disposition of the substantive claims in the case.[10] Before the Third Circuit heard the consolidated appeals, the district court entered final judgment.[11] The Third Circuit determined PHA's and RAB's appeals were premature and analyzed whether the appeals ripened under either Fed. R. App. P. 4(a)(2) or the Circuit's own *Cape May Greene* rule when the district court subsequently entered final judgment.[12] The Third Circuit determined neither Fed. R. App. P. 4(a)(2) nor the *Cape May Greene* rule could save the premature appeals because the appealed orders were clearly interlocutory discovery orders instead of final orders.[13] The court analyzed whether the *Cape May Greene* rule could save the appeals even though the court acknowledged the rule had been criticized by other circuits and the viability of the rule questioned.[14] Though the court acknowledged this questioned viability, it still refused to determine whether the rule continued to be valid.[15] Accordingly, the Third Circuit determined premature appeals from interlocutory discovery orders could not ripen upon subsequent entry of final judgment.[16]

This Note will first review the facts and holding of *Adapt*.[17] This Note will then examine previous Third Circuit cases, cases from other circuits, and a Supreme Court case discussing whether premature appeals could later become effective.[18] This Note will show the *Adapt* court correctly determined neither Fed. R. App. P. 4(a)(2) nor the *Cape May Greene* rule could save a premature appeal from a discovery order.[19] However, this Note will also demonstrate two of the rationales behind the *Adapt* court's determination were flawed.[20] Finally, this Note will reveal the *Adapt* court failed to reexamine the validity of the *Cape May Greene* rule in light of the Supreme Court's ruling in *FirsTier*.[21] This Note will show that while the *Adapt* court reached the

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9. 433 F.3d 353 (3d Cir. 2006).
10. Adapt of Philadelphia v. Philadelphia Hous. Auth., 433 F.3d 353, 357-59 (3d Cir. 2006).
11. *Adapt*, 433 F.3d at 359.
12. *Id.* at 361, 364.
13. *Id.* at 364-65.
14. *Id.* at 364, 364 n.13, 365.
15. *See generally* Adapt of Philadelphia v. Philadelphia Hous. Auth., 433 F.3d 353 (3d Cir. 2006) (failing to address the viability of the *Cape May Greene* rule).
16. *Adapt*, 433 F.3d at 361.
17. *See infra* notes 23-118 and accompanying text.
18. *See infra* notes 119-312 and accompanying text.
19. *See infra* notes 331-425 and accompanying text.
20. *See infra* notes 426-86 and accompanying text.
21. *See infra* notes 487-528 and accompanying text.

correct outcome, its analysis was flawed and it failed to clarify the validity of the *Cape May Greene* rule.[22]

FACTS AND HOLDING

In *Adapt of Philadelphia v. Philadelphia Housing Authority*,[23] ADAPT of Philadelphia, Liberty Resources, Inc., and several other individuals (collectively "ADAPT") brought an action against the Philadelphia Housing Authority and its executive director Carl Greene (collectively "PHA").[24] ADAPT alleged PHA had not provided a sufficient amount of subsidized accessible housing units for individuals with mobility impairments, as required by section 504 of the Rehabilitation Act of 1973[25] and its implementing regulations.[26]

ADAPT prevailed at a bench trial before the United States District Court for the Eastern District of Pennsylvania.[27] PHA appealed the district court's decision to the United States Court of Appeals for the Third Circuit.[28] However, before the Third Circuit heard the appeal, the parties executed a Settlement Agreement and Release ("Agreement") that resolved the litigation.[29] On May 20, 2002, the district court approved the Agreement.[30] The district court retained jurisdiction over the issue in order to enforce the Agreement and its terms.[31]

Paragraph B of the Agreement demanded PHA provide 248 accessible public housing rental units, 124 of which were to be completed by December 31, 2003.[32] The Agreement required the 248 units in addition to the units PHA was required to make accessible pursuant to the Department of Housing and Urban Development ("HUD") regulations.[33] Paragraph C of the Agreement demanded PHA take reasonable steps in accordance with other HUD regulations to maximize the number of individuals with mobility impairments occupying the

22. *See infra* notes 313-528 and accompanying text.
23. 433 F.3d 353 (3d Cir. 2006).
24. Adapt of Philadelphia v. Philadelphia Hous. Auth., 433 F.3d 353, 355 (3d Cir. 2006). ADAPT of Philadelphia was an organization which advocated for individuals with disabilities. *Adapt*, 433 F.3d at 355 n.1. Philadelphia Liberty Resources, Inc. was an advocacy and social service non-profit corporation. *Id.*
25. 29 U.S.C. § 794 (2000 & Supp. III 2003).
26. *Adapt*, 433 F.3d at 355.
27. *Id.*
28. *Id.*
29. *Id.* at 354-55.
30. *Id.* at 355.
31. *Id.*
32. *Id.* The remaining units were to be ready by December 31, 2005. *Id.*
33. *Id. See* 24 C.F.R. §§ 8.22-8.23 (2005) (requiring housing authority to provide five percent of its substantially altered units to be accessible for persons with mobility impairments).

units.[34] Paragraph P of the Agreement compelled PHA to provide ADAPT with reports regarding the status and implementation of the Paragraph B units.[35] The Agreement also provided both PHA and ADAPT with the right to seek relief by motion from the district court if a dispute arose over the enforcement of the Agreement.[36]

When the December 31, 2003 deadline passed, ADAPT requested confirmation from PHA that it had made the first group of accessible units available pursuant to the Agreement.[37] ADAPT further requested the addresses of those units.[38] PHA maintained it had fulfilled Paragraph B of the Agreement by the December 31, 2003 deadline.[39] However, PHA refused to disclose the addresses of those units that were in compliance with the Agreement.[40] As a result, ADAPT filed a motion in the district court to compel PHA to disclose the addresses.[41] The district court granted ADAPT's motion on May 10, 2004, ordering PHA to release the addresses for the units that were in compliance with the Agreement.[42] The district court also ordered PHA to disclose which of the units were not occupied by tenants with mobility impairments.[43] PHA provided ADAPT with the addresses, and after visiting the units, ADAPT determined several of the units were not leased to individuals who required the accessibility features of the units.[44]

ADAPT responded by filing a motion in the district court on July 6, 2004 to enforce the terms of the Agreement, arguing while PHA had created the accessible units as required under the Agreement, it violated Paragraph C of the Agreement by failing to lease a substantial number of the units to individuals with mobility impairments.[45] Meanwhile, instead of seeking a stay with the district court, PHA ap-

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34. *Adapt*, 433 F.3d at 356. *See* 24 C.F.R. § 8.27 (2005) (requiring managers of the units to notify qualified individuals of the availability of the accessible units and give priority to those applicants).

35. *Adapt*, 433 F.3d at 356.

36. *Id.*

37. *Id.*

38. *Id.* Paragraph B required 124 of the 248 required units be ready for occupancy by December 31, 2003. *Id.* at 355.

39. *Id.* at 356-57.

40. *Id.* at 357.

41. *Id.* PHA objected to the motion, arguing the Agreement did not require the release of the addresses. *Id.*

42. *Id.*

43. *Id.* PHA filed a motion for reconsideration and a motion to stay, but the district court denied both motions. *Id.*

44. *Id.* at 356-57. ADAPT's counsel reported that he "looked in windows" and "spoke with neighbors" to verify compliance with the Agreement. *Id.* at 357.

45. *Id.* at 356-57; Adapt of Philadelphia v. Philadelphia Hous. Auth., No. Civ.A. 98-4609, 2005 WL 3274331, at *2 (E.D. Pa. Aug. 29, 2005). ADAPT sought injunctive and declaratory relief. *Adapt*, 433 F.3d at 357.

pealed the May 10, 2004 order compelling its release of the unit addresses to the Third Circuit.[46]

ADAPT then filed two more motions to compel discovery responses based upon PHA's refusal to release additional addresses to ensure PHA had complied with both the Agreement and the statutorily required units under the HUD regulations.[47] PHA resisted the motions to compel and responded by filing its own motion to enforce the Agreement in the district court, arguing because ADAPT demanded individualized supervision of PHA's residence decisions, ADAPT was seeking to impose terms PHA had specifically refused to agree upon in negotiations.[48] PHA also argued it was only required to provide quarterly reports to ADAPT in accordance with the Agreement and by seeking to ensure compliance with the statutory requirement, ADAPT was seeking relief beyond the scope of the Agreement.[49]

On August 10, 2004, Resident Advisory Board, Inc. ("RAB") intervened to protect the privacy interests of the individuals who occupied the affected units.[50] RAB specifically objected to the release of the unit addresses, arguing it would violate the privacy of the tenants living in the units.[51] However, on September 3, 2004, the district court granted both of ADAPT's motions.[52] Thereafter, PHA complied with the order.[53] Both PHA and RAB appealed the order.[54]

Next, ADAPT requested documents from PHA concerning the physical and medical conditions of the tenants in the accessible hous-

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46. *Adapt*, 433 F.3d at 357. The Third Circuit dismissed that appeal for a lack of appellate jurisdiction in *Adapt of Philadelphia v. Philadelphia Hous. Auth.*, 417 F.3d 390, 396 (3d Cir. 2005) ("*Adapt I*"). *Id.*

47. *Adapt*, 433 F.3d at 357. PHA was statutorily required by HUD regulations to make five percent of its housing accessible for persons with mobility impairments. *Id.* at 357-58. The Agreement required PHA to create 248 accessible units in excess of the statutorily required five percent. *Id.* at 358. ADAPT wanted to ensure that units had been made in compliance with both the Agreement and the statute. *Id.* After the parties entered into the Agreement, PHA sought consent to substitute the units at Suffolk Manor and Mount Olivet for units it previously designated in the Agreement. *Id.* at 357. ADAPT agreed with this substitution, but also sought the addresses to the accessible units at these housing projects under its Motion to Compel. *Id.*

48. *Id.* at 358.

49. *Id.*

50. *Id.* at 356; Adapt of Philadelphia v. Philadelphia Hous. Auth., No. Civ.A. 98-4609, 2004 WL 1858345, at *1 (E.D. Pa. Aug. 10, 2004). RAB was a non-profit organization that advocated for tenants of tax-subsidized housing. *Adapt*, 433 F.3d at 356.

51. *Adapt*, 433 F.3d at 358.

52. *Id.*

53. *Id.*

54. *Id.* PHA first sought a stay, but was unsuccessful. *Id.* PHA complied with the order by disclosing the relevant information. *Id.* PHA appealed on the ground that the mandated disclosures went beyond the purview of the Agreement. *Id.* RAB appealed separately, maintaining the required disclosures would violate the privacy rights of the occupants of the units. *Id.* The Third Circuit also dismissed these appeals for a lack of jurisdiction in *Adapt I*. *Id.*

ing units.[55] Specifically, ADAPT sought copies of mobility-impairment verifications that PHA relied upon in placing tenants in the accessible housing units.[56] PHA objected to the disclosure and moved for a protective order in the district court.[57] RAB also sought a protective order, arguing these disclosures violated privacy rights of the tenants.[58] ADAPT moved to compel the disclosures.[59]

In its November 24, 2004 order, the district court denied in part and granted in part RAB's motion for a protective order.[60] The district court ordered PHA to disclose the verification forms in a redacted form.[61] The court also ordered certain confidentiality terms regarding the forms.[62] PHA complied with the order and, subsequently, both PHA and RAB again appealed the order to the Third Circuit.[63]

Based upon the information in the redacted verification forms, which were disclosed pursuant to the November 24, 2004 court order, ADAPT alleged fifty-nine residents in the questioned units did not require the accessibility features of the units they occupied.[64] Therefore, ADAPT moved the court for an order compelling PHA to produce the unredacted verification forms for the fifty-nine questioned residents.[65] On February 10, 2005, the district court ordered the release

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55. *Id.*

56. *Id.* Prior to accepting the tenant in an accessible housing unit, PHA required verification of the tenant's mobility impairment, which the tenant's physician usually provided. *Id.* The form consisted of questions relating to the specific features the individual required, such as lowered sinks or wider doorways. *Id.* In particular, Question No. 5 asked the reporting individual or physician the following:

> Please provide further information that would assist [PHA] to determine the accessible housing features and/or accommodations in housing required by the applicant (i.e., features to accommodate devices and equipment used by the applicant, particular needs not addressed by the features listed above, etc.). [PHA does] not require details or information about the nature or extent of the disability.

Id. at 358-59.

57. *Id.* at 358. ADAPT sought the disclosures through interrogatories and requests for production of documents. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 359. The district court denied PHA's motion for a protective order in a November 3, 2004 ruling. *Id.* at 359 n.5.

61. *Id.* at 359. The court ordered PHA to redact the forms, to remove the residents' names, and to remove the answers to Question No. 5. *Id.* The forms were identifiable by resident initials, addresses, and the date the residency began. *Id.*

62. *Id.* The court required the information in the verification forms not be released to anyone except outside experts used by the parties. *Id.* The court required the experts to agree in advance and in writing to retain the information in the verification forms as confidential, pending further order from the court. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* Specifically, ADAPT moved the court for the answers to Question No. 5 for these fifty-nine residents. *Id.*

of the forms with only the resident's name redacted.[66] PHA complied with the order.[67] Consequently, PHA and RAB again appealed the order to the Third Circuit.[68]

On March 15, 2005, the district court ordered PHA to disclose the unredacted verification forms for five additional residents and a chart created by PHA's expert.[69] Once again, PHA and RAB appealed the order to the Third Circuit.[70]

PHA's appeals from the May 10, 2004 and August 10, 2004 orders and RAB's appeal from the August 10, 2004 order were combined, and the Third Circuit dismissed these three appeals in *Adapt of Philadelphia v. Philadelphia Housing Authority*[71] ("*Adapt I*") on August 8, 2005.[72] In *Adapt I*, the Third Circuit reasoned it lacked appellate jurisdiction over the three appeals because the appealed orders were not appealable final orders.[73]

The district court entered a final judgment on August 29, 2005, denying both ADAPT's and PHA's motions to enforce the Agreement.[74] The district court entered its final judgment on August 29, 2005, prior to the Third Circuit hearing PHA's and RAB's remaining six appeals.[75] Regarding ADAPT's motion, the district court refused to read the Agreement as requiring the tenants of the questioned units to need a wheelchair to meet the standard of mobility impairment that required accessibility features.[76] Noting the placement of tenants in the units was not "an exact science," the district court opined PHA had acted reasonably and in accordance with the Agreement in its placement of tenants.[77] The district court also denied PHA's motion to enforce the Agreement, determining ADAPT merely

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66. *Id.* The answers to Question No. 5 were not redacted as they were in the first disclosure. *Id.* The court also required the verification forms to be kept under seal and with the same confidentiality requirements as when they were first released. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* The parties redacted the resident names again from the disclosed verification forms and released the forms under the same confidentiality terms. *Id.*

70. *Id.*

71. 417 F.3d 390 (3d Cir. 2005).

72. *Adapt*, 433 F.3d at 356; Adapt of Philadelphia v. Philadelphia Hous. Auth., 417 F.3d 390, 390 (3d Cir. 2005) ("*Adapt I*").

73. *Adapt I*, 417 F.3d at 392.

74. *Adapt*, 433 F.3d at 359.

75. *Id.* at 353, 359-60.

76. *Id.* at 360. The court determined ADAPT essentially argued the residents in question may have suffered some impairments but did not require wheelchairs and thus, did not require the accessibility features of the units they occupied. *Id.* The court refused to establish a rigid hierarchy among the impaired residents. *Id.* In making its determination, the court considered the medical verification forms, interviews conducted by PHA, and personal statements of the residents as substitution for their testimony. *Id.*

77. *Id.*

requested the necessary information to ensure compliance with the Agreement.[78]

The United States Court of Appeals for the Third Circuit dismissed the final six appeals for lack of appellate jurisdiction in its January 9, 2006 opinion, just as it dismissed the first three appeals.[79] Circuit Judge Leonard I. Garth, writing for the court, concluded ADAPT's and RAB's appeals from discovery orders were not premature appeals that could ripen upon the entry of a final judgment.[80] In its analysis, the court first explained it only had jurisdiction to hear appeals from final judgments, and discovery orders were not considered final orders.[81]

The court determined the issue before it was whether premature appeals from interlocutory orders, such as discovery orders, could ripen with entry of final judgment.[82] The court explained two jurisdictional doctrines allowed premature appeals to ripen with entry of a final judgment: (1) Fed. R. App. P. 4(a)(2)[83] and (2) the rule from *Cape May Greene, Inc. v. Warren*[84] ("the *Cape May Greene* rule").[85] PHA argued the *Cape May Greene* rule allowed appellate jurisdiction upon entry of final judgment in the district court under 28 U.S.C. § 1291[86]

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78. *Id.*

79. *Id.* at 353, 365.

80. *Id.* at 354, 355, 360.

81. *Id.* at 360 (citing 28 U.S.C. § 1291 (2000)). The court acknowledged in limited situations, the court may review discovery orders pursuant to the collateral order doctrine under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *Id.* PHA initially argued the court had appellate jurisdiction over the appeals pursuant to the collateral order doctrine, but the court rejected this argument just as it did in *Adapt I*. *Id.* at 360, 360 n.8. The court also rejected PHA's initial argument that appellate jurisdiction existed under 28 U.S.C. § 1292(a), which provided jurisdiction over interlocutory orders involving injunctions, determining an order compelling discovery did not grant substantive relief and, thus, was not an injunction. *Id.* at 360-61 n.8.

82. *Id.* at 361. The court addressed the issue sua sponte in accordance with *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269 (1991), in order to determine whether appellate jurisdiction existed. *Id.* at 361 n.10.

83. FED. R. APP. P. 4(a)(2) states "[a] notice of appeal filed after the court announces a decision order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." FED. R. APP. P. 4(a)(2).

84. 698 F.2d 179 (3d Cir. 1983).

85. *Adapt*, 433 F.3d at 364.

86. 28 U.S.C. § 1291 states:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1291 (2000).

because the interlocutory orders turned into final orders.[87] In contrast, ADAPT argued there was no jurisdiction over the appeals based upon *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*,[88] which defined Fed. R. App. P. 4(a)(2) as the appellate rule governing premature appeals.[89]

The court reviewed Fed. R. App. P. 4(a)(2), stating the rule allowed certain premature appeals to become valid when the district court entered a final judgment, thus preserving the appeal from dismissal for failure of jurisdiction.[90] The Third Circuit cited *FirsTier*, in which the United States Supreme Court construed and explained the application of Fed. R. App. P. 4(a)(2).[91] The court noted in *FirsTier*, the Supreme Court held the rule "permit[ted] a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announce[d] a decision that would be appealable if immediately followed by the entry of judgment."[92] The court further cited *FirsTier* as maintaining appeals from clearly interlocutory decisions, such as discovery orders, could not be fixed by entry of a final judgment because there was no reasonable belief the order could be a final judgment.[93] The court determined based on *FirsTier*, Fed. R. App. P. 4(a)(2) could not save the discovery orders because they were premature appeals.[94]

The court turned to the *Cape May Greene* rule, reviewing whether the rule still existed in light of the Supreme Court's ruling in *FirsTier*.[95] The court explained in *Cape May Greene*, a case prior to the Supreme Court ruling in *FirsTier*, the Third Circuit held a premature appeal ripened when the district court disposed of the remaining claims of the case.[96] The Third Circuit cited several cases that affirmed the *Cape May Greene* rule as well as one that had dismissed

87. *Adapt*, 433 F.3d at 360-61. PHA argued the six appeals differed from the first three appeals that were dismissed because those appeals were dismissed prior to entry of the final judgment. *Id.* at 361.

88. 498 U.S. 269 (1991).

89. *Adapt*, 433 F.3d at 361. ADAPT also argued the appeals were moot because of the entry of the final judgment. *Id.* at 361 n.9. The court acknowledged this issue but explained it would first address the issue of appellate jurisdiction. *Id.*

90. *Id.* at 362.

91. *Id.*

92. *Id.* at 362-63. The court explained *FirsTier* involved an appeal filed after the district court judge orally granted a summary judgment but prior to the judge actually entering final judgment in the case. *Id.* at 363.

93. *Id.*

94. *Id.* at 364.

95. *Id.* at 362.

96. *Id.* The court further explained that in *Cape May Greene*, an appeal from an order granting summary judgment was filed prior to dismissal of the counterclaim in the case but was heard by the appellate court after final disposal of the entire case in the district court. *Id.*

the rule.[97] The court explained while several courts limited application of the *Cape May Greene* rule in light of *FirsTier*, it previously refused to do so.[98]

The court acknowledged that despite *FirsTier* there were situations other than those under Fed. R. App. P. 4(a)(2) when a premature appeal would ripen on a later date.[99] The court proceeded to review its ruling in *Lazy Oil Co. v. Witco Corp.*,[100] in which it specifically held the *Cape May Greene* rule continued to stand in spite of the ruling in *FirsTier*.[101] The court noted that the *Lazy Oil* court opined the *Cape May Greene* rule applied in situations when a lack of appellate jurisdiction elevated technicalities above substantive issues.[102] Further, the Third Circuit explained the *Lazy Oil* court determined the fixture of a premature appeal was not limited to the specific situation and restrictions established in *FirsTier*, and it construed the still existing *Cape May Greene* rule as broader than those restrictions established in *FirsTier*.[103] The court also acknowledged another circuit had criticized the *Cape May Greene* rule.[104] Additionally, the court acknowledged the questionable validity of the rule but held this questionable validity was inapposite because the court was dealing with discovery orders.[105]

Thus, because the court already established Fed. R. App. P. 4(a)(2) could not save the appeals and the *Cape May Greene* rule survived the *FirsTier* decision, the court focused on whether the present appeals could survive under the *Cape May Greene* rule.[106] The court

97. *Id.* The court cited *Presinzano v. Hoffman-La Roche, Inc.*, 726 F.2d 105 (3d Cir. 1984), *Dowling v. City of Philadelphia*, 855 F.2d 136 (3d Cir. 1988), *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999), and *General Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296 (3d Cir. 2001) as cases that affirmed the *Cape May Greene* rule. *Adapt*, 433 F.3d at 362 n.12. The court then cited *United States v. Hansen*, 795 F.2d 35 (7th Cir. 1986) as a case that did not follow the rule. *Adapt*, 433 F.3d at 362.

98. *Adapt*, 433 F.3d at 362. The court cited *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156 (D.C. Cir. 2005), *United States v. Cooper*, 135 F.3d 960 (5th Cir. 1998), and *Serine v. Peterson*, 989 F.2d 371 (9th Cir. 1993) as cases that limited the application of the *Cape May Greene* rule in light of the decision in *FirsTier*. *Adapt*, 433 F.3d at 362.

99. *Adapt*, 433 F.3d at 363.

100. 166 F.3d 581 (3d Cir. 1999).

101. *Adapt*, 433 F.3d at 363. The court further explained that *Lazy Oil* involved an appeal from an order approving a class action settlement but denying an allocation plan of the settlement proceeds, and, therefore, the order was not final. *Id.*

102. *Id.* at 364.

103. *Id.* at 363-64.

104. *Id.* at 364 n.13.

105. *Id.* The court acknowledged then-Judge John Roberts criticized the *Cape May Greene* rule in *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156 (D.C. Cir. 2005) for "fashioning without institutional warrant, an additional doctrine to save premature notices of appeals that are not saved under the rule, as construed by the Supreme Court." *Adapt*, 433 F.3d at 364 n.13.

106. *Adapt*, 433 F.3d at 363, 364.

noted it had never applied the *Cape May Greene* rule to a premature appeal from an interlocutory order.[107] On this issue, the court discussed a case with similar facts, *Lazorko v. Pennsylvania Hospital*,[108] in which the court refused to find jurisdiction over a premature appeal of an interlocutory order awarding sanctions when the district court had not yet determined the amount of the award.[109] The court further explained that although the district court entered a final judgment in *Lazorko* prior to a hearing on the appeal, the court in that case determined the premature appeal could not be saved.[110] However, the court noted the *Lazorko* court cited the *FirsTier* decision and not the *Cape May Greene* rule.[111]

The court first opined the present case was far more similar to *Lazorko* than to *Lazy Oil* or *Cape May Greene*.[112] The court determined the present appeals presented a situation in which mere technicalities would be elevated over the important substantive issues if it denied jurisdiction under the *Cape May Greene* rule.[113] Instead, the court noted the appeals raised concerns about piecemeal litigation discouraged under 28 U.S.C. § 1291.[114] Lastly, the court noted Fed. R. App. P. 4(a)(2) did "not support the *Cape May Greene* doctrine when the order from which a notice of appeal [was] filed [was] not one that would be final if followed immediately by entry of judgment."[115] Acknowledging the questionable viability of the *Cape May Greene* rule, the court determined the *Cape May Greene* rule also could not save prematurely appealed interlocutory orders, such as a discovery order or an order for sanctions.[116] As a result, the court held the discovery orders as well as the other interlocutory orders did not qualify as premature appeals that could ripen after the entry of a final judgment.[117] Accordingly, the court dismissed the six appeals for lack of appellate jurisdiction.[118]

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107. *Id.* at 364.

108. 237 F.3d 242 (3d Cir. 2000).

109. *Adapt*, 433 F.3d at 364.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* The court focused its attention to only the *Cape May Greene* rule in its reasoning here because it had already determined Fed. R. App. P. 4(a)(2) could not save the premature appeals. *Id.*

114. *Id.*

115. *Id.* at 364-65 (quoting Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 586 (3d Cir. 1999)).

116. *Id.* at 365.

117. *Id.* at 361, 365.

118. *Id.*

BACKGROUND

A. FED. R. APP. P. 4(a)(2) PROVIDED AN INSTITUTIONAL BASIS FOR SAVING PREMATURE APPEALS

Federal Rule of Appellate Procedure 4(a)(2) ("Fed. R. App. P. 4(a)(2)") provides "[a] notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."[119] In accordance with Fed. R. App. P. 4(a)(2), an appeal after a court's announcement on an issue but prior to entry of the final judgment on the case becomes effective when the final judgment is entered.[120] Fed. R. App. P. 4(a)(2) concludes in such a situation the right to appeal cannot be lost because the appellant filed the notice of appeal prematurely.[121]

B. *CAPE MAY GREENE, INC. V. WARREN*: THE THIRD CIRCUIT ESTABLISHED THE *CAPE MAY GREENE* RULE, WHICH ALLOWED A PREMATURE APPEAL TO BECOME EFFECTIVE IF A FINAL ORDER WAS ENTERED IN THE CASE BEFORE A HEARING ON THE APPEAL

In *Cape May Greene, Inc. v. Warren*,[122] the United States Court of Appeals for the Third Circuit determined it had jurisdiction to hear a premature appeal taken from a nonfinal order.[123] In *Cape May Greene*, Cape May Greene, Inc. ("Cape May Greene") brought an action in the United States District Court for the District of New Jersey against the federal Environmental Protection Agency ("EPA"), the EPA regional director, two section chiefs, the Cape May County Municipal Utilities Authority, and the New Jersey Department of Environmental Protection, seeking declaratory and injunctive relief.[124] Cape May Greene sought relief from an EPA restrictive covenant, which prohibited sewer hookups to particular sites from a planned sewage treatment plant.[125] Cape May Greene argued the restrictive covenant was not within the EPA's authority.[126]

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119. FED. R. APP. P. 4(a)(2).
120. DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 7.2 (4th ed. 2000).
121. *Id.*
122. 698 F.2d 179 (3d Cir. 1983).
123. Cape May Greene, Inc. v. Warren, 698 F.2d 179, 179, 184, 185 (3d Cir. 1983).
124. *Cape May Greene*, 698 F.2d at 179, 181, 182, 184 n.5. Cape May Greene, Inc. was a land developer in the Cape May City, New Jersey area. *Id.* at 181.
125. *Id.*
126. *Id.* at 184. Cape May Greene further argued the restriction violated the Tucker Act, 28 U.S.C. § 1346(a)(2), the Tenth Amendment of the United States Constitution, U.S. CONST. amend. X, and the Equal Protection Clause of the United States Constitution, U.S. CONST. amend. XIV, § 1. *Cape May Greene*, 698 F.2d at 184.

The Tucker Act, 28 U.S.C. § 1346(a)(2), provided in relevant part:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

By May 11, 1982, the district court granted summary judgment in favor of the EPA, finding the restrictive covenant was reasonable and within the agency's authority.[127] The district court determined that pursuant to an executive order the EPA had the necessary authority to create the restrictive covenant.[128] In February, April, and May 1982, the court granted similar judgments in favor of the remaining defendants.[129] However, a cross-claim by the Cape May County Municipal Utilities Authority against the federal defendants remained on file.[130] The district court did not dismiss this cross-claim until July

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> Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

28 U.S.C. § 1346(a)(2) (1982).

U.S. CONST. amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

U.S. CONST. amend. XIV, § 1 provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

U.S. CONST. amend. XIV, § 1.

127. *Cape May Greene*, 698 F.2d at 184.

128. *Id.* The court reasoned Exec. Order No. 11,988, 42 Fed. Reg. 26951 (May 25, 1977), *reprinted in* 42 U.S.C. § 4321 note at 820 (Supp. IV 1980), allowed the EPA to minimize floodplain development as much as possible and supplied the EPA with the necessary authorization to create a restriction aimed at achieving this. *Cape May Greene*, 698 F.2d at 184. The court also dismissed the claims, alleging a violation of the Tucker Act, 28 U.S.C. 1246(a)(2), the Tenth Amendment, U.S. CONST. amend. X, and the Equal Protection Clause, U.S. CONST. amend. XIV, § 1. *Cape May Greene*, 698 F.2d at 184. On the alleged Tucker Act violation, the court stated jurisdiction rested with the Court of Claims. *Id.* On the alleged Tenth Amendment violation, the court determined there was not a regulation of "states as states." *Id.* Finally, on the alleged violation of the Equal Protection Clause, the court found the restriction passed the rational basis test. *Id.*

129. *Cape May Greene*, 698 F.2d at 184. The court granted summary judgment in favor of the EPA and other defendants on December 3, 1981 and on dates in February and April 1982. *Id.* The court entered the final summary judgment on May 11, 1982 in favor of the New Jersey State Department of Environmental Protection. *Id.*

130. *Id.*

22, 1982, approximately two months after the May 11, 1982 grant of the last summary judgment against Cape May Greene.[131]

On May 19, 1982, prior to the district court's dismissal of the cross-claim, Cape May Greene appealed the decision of the district court to the United States Court of Appeals for the Third Circuit.[132] On January 10, 1983, Circuit Judge Joseph F. Weis, Jr., writing for the court, reasoned although the district court did not enter a final order dismissing the cross-claim until after Cape May Greene had already filed its notice of appeal, but before the Third Circuit heard the appeal, the premature appeal became effective upon the district court's entry of the final order on July 22, 1982.[133]

The Third Circuit first addressed the issue of its appellate jurisdiction by reviewing *Pireno v. New York Chiropractic Ass'n.*,[134] a case decided by the United States Court of Appeals for the Second Circuit.[135] The court explained in *Pireno* that a party had similarly appealed an order before the district court entered final judgment, but the district court entered final judgment prior to a hearing on the appeal.[136] The court further explained in *Pireno* that the Second Circuit treated the premature appeal as becoming effective when the district court entered the final judgment and, therefore, heard the appeal on the merits.[137] The court also reviewed *Jetco Electronic Industries, Inc. v. Gardiner*,[138] a case decided by the United States Court of Appeals for the Fifth Circuit, and *Richerson v. Jones*,[139] a case previously decided by the Third Circuit, in which the same situation existed and the courts reached the same outcome.[140] The court stated "practical, not technical considerations [were] to govern the application of principles of finality."[141]

However, the court recognized one United States Supreme Court case that may have required a contrary outcome.[142] The court reviewed *Griggs v. Provident Consumer Discount Co.*,[143] in which the Supreme Court held an appeal filed before the district court disposed

131. *Id.* All the parties filed a stipulation in the district court that dismissed the cross-claim without prejudice. *Id.*
132. *Id.* at 179, 184.
133. *Id.* at 179, 181, 184.
134. 650 F.2d 387 (2d Cir. 1981), *aff'd sub nom.* Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982).
135. *Cape May Greene,* 698 F.2d at 184-85.
136. *Id.*
137. *Id.* at 185.
138. 473 F.2d 1228 (5th Cir. 1973).
139. 551 F.2d 918 (3d Cir. 1977).
140. *Cape May Greene*, 698 F.2d at 185.
141. *Id.* (quoting Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152 (1964)).
142. *Id.*
143. 459 U.S. 56 (1982).

of a Fed. R. Civ. P. 59[144] post-trial motion did not create appellate jurisdiction under Fed. R. App. P. 4(a)(4)[145] because the notice of appeal was not just defective, it was also a nullity."[146] The court noted under Fed. R. App. P. 4(a)(4) a premature appeal self-destructed if filed before the district court disposed of other types of motions.[147] However, the court opined *Griggs* did not require it to deny appellate jurisdiction because the facts in *Griggs* were distinguishable from the facts in Cape May Greene's case.[148] The court also determined Fed. R. App. P. 4(a)(4), which required premature appeals to self-destruct, was limited in application to the specific situations listed in the Rule and, therefore, did not apply to the present case because the present situation was not one of the situations listed in the Rule.[149] Accord-

144. FED. R. CIV. P. 59 provides in relevant part:

> A new trial may be granted to all or any of the parties and on all or part of the issues. (1) In an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

FED. R. CIV. P. 59.

145. FED. R. APP. P. 4(a)(4) provides:

> (A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
> (i) for judgment under Rule 50(b);
> (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;
> (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
> (iv) to alter or amend the judgment under Rule 59;
> (v) for a new trial under Rule 59; or
> (vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.
> (B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.
> (ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.
> (iii) No additional fee is required to file an amended notice.

FED. R. APP. P. 4(a)(4).

146. *Cape May Greene*, 698 F.2d at 185 (quoting Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 56 (1982)).

147. *Id.* at 185.

148. *Id.*

149. *Id.*

ingly, the court determined the case law supported the proposition that the court had jurisdiction to hear the appeal.[150]

C. *FIRSTIER MORTGAGE CO. v. INVESTORS MORTGAGE INSURANCE CO.*: THE UNITED STATES SUPREME COURT DETERMINED FED. R. APP. P. 4(a)(2) COULD SAVE CERTAIN PREMATURE APPEALS BY ALLOWING THE NOTICE OF APPEAL TO RELATE FORWARD WHEN THE DISTRICT COURT SUBSEQUENTLY ENTERED FINAL JUDGMENT

In *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*,[151] the United States Supreme Court maintained a prematurely filed notice of appeal could relate forward under Fed. R. App. P 4(a)(2) to become the notice of appeal from a subsequently entered final judgment.[152] In *FirsTier*, FirsTier Mortgage Company ("FirsTier") sued Investors Mortgage Insurance Company ("IMI"), alleging IMI breached the contract between the two companies as well as its duty of good faith and fair dealing when it refused to pay on eight insurance claims submitted by FirsTier.[153] On January 26, 1989, the parties attended a hearing on IMI's motion for summary judgment.[154] The district court judge announced from the bench he was granting IMI's motion, but requested IMI submit proposed findings of fact and conclusions of law supporting the ruling.[155] The court then announced FirsTier would be able to submit any objections to IMI's proposed findings, and the court would modify the proposal as necessary before final entry of the ruling.[156]

FirsTier appealed the decision of the district court to the United States Court of Appeals for the Tenth Circuit on February 8, 1989, arguing the district court's January 26, 1989 bench ruling granting summary judgment was erroneous.[157] About a month later on March

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150. *Id.*

151. 498 U.S. 269 (1991).

152. FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 269, 276, 277 (1991).

153. *FirsTier*, 498 U.S. at 270. IMI issued eight insurance policies to insure FirsTier against the risk of borrower default on real estate loans made by FirsTier. *Id.* The eight borrowers defaulted and FirsTier submitted claims on the policies to IMI. *Id.* IMI refused to pay the claims. *Id.*

154. *Id.*

155. *Id.* at 270, 271. The district court determined FirsTier had secured the policies through fraud or bad faith, thus making the policies void. *Id.* at 270-71. The district court judge also stated, "[o]f course in a case of this kind, the losing party has a right to appeal. If the Court happens to be wrong, I don't think I am, but if the Court happens to be wrong, it could be righted by the Circuit." *Id.* at 271.

156. *Id.* The court further clarified both the breach of contract action and the breach of the duty of good faith and fair dealing action were extinguished with the court's ruling. *Id.*

157. *Id.* at 272; FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 930 F.2d 1508, 1508 (10th Cir. 1991).

3, 1989, the district court issued its final findings of fact and conclusions of law in support of its January 16, 1989 ruling that granted IMI's motion for summary judgment.[158] Also on March 3, 1989, the district court entered final judgment in the case.[159] The Tenth Circuit dismissed the appeal.[160] The Tenth Circuit reasoned it lacked appellate jurisdiction because the January 26 bench decision was not a final order pursuant to 28 U.S.C. § 1291.[161] The United States Supreme Court granted certiorari to determine whether FirsTier's notice of appeal filed on February 8 was fatally premature.[162]

The Supreme Court reversed the decision of the Tenth Circuit, determining the district court's entry of final judgment on March 3 made the premature appeal filed on February 8 effective under Fed. R. App. P. 4(a)(2), which treated the appeal as timely filed on March 3.[163] On January 15, 1991, Justice Thurgood Marshall, writing for the court, explained Fed. R. App. P. 4(a)(2) could save some prematurely filed appeals.[164] The Court first explained under Fed. R. App. P. 4(a)(1),[165] a party must file a notice of appeal within thirty days after entry of the judgment.[166] The Court noted FirsTier filed

158. *FirsTier*, 498 U.S. at 272.

159. *Id.* The district court entered this final judgment in a separate document from its findings of fact and conclusions of law. *Id.*

160. *Id.* The Tenth Circuit requested the parties brief two issues: "first, whether the February 8 notice of appeal was filed prematurely; and, second, whether the January 26 bench ruling was a final decision appealable under 28 U.S.C. § 1291." *Id.*

161. *Id.* The Tenth Circuit failed to address whether the notice of appeal could become effective from the March 3 entry of final judgment even though the notice identified the January 26 ruling as the appealed ruling. *Id.*

162. *Id.*

163. *Id.* at 272, 276-77.

164. *Id.* at 269, 270, 272-73.

165. FED. R. APP. P. 4(a)(1) provides:

> (A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.
> (B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.
> (C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

166. FED. R. APP. P. 4(a)(1). *FirsTier*, 498 U.S. at 272. *See also* 28 U.S.C. § 2107 (2000). 28 U.S.C. § 2107 provides:

> (a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
> (b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
> (c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds

its notice of appeal approximately one month before entry of judgment.[167]

The Court then explained pursuant to Fed. R. App. P. 4(a)(2), a notice of appeal filed prior to entry of the judgment, but after the announcement of the order, was treated as if filed on the day the court entered judgment.[168] The Court noted Fed. R. App. P. 4(a)(2) codified the general practice of appellate courts to determine certain premature appeals were effective.[169] The Court further noted, unlike a late notice of appeal, certain notices of appeal filed prematurely do not prejudice the appellee and, thus, the technical defect of a premature appeal should not dismiss an otherwise proper appeal.[170]

However, IMI argued Fed. R. App. P. 4(a)(2) only saved a premature appeal when the appellant filed the notice after the announcement of a final decision pursuant to 28 U.S.C. § 1291.[171] IMI further argued the district court judge's January 26 ruling failed to constitute a final decision because the district court judge did not intend to terminate the case on its merits.[172] IMI maintained although the judge announced his order, he also announced he intended to state his rationale and the order in a more detailed fashion at a later date, and, accordingly, the judge's announced order did not exclude the possibility that he could change his mind in the interim.[173] IMI also contended Fed. R. App. P. 1(b)[174] provided courts should not construe the Federal Rules of Appellate Procedure to limit or extend the courts' appellate jurisdiction.[175] Accordingly, IMI argued Fed. R. App. P. 4(a)(2) could not save a premature appeal from a nonfinal decision because this would conflict with Fed. R. App. P. 1(b) by enlarging the appellate

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> (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
> (2) that no party would be prejudiced,
> the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.
> (d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

28 U.S.C. § 2107 (2000).

167. *FirsTier,* 498 U.S. at 272. On February 8, 1989, FirsTier filed its notice of appeal, and the judgment was entered on March 3, 1989. *Id.*

168. *Id.* at 272-73 (quoting FED. R. APP. P. 4(a)(2)).

169. *Id.* at 273.

170. *Id.*

171. *Id.*

172. *Id.* at 273-74.

173. *Id.* at 274.

174. FED. R. APP. P. 1(b) provided in relevant part that the appellate rules "shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law." FED. R. APP. P. 1(b).

175. *FirsTier*, 498 U.S. at 274.

jurisdiction conferred by 28 U.S.C. § 1291, which only provided courts with appellate jurisdiction over final appeals.[176]

The Court concluded it was unnecessary for it to determine if the bench ruling was final because Fed. R. App. P. 4(a)(2) allowed certain notices of appeals filed from nonfinal decisions to become effective upon subsequent entry of final judgments.[177] The Court further explained IMI misinterpreted Fed. R. App. P. 4(a)(2) in conjunction with Fed. R. App. P. 1(b) because Fed. R. App. P. 4(a)(2) allowed a premature appeal to ripen only at the point of final judgment in the case and treated the premature appeal as a notice of appeal for the final judgment and not for the premature decision.[178] Thus, the Court determined Fed. R. App. P. 4(a)(2) would not render the bench ruling appealable in contravention of 28 U.S.C. § 1291 but would permit the premature notice of appeal to relate forward to the final judgment.[179]

The Court then reviewed several cases cited by the Advisory Committee in the note for Fed. R. App. P. 4(a)(2) as support for its finding.[180] The Court determined these cases suggested the drafters of Fed. R. App. P. 4(a)(2) intended "to protect the unskilled litigant who file[d] a notice of appeal from a decision that he reasonably but mistakenly believe[d] to be a final judgment, while failing to file a notice of appeal from the actual final judgment."[181]

Importantly, the Court also explained although Fed. R. App. P. 4(a)(2) could save a premature appeal and treat it as an appeal from the final judgment, it could not save an appeal from a clearly interlocutory ruling—such as a discovery order or an award of sanctions.[182]

176. *Id.* at 274-75. *See also* 28 U.S.C. § 1291 (2000).

177. *FirsTier*, 498 U.S. at 274. The Court determined the Tenth Circuit erred in its determination that an appeal of a bench ruling could only become effective if the bench ruling was itself a final decision. *Id.*

178. *Id.* at 275.

179. *Id.* The Court declared this reading of Fed. R. App. P. 4(a)(2) comported with the drafters' intention, as confirmed by the cases cited in the Advisory Committee's Note to Rule 4(a)(2). *Id.*

180. *Id.* at 275-76. The Court first reviewed as an example the case of *Ruby v. Secretary of United States Navy*, 365 F.2d 385 (9th Cir. 1966), in which the appellant filed the notice of appeal of a district court order dismissing the complaint, but without dismissing the action. *FirsTier*, 498 U.S. at 275. The Court explained that in *Ruby*, the United States Court of Appeals for the Ninth Circuit ruled the notice of appeal from the nonfinal order served as the notice of appeal for the subsequently entered final judgment dismissing the entire action. *Id.* The Court then reviewed *Firchau v. Diamond National Corp.*, 345 F.2d 269 (9th Cir. 1965), in which the district court again dismissed the complaint but did not dismiss the action. *FirsTier*, 498 U.S. at 275. The Court explained in *Firchau*, the appellant appealed the ruling with respect to a claim in the complaint, and the Ninth Circuit held while the ruling that dismissed the complaint was not appealable, the notice of appeal could be regarded as from the subsequent entry of judgment. *Id.* at 275-76.

181. *FirsTier*, 498 U.S. at 276.

182. *Id.* at 275, 276.

The Court opined an appeal from a clearly interlocutory ruling could not be reasonable.[183] Further, the Court opined a premature appeal from a nonfinal decision could be saved under Fed. R. App. P. 4(a)(2) "only when a district court announce[d] a decision that would be appealable if immediately followed by the entry of judgment."[184] The Court explained in such an instance a litigant's confusion was understandable and permitting the notice to become effective with entry of final judgment would not surprise the appellee.[185]

The Court maintained in FirsTier's case the district court judge's January 26 bench ruling was a decision pursuant to Fed. R. App. P. 4(a)(2), and even though the judge could have changed his mind up until the time when he entered final judgment, he had announced a decision from the bench that would have dismissed all of FirsTier's claims.[186] Under the circumstances, the Court explained FirsTier's belief the ruling was final was reasonable, and this was exactly the situation contemplated by the drafters of Fed. R. App. P. 4(a)(2).[187] The Court determined no unfairness would result to IMI by going forward with the appeal.[188] The Court ultimately determined because the district court entered final judgment and because the February 8 notice of appeal could relate forward to constitute a timely notice of appeal for that final judgment, the Tenth Circuit erred in dismissing the appeal.[189] Accordingly, the Court reversed the Tenth Circuit's decision, determining the premature notice of appeal could relate forward to become the notice of appeal from the subsequently entered final judgment and remanded the case.[190]

183. *Id.* at 276.
184. *Id.*
185. *Id.* The Court determined little could be accomplished by prohibiting the appellate court to hear such appeals. *Id.*
186. *Id.* at 277. The Court explained had the clerk entered the judgment immediately after the hearing there was no question the ruling would have been final. *Id.*
187. *Id.* The Court maintained when FirsTier filed its February 8 notice of appeal it clearly meant, although inartfuly, to appeal from the judgment the district court entered on March 3. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 277, 277-78.

D. PERTINENT THIRD CIRCUIT DECISIONS REGARDING FED. R. APP. P. 4(a)(2) AND THE *CAPE MAY GREENE* RULE

1. Lazy Oil Co. v. Witco Corp.: *The Third Circuit Upheld the* Cape May Greene *Rule in Light of the United States Supreme Court Decision in* FirsTier

In *Lazy Oil Co. v. Witco Corp.*,[191] the United States Court of Appeals for the Third Circuit opined the *Cape May Green* rule survived despite the United States Supreme Court ruling in *FirsTier*.[192] In *Lazy Oil*, sellers of a specific crude oil brought a class action suit against three purchasers and refiners in the District Court for the Western District of Pennsylvania, alleging the refiners and purchasers violated the Sherman Antitrust Act[193] by depressing the prices of the crude.[194] The court certified the action as a class action and by early 1997 the plaintiffs reached a settlement with all three defendants.[195] Several of the represented plaintiffs in the class objected to this settlement and filed motions with the district court, requesting the court to disapprove the settlement and to certify a new subclass.[196] On December 31, 1997, the court denied the motion for certification of the subclass and approved the settlement.[197] However, in the same order, the district court denied a motion for approval of an allocation plan for the proceeds of the settlement.[198]

On January 29, 1998, the objectors filed a notice of appeal from the December 31, 1997 order with the United States Court of Appeals for the Third Circuit.[199] On April 13, 1998, more than two months after the objectors filed their notice of appeal and following further negotiations, the district court approved the revised allocation plan for

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191. 166 F.3d 581 (3d Cir. 1999).

192. Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 581, 587 (3d Cir. 1999).

193. 15 U.S.C. §§ 1-7 (2000) (illegalizing the restraint of trade or commerce and the monopolization of trade).

194. *Lazy Oil*, 166 F.3d at 584. The three refiners and sellers of the Penn Grade crude were Quaker State, Pennzoil, and Witco. *Id.*

195. *Id.* Prior to their negotiations with Pennzoil and Witco, the plaintiffs and the third defendant, Quaker State, reached a settlement for $4.4 million. *Id.* The district court approved this settlement, and the settlement was not at issue in the case. *Id.* The settlement reached with Pennzoil was for $9.7 million and approximately $4.8 million with Witco. *Id.* Neither Pennzoil nor Witco admitted liability or wrongdoing. *Id.*

196. *Id.* at 584, 585.

197. *Id.* at 585. The district court determined only a small portion of the class had objected, adequate notice of the settlement had been provided, and the plaintiffs faced difficulty in proving antitrust violations and their theory of damages. *Id.* Further, the district court determined the objections to the settlement were made on unsupported and speculative grounds. *Id.*

198. *Id.*

199. *Id.* at 581, 585. The objecting plaintiffs filed this notice of appeal within thirty days of the appealed order as required by Fed. R. App. P. 4(a)(1). *Id.* at 585.

the settlement proceeds.[200] The district court then entered final judgment in the case on the same date.[201]

On appeal, the Third Circuit determined the precedent set in *Cape May Greene* remained intact and applicable even in light of *FirsTier* and provided the court with appellate jurisdiction over the case.[202] Chief Judge Edward Becker, writing for the court, reasoned in the February 2, 1999 opinion, *FirsTier* was limited in application to the reach of Fed. R. App. P. 4(a)(2).[203] The court first noted it only had jurisdiction to hear appeals from final judgments and certain interlocutory orders.[204] The court determined the issue before it was "whether a notice of appeal, filed within 30 days after a district court's order approving a class action settlement but before the court enter[ed] a final judgment approving all aspects. . .of the settlement, ripen[ed] upon the district court's entry of final judgment or [was] premature and void."[205]

The court reviewed the *Cape May Greene* case and determined exercising jurisdiction over Lazy Oil would be consistent with the *Cape May Greene* rule.[206] The court acknowledged another circuit had revisited its rule similar to the *Cape May Greene* rule in light of the Supreme Court ruling in *FirsTier*.[207] Additionally, the court recognized Fed. R. App. P. 4(a)(2) "[did] not support the *Cape May Greene* doctrine when the order from which a notice of appeal [was] filed [was] not one that would be final if followed immediately by entry of judgment."[208] The court determined the *Cape May Greene* rule had not been overruled by *FirsTier*.[209] The court explained *FirsTier* did not hold that the *only* situation in which a premature appeal could ripen was the situation in *FirsTier*—in which the announcement of a final order was followed by the notice of appeal and then the district court

200. *Id.*
201. *Id.*
202. *Id.* at 587.
203. *Id.* at 581, 583, 587.
204. *Id.* at 585. While neither party challenged the court's jurisdiction to hear the appeal, the court determined it had the inherent obligation to first ensure it had the proper appellate jurisdiction to hear the case. *Id.*
205. *Id.* The parties both argued the appealed order was final and the allocation issue that remained before the district court was merely a ministerial matter that the district court retained jurisdiction over after it entered the final order, which approved the settlement. *Id.* at 586 n.6. In light of its decision that the *Cape May Greene* rule applied to the case to provide jurisdiction, the court did not decide whether the order was a final one, but instead left this question unanswered. *Id.*
206. *Id.* at 585-86.
207. *Id.* at 586. The court noted the United States Court of Appeals for the Fifth Circuit abrogated its own rule similar to the *Cape May Greene* rule in light of this distinction. *Id.* (citing United States v. Cooper, 135 F.3d 960, 963 (5th Cir. 1998)).
208. *Id.*
209. *Id.* at 587.

entered final judgment.[210] The court further explained there were a number of situations, besides the one in *FirsTier*, in which a premature notice of appeal could become effective at a later date.[211]

Next, the court stated Fed. R. App. P. 2[212] allowed an appellate court to suspend the provisions or requirements of any rule of appellate procedure in order to ensure justice was not interrupted due to a mere technicality.[213] The court determined if it declined jurisdiction in the present case, it would be elevating a mere technicality above the critical substantive issues involved, as well as the parties' right to have the dispute resolved on the merits.[214] The court further determined because the key elements of the case were disposed of prior to the appeal and because the appeal would not prejudice the opposing party, the *Cape May Greene* rule applied to Lazy Oil's case, therefore, providing the court with appellate jurisdiction.[215]

2. Lazorko v. Pennsylvania Hospital: *The Third Circuit Addressed Premature Interlocutory Appeals Without Addressing the* Cape May Greene *Rule*

In *Lazorko v. Pennsylvania Hospital*,[216] the United States Court of Appeals for the Third Circuit determined an appeal of a ruling granting sanctions filed prior to entry of the order for the amount of sanctions was premature and untimely.[217] In *Lazorko*, Jonathan Lazorko, as the administrator of his wife Patricia Norlie-Lazorko's estate, sued Dr. David Nicklin, the University City Family Medicine, Pennsylvania Hospital, the Institute of Pennsylvania, and U.S. Healthcare, Inc. in a Pennsylvania state court after his wife commit-

210. *Id.*

211. *Id.* As its only example, the court referred to Fed. R. App. P. 4(a)(4), which was amended in 1993 after the *FirsTier* ruling. *Id.* The court explained the 1993 amendment to Fed. R. App. P. 4(a)(4) provided that a premature appeal could later ripen if the notice of appeal was filed after the entry of final judgment, but before the disposition of post-trial motions. *Id.* The court further explained in the situation contemplated by Fed. R. App. P. 4(a)(4) the appeal ripened upon disposition of the last outstanding motion. *Id.*

212. FED. R. APP. P. 2 provides, "[o]n its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)." FED. R. APP. P. 2.

213. *Lazy Oil*, 166 F.3d at 587.

214. *Id.* The court acknowledged it could not expand its jurisdiction under Fed. R. App. P. 2. *Id.* at 587 n.9.

215. *Id.* at 587.

216. 237 F.3d 242 (3d Cir. 2000).

217. Lazorko v. Pa. Hosp., 237 F.3d 242, 242, 248 (3d Cir. 2000).

ted suicide allegedly due to her untreated mental illness.[218] Lazorko alleged U.S. Healthcare was vicariously and directly liable for his wife's death because as an HMO it created financial incentives for Dr. Nicklin to refrain from recommending further treatment for Patricia Norlie-Lazorko.[219]

After U.S. Healthcare removed the case to the United States District Court for the Eastern District of Pennsylvania, U.S. Healthcare moved for sanctions against Lazorko's attorney, arguing Lazorko's attorney had failed to investigate several charges against U.S. Healthcare and had included these purportedly frivolous claims in the complaint against U.S. Healthcare.[220] The district court granted the motion in a June 30, 1998 order, striking the frivolous claims from the complaint and awarding costs incurred by U.S. Healthcare in defending the claims.[221]

On July 29, 1998, Lazorko appealed the order to the United States Court of Appeals for the Third Circuit.[222] On August 3, 1998, after Lazorko had already appealed the order, the district court, following a hearing, awarded $2,452.50 in costs to U.S. Healthcare.[223] On appeal, the Third Circuit dismissed Lazorko's appeal of the award of sanctions for a lack of appellate jurisdiction.[224] Circuit Judge Jane R. Roth, writing for the court, in a December 26, 2000 opinion reasoned an award of sanctions was not a final judgment and, thus, was not appealable until the district court decided the amount of the sanctions.[225] The court further determined Lazorko's notice of appeal was untimely filed because the district court did not decide the amount of the sanctions until after Lazorko filed the notice.[226]

The court noted this premature appeal could be saved by a subsequently entered final order but only if the prematurely appealed order could otherwise constitute a final order.[227] The court cited *FirsTier* when it stated Fed. R. App. P. 4(a)(2) did not apply to an award of sanctions because it was a clearly interlocutory order.[228] The court then declared it lacked appellate jurisdiction over the appeal of the

218. *Lazorko*, 237 F.3d at 245-46. Dr. David Nicklin was Lazorko's wife's doctor. *Id.* at 245. University City Family Medicine was Dr. Nicklin's employer. *Id.* U.S. Healthcare, Inc. was the HMO administering Lazorko's wife's healthcare benefits. *Id.*
219. *Id.* at 246.
220. *Id.* at 246, 247.
221. *Id.* at 247.
222. *Id.* at 242, 247.
223. *Id.* at 247. Lazorko failed to appeal this order. *Id.*
224. *Id.* at 248.
225. *Id.* at 242, 245, 248.
226. *Id.* at 248.
227. *Id.*
228. *Id.* (citing FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 275-76 (1991)).

district court's order granting sanctions because Lazorko's attorney failed to timely appeal the order after it had become final.[229] In its opinion, the court never cited or mentioned the circuit's *Cape May Greene* rule.[230]

E. Pertinent Court Decisions Regarding the Effect of *FirsTier* on Rules Like the *Cape May Greene* Rule

1. United States v. Cooper: *The United States Court of Appeals for the Fifth Circuit Overruled its Line of Cases on Premature Appeals in Light of* FirsTier

In *United States v. Cooper*,[231] the United States Court of Appeals for the Fifth Circuit maintained in light of the United States Supreme Court ruling in *FirsTier*, any prior Fifth Circuit cases allowing the appeal of a nonfinal decision were no longer good law.[232] In *Cooper*, Kenia Cooper pleaded guilty in the District Court for the Western District of Texas to conspiring to import heroin.[233] The court sentenced Cooper to imprisonment proceeded by a supervised release.[234] Cooper appeared before a magistrate judge on February 13, 1997 for violating the terms of the supervised release.[235] At the hearing, the magistrate judge issued a proposed report recommending the revocation of Cooper's supervised release.[236] On March 5, 1997, the district court adopted the magistrate judge's report and recommendation, revoked Cooper's supervised release, and sentenced her to return to prison.[237]

Cooper filed her notice of appeal with the United States Court of Appeals for the Fifth Circuit on February 25, 1997, challenging her imprisonment.[238] Thus, she appealed after the magistrate judge issued his report but before the district court issued a final judgment accepting the recommendation.[239] In the February 20, 1998 opinion, Judge Jerry E. Smith opined under Fed. R. App. P. 4(b)[240] Cooper had

229. *Id.*
230. *See generally* Lazorko v. Pa. Hosp., 237 F.3d 242 (3d Cir. 2000) (lacking any citation or mention of the *Cape May Greene* rule).
231. 135 F.3d 960 (5th Cir. 1998).
232. United States v. Cooper, 135 F.3d 960, 960, 963 (5th Cir. 1998).
233. *Cooper*, 135 F.3d at 961.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* Cooper never filed an objection to the magistrate judge's proposed findings and recommendations. *Id.*
238. *Id.*
239. *Id.*
240. Fed. R. App. P. 4(b) applied to criminal cases and provides:

> (1) Time for Filing a Notice of Appeal.
> (A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

prematurely appealed the magistrate judge's recommendation, which was not an appealable judgment.[241] On appeal, the Fifth Circuit determined the issue before it was whether it had appellate jurisdiction over the premature appeal under Fed. R. App. P. 4(b).[242] The court compared the language of Fed. R. App. P. 4(b) and Fed. R. App. P. 4(a)(2), which governed the similar issue of premature appeals in the civil context, and determined because the language of the two rules was almost identical they should be given the same meaning.[243] Thus, the court determined the United States Supreme Court ruling

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(i) the entry of either the judgment or the order being appealed; or
(ii) the filing of the government's notice of appeal.
(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:
(i) the entry of the judgment or order being appealed; or
(ii) the filing of a notice of appeal by any defendant.
(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.
(3) Effect of a Motion on a Notice of Appeal.
(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:
(i) for judgment of acquittal under Rule 29;
(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or
(iii) for arrest of judgment under Rule 34.
(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:
(i) the entry of the order disposing of the last such remaining motion; or
(ii) the entry of the judgment of conviction.
(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).
(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).
(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.
(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

FED. R. APP. P. 4(b).

241. *Cooper*, 135 F.3d at 961, 962.
242. *Id.* at 962.
243. *Id.*

in *FirsTier* regarding Fed. R. App. P. 4(a)(2) was applicable to the interpretation of Fed. R. App. P. 4(b).[244]

The court reviewed the ruling in *FirsTier* and decided the situation in Cooper's case was materially different from the situation in *FirsTier*.[245] The court noted, unlike in *FirsTier*, the magistrate judge's ruling in Cooper's case was not a final decision because magistrate judge recommendations were purely advisory and not adjudicatory in any way.[246] To conserve judicial resources explained the court, a party was not allowed to appeal a ruling simply because the ruling was adverse to the party's interests.[247] The court further explained a party was only allowed to appeal a ruling when the party was certain of the court's disposition of the entire case.[248] Furthermore, the court determined in *FirsTier* the Supreme Court opined premature appeals were allowed *only* when there was a final decision without final judgment.[249] The court further determined because the magistrate's recommendation was not a final decision, Cooper's appeal was improper.[250]

The court then focused on previous Fifth Circuit cases that took a much broader view of the court's appellate jurisdiction relating to a premature appeal.[251] The court acknowledged Cooper's appeal would be the first case to determine whether this line of cases, referred to as the *Jetco-Alcorn-Alcom*[252] line, could survive after *FirsTier*.[253] In light of *FirsTier*, the court determined the expansive *Jetco-Alcorn-Alcom* line of cases could not survive.[254] The court explained this was because the Supreme Court made it clear in *FirsTier* that a premature appeal operated as valid only when the district court announced a de-

244. *Id.*
245. *Id.*
246. *Id.* at 962-63. The court further explained the magistrate judge's proposed finding did not dispose of the claim and that any party can object to these proposed findings thereby compelling the district court to review those objections. *Id.* at 963. The district court could accept, modify, or reject the magistrate judge's recommendation and could even accept more evidence on the case. *Id.* Thus, the recommendations of a magistrate judge were not final decisions in any way. *Id.*
247. *Id.*
248. *Id.* The court noted that in such a situation, the court's entry of the final judgment was a predictable formality. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* The court reviewed and cited three cases: (1) *Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160 (5th Cir. 1984); (2) *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973); and (3) *Alcom Electronic Exchange, Inc. v. Burgess*, 849 F.2d 964 (5th Cir. 1988). *Cooper*, 135 F.3d at 963.
252. *See* Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973); Alcom Elec. Exch., Inc. v. Burgess, 849 F.2d 964 (5th Cir. 1988); Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 (5th Cir. 1984).
253. *Cooper*, 135 F.3d at 963.
254. *Id.*

cision that could be appealable if immediately followed by entry of the judgment.[255] The court acknowledged this holding contradicted the Fifth Circuit line of cases on this issue.[256] Thus, the court determined all the previous Fifth Circuit cases allowing the appeal of a nonfinal decision were overruled and no longer good law.[257]

2. Outlaw v. Airtech Air Conditioning & Heating, Inc.: *The United States Court of Appeals for the District of Columbia Circuit Limited its Rule Similar to the* Cape May Greene *Rule in Light of the United States Supreme Court Ruling in* FirsTier

In *Outlaw v. Airtech Air Conditioning & Heating, Inc.*,[258] the United States Court of Appeals for the District of Columbia Circuit limited its rule similar to the *Cape May Greene* rule because of the United States Supreme Court ruling in *FirsTier*.[259] In *Outlaw*, Phyllis Outlaw ("Outlaw") sought the services of GDS Associates and J.B. Builders to renovate her Washington, D.C. building.[260] J.B. Builders subcontracted the work for the heating, ventilation, and cooling system ("HVAC") to Airtech Air Conditioning and Heating, Inc. ("Airtech").[261] Outlaw also hired Home Consulting Plus to inspect the work.[262] The work commenced on April 28, 2000.[263] Outlaw was a very involved owner, and as the project progressed, she had a falling out with both GDS and J.B. Builders.[264] Outlaw offered to pay Airtech the remaining amount if it would finish the work on the HVAC, but Airtech refused.[265] Outlaw retained another company to

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255. *Id.*

256. *Id.* The court stated the ruling in *FirsTier* was inconsistent with the *Jetco-Alcorn-Alcom* line of cases that held a premature appeal could be valid whenever no post-trial or post-judgment motions had been filed. *Id.*

257. *Id.*

258. 412 F.3d 156 (D.C. Cir. 2005).

259. Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 156, 160 (D.C. Cir. 2005).

260. *Outlaw*, 412 F.3d at 158. Outlaw hired GDS to create the architectural plans and to secure the required permits. *Id.* The renovation plans included renovations to the building's heating, ventilation, and air conditioning system. *Id.* Outlaw retained J.B. Builders as the general contractor to oversee the entire project. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* GDS secured the first work permit and the work commenced. *Id.* After the completion of each phase of the job, J.B. Builders received a cash draw and Home Consulting Plus inspected the work. *Id.*

264. *Id.* The relationship between GDS and Outlaw ended on June 22, 2000. *Id.* Purportedly, the relationship ended because of GDS's alleged failure to secure permits in a timely manner. *Id.* In November 2000, J.B. Builders and Outlaw ended their relationship allegedly due to construction delays and the amount of payment owed. *Id.*

265. *Id.* Airtech claimed to only be contractually bound to J.B. Builders. *Id.*

complete the HVAC work.[266] Outlaw alleged once she moved into the building, she learned the new HVAC system did not work properly.[267]

Outlaw brought suit against GDS, Home Consulting Plus, and Airtech in the Superior Court of the District of Columbia, claiming a breach of contract and requesting $100,000 in damages.[268] The defendants removed the case to the United States District Court for the District of Columbia due to diversity of citizenship.[269] The court stayed the case against Home Consulting Plus while the parties proceeded with contractually required binding arbitration.[270] Meanwhile, the court granted Airtech's and GDS's motions for summary judgment and requested a status report on the arbitration between Outlaw and Home Consulting Plus.[271]

On April 26, 2004, prior to the resolution of the arbitration proceedings, Outlaw appealed the district court's granting of summary judgment to the United States Court of Appeals for the District of Columbia Circuit.[272] After she filed the notice of appeal, Outlaw filed the requested status report on the arbitration proceedings with the district court, stating once the appeal was determined the parties would proceed with the arbitration.[273] On May 6, 2004, the district court *sua sponte* dismissed the claims against Home Consulting Plus without prejudice, noting otherwise there would be a question of appellate jurisdiction over Outlaw's April 26, 2004 appeal.[274] Outlaw failed to file another notice of appeal.[275]

The United States Court of Appeals for the District of Columbia Circuit assumed jurisdiction over Outlaw's appeal.[276] In the June 24, 2005 opinion, Circuit Judge John G. Roberts, writing for the court, explained the first issue for any federal appellate court was to determine whether there was appellate jurisdiction over the appeal.[277] The court further explained only final orders were appealable.[278] The court determined the order of summary judgment, which Outlaw ap-

266. *Id.*
267. *Id.*
268. *Id.* Outlaw released J.B. Builders from liability in a settlement in September 2001. *Id.*
269. *Id.*
270. *Id.* at 158-59. The court stayed the proceedings in April 2003. *Id.*
271. *Id.* at 159. The court granted the summary judgments on March 30, 2004. *Id.*
272. *Id.* at 156, 159.
273. *Id.* at 159. Outlaw filed this report with the district court on April 30, 2004. *Id.*
274. *Id.* The district court noted there would be a question whether the summary judgment order was a final order. *Id.*
275. *Id.*
276. *Id.* at 156, 158.
277. *Id.* at 156, 158, 159.
278. *Id.* at 159.

pealed, was not a final order because the claims against Home Consulting Plus were still pending when the court granted the order.[279] Thus, the court reasoned Outlaw's appeal was premature.[280]

The court then discussed Fed. R. App. P. 4(a)(2) and the Supreme Court's interpretation of Fed. R. App. P. 4(a)(2) in *FirsTier*.[281] After reviewing the facts of *FirsTier*, the court noted the Supreme Court determined Fed. R. App. P. 4(a)(2) was meant to protect the unskilled litigant who mistakenly and reasonably believed an order to be a final order.[282] According to the court, *FirsTier* permitted a premature appeal to subsequently ripen when the appealed decision would have been appealable if immediately followed by entry of final judgment.[283] The court reasoned although Outlaw's appealed order would have been final if followed by entry of final judgment, it also would have been final if followed by entry of judgment pursuant to Fed. R. Civ. P. 54(b),[284] which several other circuits concluded fit under the *FirsTier* ruling.[285] The court noted the district court did not enter judgment according to Fed. R. Civ. P. 54(b), but this did not invalidate the appeal under the test articulated in *FirsTier* because the test was hypothetical.[286] Thus, the court determined Outlaw's appeal was saved under Fed. R. App. P. 4(a)(2) and the Supreme Court's hypothetical test laid out in *FirsTier*.[287]

However, during its analysis, the court also commented on the validity of circuit rules saving premature appeals in light of the Supreme Court's ruling in *FirsTier*.[288] The court noted the D.C. Circuit

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279. *Id.* The court explained the district court did not make the determination as required for a final judgment or directly enter the final judgment. *Id.*

280. *Id.*

281. *Id.* at 159-60.

282. *Id.*

283. *Id.* at 160.

284. FED. R. CIV. P. 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

FED. R. CIV. P. 54(b).

285. *Outlaw*, 412 F.3d at 161-62.

286. *Id.* at 162. The court noted the test was whether the decision *"would be"* appealable. *Id.*

287. *Id.*

288. *Id.* at 160.

had a line of cases in existence prior to *FirsTier*, which held "an appeal taken prematurely effectively ripen[ed] and secure[ed] appellate jurisdiction when the district court's judgment [became] final prior to disposition of the appeal."[289] The court noted this rule was much broader than the rule laid out in *FirsTier*.[290] Further, the court noted other circuits had similar rules.[291] The court agreed with those circuits that had limited their rules because of *FirsTier*.[292] The court acknowledged the Third Circuit had not overruled its *Cape May Greene* rule as other circuits had done.[293] The court questioned how a broader rule could survive in light of the Supreme Court's narrow construction of Fed. R. App. P. 4(a)(2) in *FirsTier*.[294] Furthermore, the court questioned the Third Circuit's reasoning in *Lazy Oil*, which upheld the *Cape May Greene* rule, and noted courts were not at liberty to fashion their own doctrines to save premature appeals after *FirsTier*.[295]

3. Serine v. Peterson: *The United States Court of Appeals for the Ninth Circuit Acknowledged But Did Not Apply its Rule Similar to the* Cape May Greene *Rule*

In *Serine v. Peterson*,[296] the United States Court of Appeals for the Ninth Circuit determined an appeal from a magistrate's recommendation prematurely filed could not ripen from a subsequent entry of final judgment.[297] In *Serine*, Magistrate Judge Thomas M. Coffin filed a Findings and Recommendation and Order indicating the defendant's motion to dismiss should have been granted and the case dismissed.[298] Alden Serine filed his response to the magistrate judge's order with the United States District Court for the District of Ore-

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289. *Id.*

290. *Id.*

291. *Id.* (citing Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1165-66 (5th Cir. 1984); Cape May Greene, Inc. v. Warren, 698 F.2d 179, 184-85 (3d Cir. 1983); Baker v. Limber, 647 F.2d 912, 916 (9th Cir. 1981); Merchants & Planters Bank v. Smith, 516 F.2d 355, 356 n.3 (8th Cir. 1975)).

292. *Id.* (citing United States v. Cooper, 135 F.3d 960, 963 (5th Cir. 1998); Serine v. Peterson, 989 F.2d 371, 372 (9th Cir. 1993)).

293. *Id.* at 160, 160 n.2.

294. *Id.* at 160 n.2.

295. *Id.* at 160-61 n.2. The court stated on the Third Circuit's reasoning in *Lazy Oil*,

> [t]he fact that there is a rule governing pre-judgment premature notices of appeal and another rule governing post-judgment premature notices of appeal hardly means that courts are at liberty to fashion additional doctrines saving premature notices of appeal that are not saved under the rules, as construed by the Supreme Court.

Id. at 160-61 n.2.

296. 989 F.2d 371 (9th Cir. 1993).

297. Serine v. Peterson, 989 F.2d 371, 371, 372, 373 (9th Cir. 1993).

298. *Serine*, 989 F.2d at 372.

gon.[299] On December 30, 1992, without further action by either the district court or the magistrate judge, Serine filed his notice of appeal in the United States Court of Appeals for the Ninth Circuit.[300] On January 8, 1993, the district court adopted the magistrate judge's order and entered final judgment in the case in favor of Peterson.[301] Serine did not file another notice of appeal subsequent to the entry of final judgment.[302]

Peterson moved to dismiss the appeal, contending the magistrate judge's recommendation did not constitute a final order as required for an appeal.[303] The Ninth Circuit dismissed the appeal, stating it lacked appellate jurisdiction.[304] In its March 24, 1993 opinion, the court reasoned although the Ninth Circuit previously had the opportunity to consider whether a premature appeal could be cured by subsequent entry of final judgment and had created a circuit rule on the issue, the United States Supreme Court had since examined the issue in *FirsTier*.[305] The court reviewed the facts in *FirsTier* and explained the Supreme Court noted the intent of Fed. R. App. P. 4(a)(2) was to protect the unskilled litigant who filed an appeal from an order that he or she reasonably but wrongfully believed was a final judgment.[306] The court further explained the Supreme Court set the limitations on when a premature appeal could be subsequently saved by an entry of final judgment.[307] The court noted the Supreme Court defined these limitations to allow a premature appeal to ripen only when the district court judge announced a decision that would have been appealable if immediately followed by entry of final judgment.[308]

Further, the court reasoned the magistrate judge's order was not a final order and Serine had acknowledged this when he filed objections to the order in the district court.[309] The court opined the order, unlike the one in *FirsTier*, would not have been appealable if immediately followed by entry of final judgment because the order required subsequent action by the district court to become a final judgment.[310] Accordingly, the court determined the notice of appeal was premature

299. *Id.* at 371, 372. Serine filed this response with the district court on December 10, 1992. *Id.* at 372.
300. *Id.* at 371, 372.
301. *Id.* at 372.
302. *Id.*
303. *Id.* Peterson claimed because the order was not a final order, the notice of appeal was premature and ineffective. *Id.*
304. *Id.* at 372, 373.
305. *Id.* at 371, 372.
306. *Id.* at 372.
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.* at 372-73.

and dismissed the appeal.[311] The court acknowledged but never applied its prior Circuit rule similar to the *Cape May Greene* rule.[312]

ANALYSIS

In *Adapt of Philadelphia v. Philadelphia Housing Authority*,[313] the United States Court of Appeals for the Third Circuit examined whether a premature appeal from an interlocutory order could ripen upon entry of final judgment.[314] In *Adapt*, the district court ordered the Philadelphia Housing Authority ("PHA") to produce certain documents pursuant to discovery requests.[315] Prior to the district court's entry of final judgment, PHA complied with the orders by producing the documents but appealed each order upon its entry.[316] However, by the time the Third Circuit heard the consolidated appeals, the district court had entered final judgment.[317] The Third Circuit addressed whether it had appellate jurisdiction to hear the premature appeals after the district court's entry of final judgment pursuant to Fed. R. App. P. 4(a)(2) or the circuit's *Cape May Greene* rule.[318] The court reviewed the United States Supreme Court ruling in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*,[319] which interpreted Fed. R. App. P. 4(a)(2).[320] The court determined pursuant to the Supreme Court's construction of Fed. R. App. P. 4(a)(2), the rule could not provide the court with jurisdiction over the premature appeal.[321] Additionally, the court reviewed and determined the *Cape May Greene* rule also could not provide jurisdiction over the premature appeals.[322] Ultimately, the court dismissed the case for lack of appellate jurisdictions.[323]

In *Adapt*, notwithstanding the Third Circuit's incorrect application of the *Cape May Greene* rule and failure to address the validity of the rule, the Third Circuit correctly determined an interlocutory discovery order was not immediately appealable as a final order.[324] This

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311. *Id.* at 373.
312. *See generally* Serine v. Peterson, 989 F.2d 371 (9th Cir. 1993) (failing to apply its Circuit rule on premature appeals).
313. 433 F.3d 353 (3d Cir. 2006).
314. Adapt of Philadelphia v. Philadelphia Hous. Auth., 433 F.3d 353, 353, 355 (3d Cir. 2006).
315. *Adapt*, 433 F.3d at 356.
316. *Id.*
317. *Id* at 359-60.
318. *Id.* at 364.
319. 498 U.S. 269 (1991).
320. *Adapt*, 433 F.3d at 362-63.
321. *Id.* at 364.
322. *Id.* at 365.
323. *Id.*
324. *See infra* notes 313-528 and accompanying text.

Analysis will show the court of appeals correctly determined a premature appeal from an interlocutory discovery order could not ripen upon subsequent entry of final judgment.[325] This Analysis will demonstrate the Third Circuit correctly determined Fed. R. App. P. 4(a)(2) could not save a premature appeal from an interlocutory discovery order.[326] Additionally, this Analysis will illustrate the Third Circuit correctly determined the *Cape May Greene* rule could not save a premature appeal of a discovery order.[327] However, this Analysis will also reveal the Third Circuit misapplied portions of the *Cape May Greene* rule when determining the rule could not save the premature appeal of a discovery order.[328] This Analysis will show the Third Circuit improperly relied upon a case that did not discuss the *Cape May Greene* rule and incorrectly reasoned that the *Cape May Greene* rule was coterminous with Fed. R. App. P. 4(a)(2).[329] Finally, this Analysis will demonstrate the Third Circuit acknowledged criticism of the *Cape May Greene* rule but nevertheless failed to take the opportunity to overrule it in light of the Supreme Court decision in *FirsTier*.[330]

A. THE *ADAPT* COURT CORRECTLY DETERMINED A PREMATURE APPEAL FROM AN INTERLOCUTORY DISCOVERY ORDER COULD NOT RIPEN UPON ENTRY OF FINAL JUDGMENT

In *Adapt*, the Third Circuit ultimately reached the correct outcome in determining a premature appeal from an interlocutory discovery order could not ripen upon entry of final judgment.[331] In its analysis, the court provided two possible rules that could save the premature appeal: (1) Fed. R. App. P. 4(a)(2) or (2) the *Cape May Greene* rule.[332] First, the court correctly determined pursuant to the Supreme Court's interpretation of Fed. R. App. P. 4(a)(2) in *FirsTier*, that Fed. R. App. P. 4(a)(2) could not save a premature appeal from an interlocutory discovery order.[333] Second, the court also correctly determined pursuant to its prior construction of the *Cape May Greene* rule that the rule could not save a premature appeal from an interlocutory discovery order.[334]

325. *See infra* notes 331-425 and accompanying text.
326. *See infra* notes 335-84 and accompanying text.
327. *See infra* notes 385-425 and accompanying text.
328. *See infra* notes 426-86 and accompanying text.
329. *See infra* notes 426-86 and accompanying text.
330. *See infra* notes 487-528 and accompanying text.
331. *See infra* notes 332-425 and accompanying text.
332. *Adapt*, 433 F.3d at 364.
333. *See infra* notes 335-84 and accompanying text.
334. *See infra* notes 385-425 and accompanying text.

1. *The* Adapt *Court Correctly Determined Fed. R. App. P. 4(a)(2) Could Not Save a Premature Appeal from an Interlocutory Discovery Order*

The *Adapt* court correctly determined a premature appeal from an interlocutory discovery order could not be perfected by Fed. R. App. P. 4(a)(2).[335] First, the *Adapt* court correctly relied upon *FirsTier* when deciding a premature appeal from an interlocutory discovery order could not be saved by Fed. R. App. P. 4(a)(2).[336] Second, the *Adapt* court further correctly determined Fed. R. App. P. 4(a)(2) could not save a premature appeal from an interlocutory discovery order because of past precedent set in *Lazorko*.[337] Accordingly, the *Adapt* court correctly decided Fed. R. App. P. 4(a)(2) could not perfect a premature appeal from an interlocutory discovery order.[338]

a. The *Adapt* court correctly relied upon *FirsTier* when determining Fed. R. App. P. 4(a)(2) could not save a premature appeal from an interlocutory discovery order

The *Adapt* court correctly relied upon *FirsTier* when determining Fed. R. App. P. 4(a)(2) could not save a premature appeal from an interlocutory discovery order.[339] In *Adapt*, the district court granted several of Adapt's discovery motions.[340] Both PHA and RAB appealed the discovery orders upon each order's entry and prior to any final judgment.[341] After PHA and RAB appealed the discovery orders, but prior to the Third Circuit hearing the appeals, the district court entered final judgment.[342] On appeal, the Third Circuit determined Fed. R. App. P. 4(a)(2) could not save the premature appeals.[343] In support of this determination, the court cited the Supreme Court decision in *FirsTier* and noted the Supreme Court expressly read Fed. R. App. P. 4(a)(2) as not saving a clearly interlocutory order, such as a discovery order.[344] Based upon the Supreme Court's construction of Fed. R. App. P. 4(a)(2), the Third Circuit determined the rule could not save PHA's and RAB's premature appeals.[345]

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335. *See infra* notes 336-84 and accompanying text
336. *See infra* notes 339-62 and accompanying text.
337. *See infra* notes 363-84 and accompanying text.
338. *See infra* notes 339-425 and accompanying text.
339. *See infra* notes 340-62 and accompanying text.
340. *Adapt*, 433 F.3d at 356.
341. *Id.* at 356, 359-60.
342. *Id.* at 359-60.
343. *Id.* at 364.
344. *Id.* at 363.
345. *Id.* at 364.

In *FirsTier*, the district court judge orally granted a motion for summary judgment but had not entered final judgment in the case when FirsTier appealed the order.[346] However, prior to a hearing on the appeal, the district court judge entered final judgment.[347] The United States Court of Appeals for the Tenth Circuit dismissed the appeal for lack of jurisdiction.[348] On appeal, the United States Supreme Court interpreted Fed. R. App. P. 4(a)(2).[349] The Supreme Court determined the appealed order—the premature appeal of a summary judgment order—was not a final order but also was not a clearly interlocutory order, such as a discovery order or award of sanctions.[350] The Court further determined the court of appeals had appellate jurisdiction over FirsTier's appeal.[351] The Supreme Court concluded Fed. R. App. P. 4(a)(2) "permit[ted] a notice of appeal filed from certain nonfinal decisions to serve as an effective notice from a subsequently entered final judgment."[352] However, the Supreme Court further explained Fed. R. App. P. 4(a)(2) did not permit "a notice of appeal from a clearly interlocutory decision—such as a discovery ruling or a sanction order under Rule 11 of the Federal Rules of Civil Procedure—to serve as a notice of appeal from the final judgment."[353] Thus, the Supreme Court expressly stated Fed. R. App. P. 4(a)(2) could not save a premature appeal from a discovery order.[354]

Similar to *FirsTier*, which involved the district court preliminarily ruling on a motion, in *Adapt*, the district court ruled on a motion without disposing of the entire case.[355] Additionally, similar to *FirsTier*, in which FirsTier appealed the district court's order upon its entry, in *Adapt*, PHA and RAB appealed the motions to compel discovery before the district court had entered final judgment.[356] Furthermore, like *FirsTier*, in which the district court subsequently entered a

346. FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 270, 272 (1991).

347. *FirsTier*, 498 U.S. at 272.

348. *Id.* FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 930 F.2d 1508, 1508 (10th Cir. 1991).

349. *FirsTier*, 498 U.S. at 272-78.

350. *Id.* at 275-77.

351. *Id.* at 277-78.

352. *Id.* at 274.

353. *Id.* at 276.

354. *Id.*

355. *Compare FirsTier*, 498 U.S. at 271-72 (noting the district court granted IMI's motion for summary judgment from the bench without entering final judgment), *with Adapt*, 433 F.3d at 357-60 (noting the district court granted the motions to compel discovery before reaching the merits of the case).

356. *Compare FirsTier*, 498 U.S. at 271-72 (noting FirsTier appealed the order prior to the district court entering final judgment), *with Adapt*, 433 F.3d at 357-60 (noting PHA and RAB immediately appealed the discovery orders before the district court entered final judgment).

final judgment after the appeal, in *Adapt*, the district court entered a final judgment after the appeal was made but prior to a hearing on the appeal.[357] Although *FirsTier* dealt with an order that was not an interlocutory order, whereas the order in *Adapt* was an interlocutory order, the *FirsTier* Court and the *Adapt* court both discussed the consequences of Fed. R. App. P. 4(a)(2) when the order was interlocutory in nature.[358] Accordingly, the *Adapt* court correctly relied upon *FirsTier* in its determination that Fed. R. App. P. 4(a)(2) could not save a premature appeal from a discovery order.[359]

Similar to the *FirsTier* Court, the *Adapt* court explained Fed. R. App. P. 4(a)(2) allowed a notice of appeal from a nonfinal decision to act as a notice of appeal from the final judgment only when a district court made a decision that would be appealable if immediately followed by the entry of judgment.[360] Additionally, like the *FirsTier* Court, the *Adapt* court determined under Fed. R. App. P. 4(a)(2), appeals from clearly interlocutory decisions, such as discovery rulings, could not be fixed by an entry of final judgment because there was no reasonable belief the order could be a final judgment.[361] Therefore, the *Adapt* court correctly dismissed PHA's and RAB's appeals for lack of appellate jurisdiction based on the *FirsTier* Court's construction and explanation of the applicability of Fed. R. App. P. 4(a)(2).[362]

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357. *Compare FirsTier*, 498 U.S. at 271-72 (noting the district court entered final judgment in the case prior to the court of appeals hearing the appeal), *with Adapt*, 433 F.3d at 359-60 (noting the district court entered final judgment in the case prior to the Third Circuit hearing the appeal).

358. *Compare FirsTier*, 498 U.S. at 276 (discussing the consequences of Fed. R. App. P. 4(a)(2) when the order was interlocutory in nature), *with Adapt*, 433 F.3d at 362-63 (discussing the consequences of Fed. R. App. P. 4(a)(2) when the order was interlocutory in nature).

359. *See supra* notes 355-58 and accompanying text.

360. *Compare FirsTier*, 498 U.S. at 276 (stating Fed. R. App. P. 4(a)(2) "permit[ed] a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announce[d] a decision that would be appealable if immediately followed by the entry of judgment"), *with Adapt*, 433 F.3d at 362-63 (quoting the same statement from *FirsTier* in the court's determination Fed. R. App. P. 4(a)(2) could not save PHA's and RAB's premature appeals).

361. *Compare FirsTier*, 498 U.S. at 276 (stating a premature appeal from a clearly interlocutory decision, like an award for sanctions or a discovery order, could not later ripen because a belief that such an order was final was not reasonable), *with Adapt*, 433 F.3d at 363 (explaining Fed. R. App. P. (4)(2) could not save a premature appeal from a clearly interlocutory order, such as a discovery order, because an appeal from such an order could not reasonably have been mistaken as a final order).

362. *See supra* notes 360-61 and accompanying text.

b. The *Adapt* court correctly determined Fed. R. App. P. 4(a)(2) could not save a premature appeal from an interlocutory discovery order pursuant to Third Circuit precedent set forth in *Lazorko*

The *Adapt* court correctly determined a premature appeal from an interlocutory discovery order could not be saved by Fed. R. App. P. 4(a)(2) in accordance with the *Lazorko* decision.[363] In *Adapt*, the district court granted several of ADAPT's discovery motions.[364] Both PHA and RAB appealed the discovery orders upon each order's entry and prior to any final judgment in the case.[365] After PHA and RAB appealed the discovery orders, but prior to the Third Circuit hearing the appeals, the district court entered final judgment.[366] On appeal, the Third Circuit determined Fed. R. App. P. 4(a)(2) could not save the premature appeals.[367] In support of this determination, the court cited the Supreme Court decision in *FirsTier* and noted in *FirsTier*, the Supreme Court expressly read Fed. R. App. P. 4(a)(2) as not saving a clearly interlocutory order, such as a discovery order.[368] Based upon the Supreme Court's construction of Fed. R. App. P. 4(a)(2), the Third Circuit determined the rule could not save PHA's and RAB's premature appeals.[369]

In *Lazorko v. Pennsylvania Hospital*,[370] the district court granted an award of sanctions against Lazorko's attorney.[371] Lazorko appealed this award before the district court determined the amount of the sanctions.[372] Before the Third Circuit heard the appeal, the district court determined the amount of sanctions and entered final judgment.[373] On appeal, the Third Circuit determined Fed. R. App. P. 4(a)(2) could not save a premature appeal from an award of sanctions because the award was clearly interlocutory and Fed. R. App. P. 4(a)(2) could not save a clearly interlocutory order.[374]

Similar to *Lazorko*, which involved the district court preliminarily ruling on motions, in *Adapt*, the district court ruled on an interlocu-

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363. *See infra* notes 364-84 and accompanying text.
364. *Adapt*, 433 F.3d at 356.
365. *Id.* at 356, 359-60.
366. *Id.* at 359-60.
367. *Id.* at 364.
368. *Id.* at 363.
369. *Id.* at 364.
370. 237 F.3d 242 (3d Cir. 2000).
371. Lazorko v. Pa. Hosp., 237 F.3d 242, 247 (3d Cir. 2000).
372. *Lazorko*, 237 F.3d at 248.
373. *Id.*
374. *Id.* at 247-48.

tory motion without disposing of the entire case.[375] Additionally, similar to *Lazorko*, in which the parties appealed the district court's order upon its entry, in *Adapt*, PHA and RAB appealed the motions to compel discovery before the district court had entered final judgment.[376] Furthermore, like *Lazorko*, in which the district court subsequently entered a final judgment after the appeal, in *Adapt*, the district court entered a final judgment after the appeal was made but prior to a hearing on the appeal.[377] Similar to *Lazorko*, which involved a premature appeal from an interlocutory order, *Adapt* involved a premature appeal from an interlocutory order.[378]

The *Adapt* court correctly decided Fed. R. App. P. 4(a)(2) could not save a premature appeal from an interlocutory discovery order because the *Lazorko* court concluded, under similar facts, a premature appeal from an interlocutory decision could not serve as a notice of appeal from a final judgment.[379] Like the *Lazorko* court, the *Adapt* court recognized a premature appeal could be saved by a subsequently entered final order but only if the prematurely appealed order could otherwise constitute a final order.[380] Although *Lazorko* dealt with an appeal of an award of sanctions and *Adapt* dealt with an appeal of discovery orders, the *Adapt* court likewise recognized Fed. R. App. P. 4(a)(2) did not apply to appeals of a clearly interlocutory order.[381] Thus, similar to the *Lazorko* court, which determined Fed R. App. P. 4(a)(2) did not apply to an appeal of an award of sanctions when the amount had not been determined, the *Adapt* court determined Fed. R.

375. *Compare Lazorko*, 237 F.3d at 248 (noting the district court granted a motion for sanctions against Lazorko's attorney before disposal of the entire case), *with Adapt*, 433 F.3d at 356, 359-60 (noting the district court granted the motions to compel discovery before reaching the merits of the case).

376. *Compare Lazorko*, 237 F.3d at 248 (noting Lazorko appealed the award of sanctions prior the district court entering an amount for the sanctions or a final order), *with Adapt*, 433 F.3d at 356, 359-60 (noting PHA and RAB immediately appealed the discovery orders before the district court entered final judgment).

377. *Compare Lazorko*, 237 F.3d at 248 (noting the district court entered final judgment in the case prior to the Third Circuit hearing the appeal), *with Adapt*, 433 F.3d at 359-60 (noting the district court entered final judgment in the case prior to the Third Circuit hearing the appeal).

378. *Compare Lazorko*, 237 F.3d at 248 (addressing an appeal from an interlocutory order awarding sanctions,), *with Adapt*, 433 F.3d at 361 (addressing appeals from interlocutory discovery orders).

379. *See infra* notes 380-84 and accompanying text.

380. *Compare Lazorko*, 237 F.3d at 248 (noting a premature appeal could only ripen with subsequent entry of final judgment if the appealed order would have otherwise constituted a final judgment), *with Adapt*, 433 F.3d at 362-63 (noting a premature appeal could only ripen with subsequent entry of final judgment if the appealed order would have otherwise constituted a final judgment).

381. *Compare Lazorko*, 237 F.3d at 248 (involving a premature appeal from an award of sanctions but noting Fed. R. App. P. 4(a)(2) did not apply to clearly interlocutory orders), *with Adapt*, 433 F.3d at 364 (involving premature appeals from discovery orders but noting Fed. R. App. P. 4(a)(2) did not apply to clearly interlocutory orders).

App. P. 4(a)(2) did not apply to an appeal of discovery orders.[382] Furthermore, like the *Lazorko* court, under similar facts, the *Adapt* court determined it lacked appellate jurisdiction over the appeal of the district court's interlocutory order because PHA and RAB failed to timely appeal the order after it had become final.[383] Thus, in accordance with the precedent set by the Third Circuit in *Lazorko*, the Third Circuit correctly determined Fed. R. App. P. 4(a)(2) could not save PHA's and RAB's premature appeals of the district court's discovery orders.[384]

2. *The* Adapt *Court Correctly Determined the* Cape May Greene *Rule Could Not Save a Premature Appeal from an Interlocutory Discovery Order*

The *Adapt* court further correctly determined the *Cape May Greene* rule could not perfect an appeal from an interlocutory discovery order upon entry of a final judgment.[385] In its analysis, the court based this determination upon three rationales.[386] First, the court drew similarities with the facts in *Adapt* to those in *Lazorko*, which did not allow a premature appeal to ripen.[387] Second, the court reasoned allowing premature appeals from a discovery order to ripen would not elevate a mere technicality over important substantive issues but rather would encourage piecemeal litigation.[388] Third, the court determined a discovery order could not be final even if immediately followed by a final entry of judgment as required by the *Cape May Greene* rule.[389] The first and third reasons will be addressed later in this Analysis.[390] However, the second reason alone provided a sufficient basis for the court to correctly determine the *Cape May Greene* rule could not save a premature appeal of an interlocutory discovery order.[391]

382. *Compare Lazorko*, 237 F.3d at 248 (determining Fed. R. App. P. 4(a)(2) could not save a premature appeal from an interlocutory award of sanctions), *with Adapt*, 433 F.3d at 364 (determining Fed. R. App. P. 4(a)(2) could not save premature appeals from interlocutory discovery orders).

383. *Compare Lazorko*, 237 F.3d at 248 (determining the court lacked appellate jurisdiction over the premature appeal because Lazorko failed to timely appeal the order once it became final), *with Adapt*, 433 F. 3d at 355 (determining the court lacked appellate jurisdiction over the premature appeals because PHA and RAB failed to timely file notice of the appeal).

384. *See supra* notes 375-83 and accompanying text.

385. *See infra* notes 386-91 and accompanying text.

386. *Adapt*, 433 F.3d at 364-65.

387. *Id.* at 364.

388. *Id.*

389. *Id.* at 364-65.

390. *See infra* notes 426-86 and accompanying text.

391. *See infra* notes 392-425 and accompanying text.

In *Adapt*, PHA and RAB appealed six discovery orders after the district court decided each order.[392] PHA and RAB appealed these orders before the district court made any determination on substantive issues of the suit, which was the performance of the Settlement Agreement and Release between PHA and ADAPT.[393] All of the appeals by PHA and RAB exclusively involved discovery orders.[394] Additionally, approximately one year and three months elapsed between when PHA and RAB first appealed a discovery order and entry of final judgment.[395]

On appeal, the Third Circuit in *Adapt* concluded the *Cape May Greene* rule could not save the premature appeals from discovery orders.[396] The court noted it had never applied the *Cape May Greene* rule to a premature appeal from an interlocutory order.[397] The court cited *Lazy Oil Co. v. Witco Corp.*[398] in support of its determination that the *Cape May Greene* rule could not save the discovery appeals in *Adapt*.[399] The court explained the purpose behind the *Cape May Greene* rule was to elevate important substantive issues above mere technicalities.[400] The court determined repeatedly appealing discovery orders before the district court declared any final disposition was not just a mere technicality.[401] Further, the court reasoned if it were to find jurisdiction over the premature appeal, it would have encouraged conduct that elevated a mere technicality above substantive issues and invited piecemeal litigation, which was a result strongly discouraged by 28 U.S.C. § 1291.[402]

In *Lazy Oil*, the district court disposed of the key issues in the case by overruling Lazy Oil's objections to the proposed class action settlement and, also, by denying Lazy Oil's motions to remove the Class Counsel and to certify a subclass.[403] However, the district court did not approve the plan allocating the settlement proceeds.[404] Lazy Oil appealed this ruling within the thirty-day time limit for ap-

392. *Adapt*, 433 F.3d at 356.
393. *Id.* at 359-60.
394. *Id.* at 356.
395. *Id.* at 357, 359. The first order PHA and RAB appealed was an order entered on May 10, 2004. *Id.* at 357. The district court entered final judgment on August 29, 2005. *Id.* at 359.
396. *Id.* at 365.
397. *Id.* at 364.
398. 166 F.3d 581 (3d Cir. 1999).
399. *Adapt*, 433 F.3d at 364.
400. *Id.*
401. *Id.*
402. *Id.*
403. Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 585, 587 (3d Cir. 1999).
404. *Lazy Oil*, 166 F.3d at 585.

peals.[405] A little over two months later, the district court approved an allocation plan and entered final judgment.[406] Following this entry, the Third Circuit heard the appeal.[407]

On appeal, the *Lazy Oil* court first determined despite the United States Supreme Court ruling in *FirsTier*, the Third Circuit's *Cape May Greene* rule survived.[408] The court declared the purpose of the rule was to ensure justice was not denied due to a mere technicality.[409] The court determined in Lazy Oil's case, declining jurisdiction would elevate a mere technicality above the important substantive issues of the case and deny the parties the right to resolve their dispute on the merits.[410] The court explained the premature appeal involved a mere technicality because the district court disposed of the key substantive elements of the suit with its order that Lazy Oil appealed.[411] The court further explained primarily because of the short amount of time between when Lazy Oil filed the notice of appeal and when the district court entered final judgment, no party was prejudiced by the court asserting jurisdiction over the appeal.[412]

Similar to *Lazy Oil*, in which the appellant prematurely appealed an order, in *Adapt*, PHA and RAB prematurely appealed orders prior to disposition of the entire case.[413] However, in contrast to *Lazy Oil*, in which the appealed order disposed of the key substantive issues, in *Adapt*, the appealed order did not dispose of any key substantive issue because the district court had not yet addressed such issues.[414] Additionally, in contrast to *Lazy Oil*, in which the time between the appeal and the entry of final judgment was just over two months, in *Adapt*, the time between the appeal and the entry of final judgment was well

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405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.* at 587.
409. *Id.*
410. *Id.*
411. *Id.* The court explained that the key issues were liability and damages. *Id.*
412. *Id.*
413. *Compare Lazy Oil*, 166 F.3d at 585 (noting Lazy Oil appealed before the district court had entered final judgment), *with Adapt*, 433 F.3d at 356, 359-60 (noting PHA and RAB appealed before the district court had entered final judgment).
414. *Compare Lazy Oil*, 166 F.3d at 587 (noting the appealed order disposed of the key elements including liability and damages), *with Adapt*, 433 F.3d at 356, 359-60 (noting the appealed orders disposed of discovery issues and did not dispose of any of the key issues such as liability or damages).

over a year.[415] Thus, there was a distinction between the facts in *Lazy Oil* and the facts in *Adapt*.[416]

Accordingly, the *Adapt* court correctly recognized the distinction between the facts in *Lazy Oil* and the facts in *Adapt* and, therefore, correctly relied upon this distinction and the reasoning of the *Lazy Oil* court in support of its determination to decline jurisdiction over the premature appeals.[417] The *Adapt* court relied upon the *Lazy Oil* court in determining assertion of appellate jurisdiction would not elevate a mere technicality above the important substantive issues in the case.[418] The *Adapt* court followed the *Lazy Oil* court in recognizing the *Cape May Greene* rule continued to stand in spite of the United States Supreme Court decision in *FirsTier*.[419] The *Adapt* court also followed the *Lazy Oil* court in deciding perfection of a premature appeal was not restricted to the particular situation and restrictions established in *FirsTier*.[420] Similar to the *Lazy Oil* court, the *Adapt* court explained the *Cape May Greene* rule was broader in application than Fed. R. App. P. 4(a)(2).[421] Additionally, like the *Lazy Oil* court, the *Adapt* court determined appellate courts had jurisdiction to hear appeals from final judgments and certain interlocutory orders.[422] Further, similar to the *Lazy Oil* court, the *Adapt* court reasoned the *Cape May Greene* rule applied in circumstances in which a lack of appellate jurisdiction would elevate mere technicalities above key substantive issues.[423] However, unlike the *Lazy Oil* court, which determined the appeal related to a mere technicality because the dis-

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415. *Compare Lazy Oil*, 166 F.3d at 585 (noting the district court entered final judgment over two months after Lazy Oil appealed the order), *with Adapt*, 433 F.3d at 356, 359-60 (noting the district court entered final judgment approximately one year and three months after PHA's and RAB's first appeals).

416. *See supra* notes 413-15 and accompanying text.

417. *See infra* notes 418-25 and accompanying text.

418. *Compare Lazy Oil*, 166 F.3d at 587 (determining the maturity of the premature appeal was a technicality when the district court entered final judgment on the key issues only a few months after the appeal), *with Adapt*, 433 F.3d at 364 (determining the maturity of the premature appeal was not just a mere technicality when the district court entered final judgment over a year after the first appeal).

419. *Adapt*, 433 F.3d at 363.

420. *Id.*

421. *Compare Lazy Oil*, 166 F.3d at 587 (noting there were more situations when under the *Cape May Greene* rule a premature notice of appeal could become effective at a later date than under Fed. R. App. P. 4(a)(2)), *with Adapt*, 433 F.3d at 364 (noting the scope of the *Cape May Greene* rule was much broader than the limited scope of Fed. R. App. P. 4(a)(2)).

422. *Compare Lazy Oil*, 166 F.3d at 585 (noting the court had appellate jurisdiction over final judgments and certain interlocutory orders), *with Adapt*, 433 F.3d at 360 (noting the court had appellate jurisdiction over final judgments and certain interlocutory orders).

423. *Compare Lazy Oil*, 166 F.3d at 587 (noting the *Cape May Greene* rule allowed it to assume jurisdiction over a case in which declining jurisdiction would have elevated mere technicalities over important substantive issues), *with Adapt*, 433 F.3d at 364

trict court disposed of the key substantive elements of the suit before the appeal, the *Adapt* court determined the appeal did not relate to a mere technicality because the district court did not dispose of any substantive elements of the suit before the appeal.[424] Therefore, the *Adapt* court correctly recognized the distinction between the facts in *Lazy Oil* and the facts in *Adapt* and correctly relied upon this distinction as well as the reasoning of the *Lazy Oil* court to determine the *Cape May Greene* rule did not save a premature appeal from an interlocutory discovery order.[425]

B. THE FIRST AND THIRD REASONS THE *ADAPT* COURT PROVIDED AS TO WHY THE *CAPE MAY GREENE* RULE COULD NOT SAVE THE PREMATURE APPEAL OF A DISCOVERY ORDER WERE MISAPPLIED AND FLAWED RATIONALES

In *Adapt*, when the court determined the *Cape May Greene* rule could not save a premature appeal from an interlocutory discovery order, the court provided three reasons to support its determination.[426] First, the court drew similarities with the facts in *Adapt* to those in *Lazorko*, which did not allow a premature appeal to ripen.[427] Second, the court reasoned not allowing premature appeals from a discovery order to ripen when final judgment was entered would not elevate a mere technicality above important substantive issues but instead would encourage piecemeal litigation.[428] Third, the court reasoned a discovery order could not be final if immediately followed by a final entry of judgment as required by the *Cape May Greene* rule.[429] However, the first and third rationales were both misapplied by the court and flawed because neither rationale could support the application of the *Cape May Greene* rule to the case.[430]

(noting the *Cape May Greene* rule applies when refusing jurisdiction would elevate a mere technicality above important substantive issues).

424. *Compare Lazy Oil*, 166 F.3d at 587 (determining the maturity of the premature appeal was a technicality when the district court entered final judgment on the key issues only a few months after the appeal), *with Adapt*, 433 F.3d at 364 (determining the maturity of the premature appeal was not just a mere technicality when the district court entered final judgment over a year after the first appeal).

425. *See supra* notes 417-24 and accompanying text.

426. *Adapt*, 433 F.3d at 364-65.

427. *Id.* at 364.

428. *Id.*

429. *Id.* at 364-65.

430. *See infra* notes 431-86 and accompanying text.

1. *The* Adapt *Court Incorrectly Relied On* Lazorko *in Its Application of the* Cape May Greene *Rule and Failed to Follow Its Own Precedent*

The *Adapt* court incorrectly relied on *Lazorko* to support its determination the *Cape May Greene* rule could not save a premature appeal from an interlocutory discovery order.[431] In *Adapt*, PHA and RAB prematurely appealed several clearly interlocutory discovery orders.[432] On appeal, the Third Circuit first determined Fed. R. App. P. 4(a)(2) could not save the premature appeal.[433] The court then focused on whether the *Cape May Greene* rule—a rule it defined as broader that Fed. R. App. P. 4(a)(2)—could save the premature appeal of an interlocutory discovery order.[434] The court ultimately concluded the *Cape May Greene* rule could not save the premature appeal.[435] To support this determination, the *Adapt* court first discussed the precedent the Third Circuit had previously set in *Lazorko*.[436] The court briefly reviewed the facts and holding of *Lazorko*, determining *Adapt* bore more similarities to *Lazorko*, than *Cape May Greene, Inc. v. Warren*[437] or *Lazy Oil*.[438] Thus, the court reasoned that because the facts in *Adapt* were similar to those in *Lazorko* the *Cape May Greene* rule could not save the appeal.[439]

In *Lazorko*, Lazorko prematurely appealed a clearly interlocutory order awarding sanctions.[440] On appeal, the *Lazorko* court opined it did not have jurisdiction over an appeal from an award for sanctions when the amount of the sanctions was not determined until after the notice of appeal was filed, even if the district court determined the amount before to the appellate court heard the appeal.[441] In support of this opinion, the *Lazorko* court only cited Fed. R. App. P. 4(a)(2) and the United States Supreme Court's interpretation of Fed. R. App. P. 4(a)(2) in *FirsTier*.[442] Based upon its analysis of Fed. R. App. P. 4(a)(2) and the interpretation set by the Supreme Court in *FirsTier*, the *Lazorko* court determined a premature appeal could only be saved by a subsequent entry of final judgment when the appealed order

431. *See infra* notes 432-66 and accompanying text.
432. *Adapt*, 433 F.3d at 356.
433. *Id.* at 364.
434. *Id.*
435. *Id.* at 365.
436. *Id.* at 364.
437. 698 F.2d 179 (3d Cir. 1983).
438. *Adapt*, 433 F.3d at 364.
439. *Id.*
440. *Lazorko*, 237 F.3d at 247, 248.
441. *Id.* at 248.
442. *Id.*

would otherwise constitute a final order.[443] The *Lazorko* court determined an award for sanctions was interlocutory in nature and failed to otherwise constitute a final order.[444] Thus, the court declined to exercise jurisdiction over the premature appeal.[445] In its analysis, the court never cited either *Lazy Oil* or *Cape May Greene* and never addressed the application of the *Cape May Greene* rule in such a context.[446]

Similar to *Lazorko,* in which the appellant prematurely appealed a clearly interlocutory order, in *Adapt*, the appellant also prematurely appealed a clearly interlocutory order.[447] Similar to *Lazorko,* which involved the district court preliminarily ruling on motions, in *Adapt*, the district court ruled on an interlocutory motion without disposing of the entire case.[448] Additionally, similar to *Lazorko,* in which the parties appealed the district court's order upon entry, in *Adapt*, PHA and RAB appealed the motions to compel discovery before the district court entered final judgment.[449] Furthermore, like *Lazorko,* in which the district court subsequently entered a final judgment after the appeal, in *Adapt*, the district court entered a final judgment after the appeal was made but prior to a hearing on the appeal.[450]

Like the *Lazorko* court, the *Adapt* court ultimately determined under similar facts the premature appeal from the interlocutory order could not later ripen with entry of final judgment.[451] However, the *Adapt* court was incorrect using *Lazorko* to specifically support its de-

443. *Id.*

444. *Id.*

445. *Id.* The court specifically reasoned jurisdiction was not proper because the plaintiff's counsel failed to appeal the order in a timely manner after the order became final. *Id.*

446. *See generally* Lazorko v. Pa. Hosp., 237 F.3d 242 (3d Cir. 2000) (omitting any mention of the *Cape May Greene* rule).

447. *Compare Lazorko*, 237 F.3d at 248 (noting the appeal was from a clearly interlocutory order awarding sanctions), *with Adapt*, 433 F.3d at 361 (noting the appeal was from clearly interlocutory orders compelling discovery).

448. *Compare Lazorko*, 237 F.3d at 247 (noting the district court granted a motion for sanctions against Lazorko's attorney before disposal of the entire case), *with Adapt*, 433 F.3d at 356, 359-60 (noting the district court granted the motions to compel discovery before reaching the merits of the case).

449. *Compare Lazorko*, 237 F.3d at 247 (noting Lazorko appealed the award of sanctions prior to the district court entering an amount for the sanctions or a final order), *with Adapt*, 433 F.3d at 356, 359-60 (noting PHA and RAB immediately appealed the discovery orders before the district court entered final judgment).

450. *Compare Lazorko*, 237 F.3d at 247 (noting the district court entered final judgment prior to the Third Circuit hearing the appeal), *with Adapt*, 433 F.3d at 359-60 (noting the district court entered final judgment prior to the Third Circuit hearing the appeal).

451. *Compare Lazorko*, 237 F.3d at 248 (determining the premature interlocutory award of sanctions could not ripen upon subsequent entry of final judgment), *with Adapt*, 433 F.3d at 361 (determining the premature interlocutory discovery orders could not ripen upon subsequent entry of final judgment).

termination that the *Cape May Greene* rule could not save the premature appeal from an interlocutory order.[452] Unlike the *Lazorko* court, which addressed the issue of an interlocutory order only in the context of Fed. R. App. P. 4(a)(2) and *FirsTier* without mentioning the *Cape May Greene* rule, the *Adapt* court addressed the issue of an interlocutory order in the context of the *Cape May Greene* rule.[453] Thus, because it made no mention of the *Cape May Greene* rule, *Lazorko* could not support the *Adapt* court's application of the *Cape May Greene* rule.[454] If anything, the *Lazorko* case supported the *Adapt* court's determination that Fed. R. App. P. 4(a)(2) could not save the appeal because Fed. R. App. P. 4(a)(2) was the only rule cited and applied in *Lazorko*.[455] Thus, the court incorrectly relied on *Lazorko* in support of its determination that the *Cape May Greene* rule could not save a premature appeal from an interlocutory discovery order.[456]

Moreover, not only did the court misapply its review of *Lazorko*, but the court failed to follow the precedent set in *Lazorko*.[457] Similar to *Lazorko*, in which the appellant prematurely appealed a clearly interlocutory order, in *Adapt*, the appellant also prematurely appealed a clearly interlocutory order.[458] Similar to *Lazorko*, which involved the district court preliminarily ruling on motions, in *Adapt*, the district court ruled on an interlocutory motion without disposing of the entire case.[459] Additionally, similar to *Lazorko*, in which the parties immediately appealed the district court's order, in *Adapt*, PHA immediately appealed the motion to compel discovery before the district court had

452. *Compare Lazorko*, 237 F.3d at 248 (questioning whether Fed. R. App. P. 4(a)(2) could save a premature appeal from an interlocutory order and reviewing the Supreme Court's interpretation of Fed. R. App. P. 4(a)(2) in its analysis of the issue), *with Adapt*, 433 F.3d at 364 (questioning whether the *Cape May Greene* rule—a rule defined as broader than Fed. R. App. P. 4(a)(2)—could save a premature appeal from an interlocutory order).

453. *Compare Lazorko*, 237 F.3d at 248 (noting the appeal was from a clearly interlocutory order awarding sanctions and only reviewing Fed. R. App. P. 4(a)(2) and *FirsTier*), *with Adapt*, 433 F.3d at 361, 362-63, 364-65 (noting the appeals were from clearly interlocutory discovery orders and reviewing Fed. R. App. P. 4(a)(2), *FirsTier*, and the *Cape May Greene* rule).

454. *See supra* notes 451-53 and accompanying text.

455. *See supra* notes 451-54 and accompanying text.

456. *See supra* notes 451-55 and accompanying text.

457. *See infra* notes 458-62 and accompanying text.

458. *Compare Lazorko*, 237 F.3d at 248 (noting the appeal was from a clearly interlocutory order awarding sanctions), *with Adapt*, 433 F.3d at 361 (noting the appeal was from clearly interlocutory orders compelling discovery).

459. *Compare Lazorko*, 237 F.3d at 247 (noting the district court granted a motion for sanctions against Lazorko's attorney before disposal of the entire case), *with Adapt*, 433 F.3d at 356, 359-60 (noting the district court granted the motions to compel discovery before reaching the merits of the case).

entered final judgment.[460] Furthermore, like *Lazorko*, in which the district court subsequently entered a final judgment after the appeal, in *Adapt*, the district court entered a final judgment after the appeal was made but prior to a hearing on the appeal.[461] Accordingly, under similar facts, the *Adapt* court should have followed the previous precedent set forth in *Lazorko*.[462]

However, the *Adapt* court failed to follow *Lazorko*.[463] Unlike the *Lazorko* court, which addressed the issue of an interlocutory order only in the context of Fed. R. App. P. 4(a)(2) and *FirsTier* without mentioning the *Cape May Greene* rule, the *Adapt* court addressed the issue of an interlocutory order in the context of the *Cape May Greene* rule.[464] The *Adapt* court should have followed *Lazorko* and addressed the issue of an interlocutory order only in the context of Fed. R. App. P. 4(a)(2) and *FirsTier* without addressing the *Cape May Greene* rule.[465] Therefore, in *Adapt*, the Third Circuit misapplied and failed to follow *Lazorko*.[466]

2. *The* Adapt *Court Misapplied the Rationale that Fed. R. App. P. 4(a)(2) Could Only Support Final Decisions in Its Application of the* Cape May Greene *Rule*

The *Adapt* court incorrectly relied on the rationale that Fed. R. App. P. 4(a)(2) could only support final decisions to reach its determination that the *Cape May Greene* rule could not save a premature appeal from an interlocutory discovery order.[467] In *Adapt*, the court analyzed whether the *Cape May Greene* rule could apply to the premature appeals to save them.[468] The court acknowledged the rule had been criticized and its validity questioned, but the court nevertheless

460. *Compare Lazorko*, 237 F.3d at 247 (noting Lazorko appealed the award of sanctions prior to the district court entering an amount for the sanctions or a final order), *with Adapt*, 433 F.3d at 356, 359-60 (noting PHA and RAB immediately appealed the discovery orders before the district court entered final judgment).

461. *Compare Lazorko*, 237 F.3d at 247 (noting the district court entered final judgment prior to the Third Circuit hearing the appeal), *with Adapt*, 433 F.3d at 359-60 (noting the district court entered final judgment prior to the Third Circuit hearing the appeal).

462. *See supra* notes 457-61 and accompanying text.

463. *See infra* notes 464-66 and accompanying text.

464. *Compare Lazorko*, 237 F.3d at 248 (noting the appeal was from a clearly interlocutory order awarding sanctions and only reviewing Fed. R. App. P. 4(a)(2) and *FirsTier*), *with Adapt*, 433 F.3d at 361, 362-63, 364-65 (noting the appeals were from clearly interlocutory discovery orders and reviewing Fed. R. App. P. 4(a)(2), *FirsTier*, and the *Cape May Greene* rule).

465. *See supra* notes 463-64 and accompanying text.

466. *See supra* notes 463-65 and accompanying text.

467. *See infra* notes 468-86 and accompanying text.

468. *Adapt*, 433 F.3d at 364-65.

analyzed the application of the rule.[469] The court ultimately determined the *Cape May Greene* rule could not save the appeal.[470] The court noted the third rationale that supported this determination was the most important rationale.[471] In its explanation of this rationale, the *Adapt* court noted the *Lazy Oil* court stated Fed. R. App. P. 4(a)(2) did "not support the *Cape May Greene* doctrine when the order from which a notice of appeal [was] filed [was] not one that would [have been] final if followed immediately by entry of judgment."[472] The court then determined this situation was the precise situation it had before it.[473] Partially based upon this limited analysis, the *Adapt* court determined the *Cape May Greene* rule could not save the premature appeal.[474]

In *Lazy Oil*, the court analyzed whether the *Cape May Greene* rule could apply to save the premature appeal.[475] The court first reviewed the Supreme Court's construction of Fed. R. App. P. 4(a)(2) in *FirsTier*.[476] Based upon this construction, the court determined Fed. R. App. P. 4(a)(2) did "not support the *Cape May Greene* doctrine when the order from which a notice of appeal [was] filed [was] not one that would be final if followed immediately by entry of judgment."[477] The court then acknowledged based upon this distinction other circuits had abrogated their own versions of the *Cape May Greene* rule.[478] But, the *Lazy Oil* court opined in spite of this distinction, the *Cape May Greene* rule continued to be a valid rule because it was broader in scope than Fed. R. App. P. 4(a)(2).[479] Thus, the court determined because the *Cape May Greene* rule was broader than Fed. R. App. P. 4(a)(2) it could sometimes save a premature appeal when Fed. R. App. P. 4(a)(2) could not.[480]

Similar to *Lazy Oil*, in which the court analyzed whether the *Cape May Greene* rule could apply, in *Adapt*, the court also analyzed whether the *Cape May Greene* rule could apply.[481] In its analysis, the *Adapt* court relied upon a statement made by the *Lazy Oil* court that

469. *Id.* at 364 n.13, 364-65.
470. *Id.* at 365.
471. *Id.* at 364.
472. *Id.* at 364-65.
473. *Id.* at 365.
474. *Id.* at 364-65.
475. *Lazy Oil*, 166 F.3d at 585-87.
476. *Id.* at 586.
477. *Id.*
478. *Id.*
479. *Id.* at 587.
480. *Id.*
481. *Compare Lazy Oil*, 166 F.3d at 585-87 (analyzing the application of the *Cape May Greene* rule to save a premature appeal), *with Adapt*, 433 F.3d at 364-65 (analyzing the application of the *Cape May Greene* rule to save a premature appeal).

explained the *Cape May Greene* doctrine was not supported by Fed. R. App. P. 4(a)(2) when the premature appeal was not one that would be final if followed instantly by an entry of judgment.[482] However, unlike the *Lazy Oil* court, which determined the *Cape May Greene* rule was broader than Fed. R. App. P. 4(a)(2), the *Adapt* court determined Fed. R. App. P. 4(a)(2) could not support the application of the *Cape May Greene* rule when the appealed order was not a final order if immediately followed by an entry of final judgment.[483] Additionally, unlike the *Lazy Oil* court, which stated the *Cape May Greene* rule could reach beyond appeals from a final decision to save other premature appeals, the *Adapt* court reasoned a premature appeal from an interlocutory order, which would not have been final if immediately followed by entry of judgment, could not ripen because Fed. R. App. P. 4(a)(2) did not support the application of the *Cape May Greene* rule in such situations.[484] Accordingly, the *Adapt* court's reasoning contradicted the theory behind the validity of the *Cape May Greene* rule laid out by the *Lazy Oil* court—that the rule could reach beyond those appeals from final decisions to save other premature appeals.[485] As a result, the *Adapt* court's reliance on this reasoning in support of the application of the *Cape May Greene* rule was inappropriate and misapplied.[486]

482. *Adapt*, 433 F.3d at 364-65.

483. *Compare Lazy Oil*, 166 F.3d at 586, 587 (noting Fed. R. App. P. 4(a)(2) did not support the *Cape May Greene* rule when the appealed order would not have been final if immediately followed by entry of judgment, but determining the *Cape May Greene* rule could save premature appeals when the appealed order would not have been final if immediately followed by entry of judgment because the *Cape May Greene* rule was broader in scope), *with Adapt*, 433 F.3d at 364-65 (determining the *Cape May Greene* rule could not apply because Fed. R. App. P. 4(a)(2) did not support the *Cape May Greene* rule when the appealed order would not have been final if immediately followed by entry of judgment).

484. *Compare Lazy Oil*, 166 F.3d at 586, 587 (noting the *Cape May Greene* rule could save premature appeals when the appealed order would not have been final if immediately followed by entry of judgment because the *Cape May Greene* rule was broader in scope), *with Adapt*, 433 F.3d at 364-65 (determining the *Cape May Greene* rule could not apply because Fed. R. App. P. 4(a)(2) did not support the *Cape May Greene* rule when the appealed order would not have been final if immediately followed by entry of judgment).

485. *See supra* notes 481-84 and accompanying text.

486. *See supra* notes 481-85 and accompanying text.

C. THE *ADAPT* COURT FAILED TO TAKE THE OPPORTUNITY TO ADDRESS THE VALIDITY OF THE *CAPE MAY GREENE* RULE IN LIGHT OF THE UNITED STATES SUPREME COURT RULING IN *FIRSTIER* AND THE CIRCUIT SPLIT ON THE ISSUE

The *Adapt* court failed to determine whether the *Cape May Greene* rule was still a valid rule after the Supreme Court's construction of Fed. R. App. P. 4(a)(2) and in light of the circuit split on the issue.[487] In *Adapt,* the court addressed whether a premature appeal could be saved by the subsequent entry of final judgment.[488] Given this issue, the court had the opportunity to address the construction of Fed. R. App. P. 4(a)(2) and also the validity of the *Cape May Greene* rule.[489] The court first determined the limited construction of Fed. R. App. P. 4(a)(2) proscribed by the Supreme Court in *FirsTier* could not save the premature appeal.[490] The court then focused on the *Cape May Greene* rule and noted the rule allowed premature appeals to later ripen.[491] The court explained the *Cape May Greene* rule was in existence prior to the Supreme Court's interpretation of Fed. R. App. P. 4(a)(2) in *FirsTier*.[492] The court further noted after *FirsTier*, other circuits with rules similar to the *Cape May Greene* rule had abrogated those rules.[493] The court also acknowledged the United States Court of Appeals for the District of Columbia Circuit had expressly criticized the Third Circuit for fashioning a rule without institutional warrant by upholding the *Cape May Greene* rule after *FirsTier*.[494] However, in light of *FirsTier*, the circuit split, and the criticism, the *Adapt* court still chose to apply the *Cape May Greene* rule.[495] Although acknowledging its questioned validity, the court refused to address the validity of the rule because it stated the validity of the rule was inapposite.[496]

In contrast to the *Adapt* court, courts in other circuits that have had the opportunity to readdress the validity of a rule similar to the Third Circuit's *Cape May Greene* rule have done so.[497] In *United*

487. *See infra* notes 488-528 and accompanying text.
488. *Adapt*, 433 F.3d at 361.
489. *Id.* at 362-63, 364 n.13, 365.
490. *Id.* at 364.
491. *Id.*
492. *Id.* at 361-62.
493. *Id.* at 362.
494. *Id.* at 364 n.13.
495. *Id.* at 364-65.
496. *Id.* at 364 n.13.
497. *See* United States v. Cooper, 135 F.3d 960, 963 (5th Cir. 1998) (addressing a similar rule in a case in which a party prematurely appealed an interlocutory, instead of final magistrate order); Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 160 (D.C. Cir. 2005) (addressing the validity of both its own rule similar to the *Cape May Greene* rule on premature appeals and also addressing the validity of the

States v. Cooper,[498] the United States Court of Appeals for the Fifth Circuit addressed whether a premature appeal could ripen upon entry of a final judgment.[499] Given this issue, the *Cooper* court reviewed the Supreme Court's interpretation and construction of Fed. R. App. P. 4(a)(2) in *FirsTier*.[500] The *Cooper* court applied *FirsTier's* construction to determine Fed. R. App. P. 4(a)(2) could not save a premature appeal because the appealed order did not dispose of the claims in the case in any way.[501] The court then turned its attention to the Fifth Circuit line of cases that had created and applied the *Jetco-Alcorn-Alcom* rule, which was a rule the Fifth Circuit created to save premature appeals when followed by a subsequent entry of final judgment.[502] The court acknowledged the *Jetco-Alcorn-Alcom* rule was much broader in scope than the Supreme Court's construction of Fed. R. App. P. 4(a)(2).[503] The court further acknowledged that in light of the limited construction in *FirsTier*, the *Jetco-Alcorn-Alcom* rule could not stand.[504] As a result, the court overruled the *Jetco-Alcorn-Alcom* rule.[505]

In *Outlaw v. Airtech Air Conditioning & Heating, Inc.*,[506] the United States Court of Appeals for the District of Columbia Circuit addressed whether a premature appeal from the district court's order granting summary judgment, which did not dispose of all the claims, could ripen upon subsequent entry of final judgment.[507] The D.C. Circuit analyzed this issue in the context of the Supreme Court's construction of Fed. R. App. P. 4(a)(2) in *FirsTier*.[508] The court determined the limited construction of Fed. R. App. P. 4(a)(2) could save the premature appeal.[509] However, the D.C. Circuit also explained prior to *FirsTier*, the D.C. Circuit had a line of cases holding "an appeal taken prematurely effectively ripen[ed] and secure[ed] appellate jurisdiction when the district court's judgment [became] final prior to disposition of the appeal."[510] The D.C. Circuit also deter-

Cape May Greene rule itself); Serine v. Peterson, 989 F.2d 371, 372 (9th Cir. 1993) (acknowledging that it had a rule similar to the *Cape May Greene* rule prior to *FirsTier*, but failed to address this rule and only addressed the holding in *FirsTier*).

498. 135 F.3d 960 (5th Cir. 1998).
499. United States v. Cooper, 135 F.3d 960, 960, 961 (5th Cir. 1998).
500. *Cooper*, 135 F.3d at 962.
501. *Id.* at 962-63.
502. *Id.* at 963.
503. *Id.*
504. *Id.*
505. *Id.*
506. 412 F.3d 156 (D.C. Cir. 2005).
507. Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 156, 159 (D.C. Cir. 2005).
508. *Outlaw*, 412 F.3d at 159-62.
509. *Id.* at 162.
510. *Id.* at 160.

mined the line of such cases must be limited in light of the Supreme Court ruling in *FirsTier*.[511] Not only did the D.C. Circuit limit its rule similar to the *Cape May Greene* rule, but the D.C. Circuit expressly criticized the Third Circuit's holding in *Lazy Oil*.[512] The D.C. Circuit questioned how a broader rule on premature appeals could survive the Supreme Court's narrow interpretation of the specific appellate rule governing premature appeals, without making the broader rule entirely "superfluous."[513] The D.C. Circuit also criticized the Third Circuit's analysis in *Lazy Oil* that compared how Fed. R. App. P. 4(a)(4) allowed a premature appeal filed after judgment but before disposition of post-trial motions to ripen upon disposition of those motions.[514] The D.C. Circuit stated just because another rule governing post-trial motions saved premature appeals "hardly [meant] that courts [were] at liberty to fashion additional doctrines saving premature notices of appeal that [were] not saved under the rules, as construed by the Supreme Court."[515]

Additionally, in *Serine v. Peterson*,[516] the plaintiff prematurely appealed a magistrate judge's order that the court determined clearly was not a final judgment.[517] In its analysis, the United States Court of Appeals for the Ninth Circuit acknowledged the Ninth Circuit had a prior rule involving the ripening of premature appeals upon entry of a final judgment.[518] However, the Ninth Circuit stated the Supreme Court had reexamined the question in *FirsTier*, and proceeded to follow the *FirsTier* analysis.[519] The Ninth Circuit did not apply its rule on premature appeals in existence prior to *FirsTier*.[520] Thus, the Ninth Circuit effectively overruled its rule similar to the *Cape May Greene* rule by determining it was no longer necessary to apply the rule in light of the Supreme Court ruling in *FirsTier*.[521]

Similar to *Cooper*, *Outlaw*, and *Serine*, in which the parties prematurely appealed an order that did not dispose of the final issues, in *Adapt*, PHA and RAB also prematurely appealed an order that did not dispose of the final issues.[522] Furthermore, as with the *Cooper*, *Out-*

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511. *Id.* (citing United States v. Cooper, 135 F.3d 960, 963 (5th Cir. 1998); Serine v. Peterson, 989 F.2d 371, 372 (9th Cir. 1993)).
512. *Id.* at 160-61 n.2.
513. *Id.* at 160 n.2.
514. *Id.* at 160-61 n.2.
515. *Id.*
516. 989 F.2d 371 (9th Cir. 1993).
517. Serine v. Peterson, 989 F.2d 371, 372 (9th Cir. 1993).
518. *Serine*, 989 F.2d at 372.
519. *Id.*
520. *Id.* at 372-73 (omitting application of its prior rule on premature appeals).
521. *See supra* notes 517-20 and accompanying text.
522. *Compare Cooper*, 135 F.3d at 961 (noting Cooper prematurely appealed the magistrate's recommendation before the district court made a determination), *and Out-*

law, and *Serine* courts, the *Adapt* court made its determination involving the ripening of premature appeals after the Supreme Court's construction of Fed. R. App. P. 4(a)(2) in *FirsTier*.[523] Additionally, like the *Cooper*, *Outlaw*, and *Serine* courts, the *Adapt* court acknowledged a circuit rule on premature appeals that existed prior to the Supreme Court's decision in *FirsTier*.[524] Much like in *Cooper*, *Outlaw*, and *Serine*, in which the courts had the opportunity to address the issue of premature appeals after the Supreme Court's construction of Fed. R. App. P. 4(a)(2), in *Adapt*, the Third Circuit also had the opportunity to once again address the issue of premature appeals after the Supreme Court's construction of Fed. R. App. P. 4(a)(2).[525] However, unlike *Cooper*, *Outlaw*, and *Serine*, in which the courts did address the validity of the circuit's rule on premature appeals in light of the ruling in *FirsTier*, the court in *Adapt* acknowledged the questioned validity but refused to address the issue.[526] Therefore, the

law, 412 F.3d at 159 (noting Outlaw prematurely appealed the order granting summary judgment because claims against another party were still pending), *and Serine*, 989 F.2d at 372 (noting Serine prematurely appealed the magistrate's order before the district court made a determination), *with Adapt*, 433 F.3d at 356, 359-60 (noting PHA and RAB prematurely appealed the discovery orders before the district court ruled on the enforcement of the Agreement).

523. *Compare Cooper*, 135 F.3d at 960 (decided in 1998, approximately seven years after *FirsTier*), *and Outlaw*, 412 F.3d at 156 (decided in 2005, approximately fourteen years after *FirsTier*), *and Serine*, 989 F.2d at 371 (decided in 1993, approximately two years after *FirsTier*), *with Adapt*, 433 F.3d at 353 (decided in 2006, approximately fifteen years after *FirsTier*).

524. *Compare Cooper*, 135 F.3d at 963 (acknowledging the *Jetco-Alcorn-Alcom* rule, which was broader in scope than Fed. R. App. P. 4(a)(2)), *and Outlaw*, 412 F.3d at 160 (acknowledging a line of cases that allowed a premature appeal to ripen whenever the district court's judgment became final before disposition of the appeal), *and Serine*, 989 F.2d at 372 (acknowledging a circuit line of cases addressing when a premature appeal could become final prior to *FirsTier*), *with Adapt*, 433 F.3d at 361-62 (acknowledging the *Cape May Greene* rule, which the Third Circuit previously determined was broader in scope than Fed. R. App. P. 4(a)(2)).

525. *Compare Cooper*, 135 F.3d at 962-63 (determining after the Supreme Court's construction of Fed. R. App. P. 4(a)(2) in *FirsTier* whether a premature appeal from a magistrate's report could subsequently ripen), *and Outlaw*, 412 F.3d at 160-62 (determining after the Supreme Court's construction of Fed. R. App. P. 4(a)(2) in *FirsTier* whether a premature appeal from an order granting summary judgment but not disposing of the entire case could subsequently ripen), *and Serine*, 989 F.2d at 372-73 (determining after the Supreme Court's construction of Fed. R. App. P. 4(a)(2) whether a premature appeal from a magistrate's recommendation could subsequently ripen), *with Adapt*, 433 F.3d at 362-65 (determining after the Supreme Court's construction of Fed. R. App. P. 4(a)(2) in *FirsTier* whether a premature appeal from discovery orders could subsequently ripen).

526. *Compare Cooper*, 135 F.3d at 963 (addressing the validity of the *Jetco-Alcorn-Alcom* rule in light of the Supreme Court's ruling in *FirsTier* and abrogating the rule), *and Outlaw*, 412 F.3d at 160, 160-61 n.2 (addressing the validity of the rule on premature appeals in existence prior to *FirsTier* in light of the Supreme Court's ruling in *FirsTier*, abrogating that rule, and expressly criticizing the *Cape May Greene* rule), *and Serine*, 989 F.2d at 372 (acknowledging the existence of a rule on premature appeals prior to *FirsTier* and failing to apply that rule, and only applying the ruling of *FirsTier*),

Adapt court should have addressed the validity of the Third Circuit's rule of premature appeals in light of the ruling in *FirsTier*, like the *Cooper*, *Outlaw*, and *Serine* courts had done under similar facts.[527] Accordingly, the Third Circuit failed to take the opportunity to address the viability of the *Cape May Greene* rule after the United States Supreme Court decision in *FirsTier* and the circuit split on the issue.[528]

CONCLUSION

In *Adapt of Philadelphia v. Philadelphia Housing Authority*,[529] the United States Court of Appeals for the Third Circuit dismissed Philadelphia Housing Authority's and Resident Advisory Board, Inc.'s premature appeals for lack of appellate jurisdiction.[530] In doing so, the court determined neither Fed. R. App. P. 4(a)(2) nor the *Cape May Greene* rule could save a premature appeal from an interlocutory discovery order even when the district court entered final judgment prior to the hearing on the appeal.[531] Additionally, while the court acknowledged the criticism and questioned validity of the *Cape May Greene* rule, the court failed to reexamine the validity of the rule and instead analyzed the application of the rule without any discussion as to its viability.[532]

In *Adapt*, the Third Circuit correctly determined a premature appeal from a clearly interlocutory order, such as a discovery order, could not later ripen with subsequent entry of final judgment.[533] The rulings in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*,[534] and *Lazorko v. Pennsylvania Hospital*[535] adequately supported the *Adapt* court's determination Fed. R. App. P. 4(a)(2) could not save the premature appeals from interlocutory discovery orders upon subsequent entry of final judgment.[536] Additionally, the *Adapt* court was correct in opining the *Cape May Greene* rule could not save the premature appeals from interlocutory discovery orders upon subsequent en-

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with Adapt, 433 F.3d at 362, 364 n.13, 365 (acknowledging repeatedly the circuit split on the issue with prior rules on premature appeals, the criticism of the *Cape May Greene* rule, and the questionable validity of the rule, but failing to address whether the rule was still valid or not).

527. *See supra* notes 522-26 and accompanying text.
528. *See supra* notes 522-27 and accompanying text.
529. 433 F.3d 353 (3d Cir. 2006).
530. Adapt of Philadelphia v. Philadelphia Hous. Auth., 433 F.3d 353, 365 (3d Cir. 2006).
531. *Adapt*, 433 F.3d at 364-65.
532. *Id.* at 363-65.
533. *Id.*
534. 498 U.S. 269 (1991).
535. 237 F.3d 242 (3d Cir. 2000).
536. *See supra* notes 335-84 and accompanying text.

try of final judgment.[537] However, two rationales the *Adapt* court provided as to why the *Cape May Greene* rule could not save a premature appeal of a discovery order were misapplied and flawed.[538] The *Adapt* court incorrectly relied on *Lazorko* in its application of the *Cape May Greene* rule and failed to follow its own precedent.[539] The *Adapt* court also misapplied the rationale that Fed. R. App. P. 4(a)(2) could only support final decisions in its application of the *Cape May Greene* rule.[540] Furthermore, the Third Circuit failed to take the opportunity to reexamine the validity of the criticized *Cape May Greene* rule, even after other circuits had overturned their similar rules.[541]

While the Third Circuit did reach the correct outcome in *Adapt*, the court failed in its analysis. In its analysis, the court acknowledged the criticism and questioned validity of its *Cape May Greene* rule several times but refused to answer the ultimate question of whether the *Cape May Greene* rule was still a valid rule. The court then went through the application of the *Cape May Greene* rule but relied upon rationales in its application that could not support the rule. This creates uncertainty as to whether the *Cape May Greene* rule is a valid rule in the Third Circuit. The Third Circuit only added to the confusion surrounding the *Cape May Greene* rule by acknowledging the questioned validity of the rule, misapplying the rule, and then failing to address whether the rule was still a valid rule within the Third Circuit. Because of its flawed analysis, the court has left practitioners within the Third Circuit with a confused understanding of when a premature appeal could ripen. As a result, parties' ability to use the appellate process is adversely affected because the parties are unable to determine whether they have filed an appeal within the appropriate time. Thus, even after the Third Circuit addressed premature appeals, the validity of the circuit's *Cape May Greene* rule is still uncertain.

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537. *See supra* notes 385-425 and accompanying text.
538. *See supra* notes 426-86 and accompanying text.
539. *See supra* notes 431-66 and accompanying text.
540. *See supra* notes 467-86 and accompanying text.
541. *See supra* notes 529-41 and accompanying text.