SELECTED TOPICS IN PENNSYLVANIA LEGAL MALPRACTICE LAW

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ATTORNEY-CLIENT RELATIONSHIP

Pennsylvania follows the general principle that privity is required and a plaintiff may not sue an attorney for alleged negligence in the performance of professional duties in the absence of an attorney-client relationship. Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744 (1983); Schenkel v. Monheit, 266 Pa. Super. 396, 405 A.2d 493 (1979); Cost v. Cost, 450 Pa. Super. 685, 677 A.2d 1250 (1996). "The general rule [in Pennsylvania] is that an attorney cannot be held liable for negligence to a third person with whom he has no contract of employment." Austin J. Richards,

Inc. v. McClafferty, 538 A.2d 11 (Pa. Super. 1988). "[T]he Supreme Court specifically retained the requirement that a plaintiff must show an attorney-client relationship or a specific undertaking by the attorney furnishing professional services, as a necessary prerequisite for maintaining an action…on a theory of negligence." Gregg v. Lindsay, 649 A.2d 935 (Pa. Super. 1994).

The only exception to this rule is for a "narrow class of third party beneficiaries" such as named legatees of a will whose legacies have failed as a result of attorney malpractice. Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744 (1983); Schenkel v. Monheit, 266 Pa. Super. 396, 405 A.2d 493 (1979); Cost v. Cost, 450 Pa. Super. 685, 677 A.2d 1250 (1996).

Absent an express contract, an implied attorney-client relationship will be found if 1) the purported client sought advice or assistance from the attorney, 2) the advice sought was within the attorney's competence, 3) the attorney expressly or impliedly agreed to render such assistance, and 4) it is reasonable for the putative client to believe the attorney was representing him. Atkinson v. Haug, 424 Pa. Super. 406, 622 A.2d 983 (1993). A subjective belief that an attorney-client relationship existed between is an insufficient basis upon which to find there existed a genuine issue of material fact precluding summary judgment. Cost v. Cost, 450 Pa. Super. 685, 677 A.2d 1250 (1996).

As a general rule the attorney acts as an agent of his client within the authority he has been granted. In this regard, a client is charged with notice given to his attorney in the context of litigation. Garcia v. Community Legal Services, 362 Pa. Super. 484, 524 A.2d 980 (Pa. Super. 1987). Notice from a court to a person's attorney is considered notice to the client as long as it concerns a matter within the scope of the representation. Yeager v. United Natural Gas Co., 197 Pa. Super. 25, 176 A.2d 455 (1961). An admission by the attorney during the course of a trial is binding upon the client. Bartholomew v. State Ethics Commission, 795 A.2d 1073 (Pa. Cmwlth. 2002); Sule v. W.C.A.B., 550 A. 2d 847 (Pa. Cmwlth. 1988). An out of court statement by an attorney does not, however, bind the client unless given expressly for the purpose of dispensing with formal proofs at trial. The rule has been expressed as barring the introduction of evidence of an attorney's admissions made out of court and not in the presence of the client, unless authority to make them or knowledge or assent of the client is affirmatively shown. Eldridge v. Melcher, 226 Pa. Super. 381, 313 A.2d 750 (1973).

CAUSE OF ACTION FOR LEGAL MALPRACTICE

The elements of a legal malpractice claim are 1) the employment of the attorney or other basis for duty, 2) failure of the attorney to exercise ordinary skill and knowledge, and 3) such failure proximately causing damages to the plaintiff. Hughes v. Consol-Pennsylvania Coal Company, 945 F.2d 594 (3d Cir. 1991), *cert. den'd*, 112 S. Ct. 2300 (1992); Steiner v. Markel, 600 Pa. 515, 968 A.2d 1253 (2009); Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (1985). An essential element to this cause of action is proof of actual loss rather than nominal damages, speculative harm or the threat of future harm. Damages are considered remote or speculative only if there is uncertainty concerning the identification of the existence of damages rather than the ability to precisely calculate the amount or value of damages. Rizzo*, supra*.

In a litigation representation, "a legal malpractice action in Pennsylvania requires the plaintiff to prove that he had a viable cause of action against the party he wished to sue in the underlying case and that the attorney he hired was negligent in prosecuting or defending that underlying case (often referred to as proving a 'case within a case')." Kituskie v. Corbman, 552 Pa. 275, 714 A. 2d 1027 (1998); Poole v. Warehouse Club, Inc. 570 Pa. 495, 810 A. 2d 1183 (2002); Epstein v. Saul Ewing, 7 A.3d 303 (Pa. Super. 2010).

CIVIL RIGHTS CLAIMS

A criminal defense attorney does not act under color of state law, even if court-appointed or employed by a public defender's office, for purposes of meeting the requirement for bringing a civil rights claim. A lawyer representing a client is not, by virtue of being an officer of the court, a state actor "under color of state law". This is essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed. Polk County v. Dodson, 454 U.S. 312, 102 S. Ct. 445 (1981). Although states license lawyers to practice and although lawyers are deemed officers of the court, such is an insufficient basis for concluding that lawyers act "under color of state law" for purposes of the Civil Rights Act. Henderson v. Fisher, 631 F.2d 1115 (3rd Cir. 1980).

The mere regulation of a profession does not, by itself, turn the actions of members of those professions into state action. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). The fact that lawyers are regulated does not render their actions into that of the state, absent more, for purposes of the 14th Amendment. Henderson v. Fisher, 631 F.2d 1115 (3rd Cir.1980).

While a prosecutor's conduct is state action, a prosecutor enjoys absolute immunity from suit for conduct "intimately associated with the judicial phase of the criminal process." Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984 (1976). State prosecutors are absolutely immune from liability under § 1983 for actions performed in a quasi-judicial role; this protection is not grounded in any special esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself. Light v. Haws, 472 F.3d 74, 78 (3d Cir. 2007). However, a prosecutor bears the "heavy burden" of establishing entitlement to absolute immunity. Light v. Haws, 472 F.3d 74 (3d Cir.2007); Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir.1979). A prosecutor must show that he was functioning as the state's advocate when performing the action in question.

However, immunity will not extend to willful destruction of exculpatory evidence of the accused. Where a prosecutor's role as advocate has not yet begun, or where it has concluded, absolute immunity does not attach. Yarris v. County of Delaware, 465 F.3d 129 (3rd Cir. 2006).

CONSUMER PROTECTION ACT CLAIMS

The Pennsylvania Supreme Court has held that attorneys cannot be liable for alleged misconduct under the Pennsylvania Unfair Trade Practice and Consumer Protection Law, 73 P.S. 201-1, *et seq.*, for actions involving collection and distribution of settlement funds as the Rules of Professional Conduct provides exclusive governance of that activity. Beyers v. Richmond, 594 Pa. 654, 937 A.2d 1082 (2007).

CONTRACT ACTION

In Pennsylvania, the client has a choice: either to sue the attorney in assumpsit, on the theory that the attorney committed a breach of contract; or to sue the attorney in trespass, on the theory that the attorney failed to exercise the standard of care that he was obliged to exercise. Duke & Co. v. Anderson, 275 Pa. Super. 65, 418 A.2d 613 (1908). In Bailey v. Tucker , 533 Pa. 237, 621 A. 2d 108 (1993) the Pennsylvania Supreme Court advised:

> An assumpsit claim based on breach of the attorney-client agreement is a contract claim and the attorney's liability in this regard will be based on terms of that contract. Thus, if an attorney agrees to provide his or her best efforts and fails to do so an action will accrue. Of course an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large.

A breach of contract claim against an attorney does not require proof that an attorney failed to follow a specific instruction of the client. A plaintiff need only demonstrate that an attorney has breached his implied contractual duty to provide legal service in a manner consistent with the profession at large. Gorski v. Smith, 812 A. 2d 683 (Pa. Super 2002).

Generally speaking, for a plaintiff to successfully maintain a cause of action for breach of contract the plaintiff must establish 1) the existence of a contract including its essential terms, 2) a breach of a duty imposed by the contract, and 3) resultant damages. Gorski, *supra*. In a simple contract action there is no need to allege negligence unless the alleged breach is based on an implied contractual duty to provide professional skills consistent with those expected in a given field. McShea v. City of Philadelphia, 995 A. 2d 334 (Pa. 2010); Bailey v. Tucker, 533 Pa. 237, 621 A.2d 108 (1993).

A contract claim is governed by the four-year statute for contract claims, 42 Pa .C.S. § 5525, and is not be subject to a contributory negligence defense, though it might be defended by contending that the client's negligent actions were in breach of the implied contract.

CONTRIBUTORY NEGLIGENCE

Any degree of contributory negligence is a complete bar to recovery in cases not involving bodily injury or tangible property damage. The Pennsylvania Comparative Negligence Act, 42 P.S.§ 7102, applies only to actions seeking damages for death, bodily injury, or property damage. A legal malpractice claim is for economic loss, and thus the negligence of the client in bringing about the loss acts as a complete bar A purely monetary loss does not constitute damage to tangible property and, as a result, the comparative negligence statute will not apply; rather, the common law doctrine of pure contributory negligence applies. Rizzo v. Michner, 584 A.2d 973 (Pa. Super. 1990). Columbia Medical Group v. Herring and Roll, P.C., 829 A. 2d 1184 (Pa. Super. 2003)

The Superior Court has recognized contributory negligence as a complete defense to a legal malpractice action sounding in negligence. Gorski v. Smith, 812 A.2d 683 (Pa. Super. 2002). The Superior Court in Gorski noted that contributory negligence can be found where a client withholds information from his attorney, misrepresents to the attorney crucial facts regarding circumstances integral to the representation or fails to follow the specific instructions of the attorney.

CRIMINAL ATTORNEY LIABILITY

In Bailey v. Tucker, 533 Pa. 237, 621 A.2d 108 (1993), the Pennsylvania Supreme Court reviewed the requirements of a malpractice case for an attorney's representation in a prior criminal case. The Pennsylvania Supreme Court held:

> Consequently, today we hold that a plaintiff seeking to bring a trespass action against a criminal defense attorney, resulting from his or her representation of the plaintiff in criminal proceedings, must establish the following elements: (1) The employment of the attorney; (2) Reckless or wanton disregard of the defendant's interest on the part of the attorney; (3) the attorney's culpable conduct was the proximate cause of an injury suffered by the defendant/plaintiff, i.e., (4) the attorney's conduct, the defendant/ plaintiff would have obtained an acquittal or complete dismissal of the charges (or) as a result of the injuries, the criminal defendant/ plaintiff suffered damages. (5) Moreover, the plaintiff will not prevail in an action in criminal malpractice unless and until he has pursued post-trial remedies and obtained relief which was dependent upon attorney error; Additionally, although such finding may be introduced into evidence in a subsequent action as shall not be dispositive of the establishment of culpable conduct in the malpractice….
>
> Unlike in the civil litigation area, a client does not come before the criminal justice system under the care of his counsel alone; he comes with a full panoply of rights, powers, and privileges. These rights and privileges not only protect the client from abuses of the system but are designed to protect the client from a deficient representative. Thus, whereas in a civil matter a case once lost is lost forever, in a criminal matter a defendant is entitled to a second chance (perhaps even a third or fourth chance) to insure that an injustice has not been committed. For these reasons

> we are constrained to recognize that criminal malpractice trespass actions are distinct from civil legal malpractice trespass actions, and as a result the elements to sustain such a cause of action must likewise differ.

A claim against a criminal attorney may be based on breach of the attorney-client agreement. If an attorney agrees to provide his or her best efforts and fails to do so an action will accrue. The attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large. This cause of action will proceed along the lines of all established contract claims and would not require a determination by an appellate court of ineffective assistance of counsel, nor would the client need to prove innocence. However, in a contract action for attorney malpractice in criminal matter, damages are limited to amount actually paid for services plus statutory interest. Bailey, *supra.*

A client who has unsuccessfully raised the constitutional claim of ineffective assistance of counsel in the underlying criminal action is estopped from relitigating identical issues in a subsequent malpractice action against his defense attorney. Applying this form of estoppel in a criminal malpractice action is justified only when the issue barred from re-litigation is identical to the issue necessarily decided or actually adjudicated in the prior proceeding. Also, the party against whom the defense is asserted must have had a full and fair opportunity to litigate the issues in the prior proceeding. Alberici v. Tinari, 374 Pa. Super. 20, 542 A.2d 127 (1988), *alloc. den'd*, 534 Pa. 625, 627 A.2d 730 (1993). Collateral estoppel applies even where the subsequent action differs from the original suit. Murphy v. Landsburg, 490 F.2d 319 (3d Cir. 1973), *cert. den'd*, 416 U.S. 939 (1974).

DAMAGES IN LEGAL MALPRACTICE CLAIM

In order to establish a claim of legal malpractice, a plaintiff must demonstrate that the negligence of the attorney was the proximate cause of actual loss to the plaintiff rather than only nominal damages, speculative harm or the threat of future harm. Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (1989). Damages are considered remote or speculative only if there is uncertainty concerning the identification of the existence of damages, not just the inability to precisely calculate the amount or value of damages.

Where the malpractice action stems from an underlying litigation case, "[t]he orthodox view, and indeed virtually the universal one, is that when a plaintiff alleges that the defendant lawyer negligently provided services to him or her as a plaintiff in the underlying action, he or she must establish by the preponderance of the evidence that he or she would have recovered a judgment in the underlying action in order to be awarded damages in the malpractice action, which are measured by the lost judgment." Williams v. Bashman, 457 F. Supp. 322 (E.D. Pa.1978). This often called proof of the case within a case.

Under Pennsylvania law, any lack of ability to collect damages in the underlying action must be asserted as an affirmative defense by the attorney and affirmatively proven. The attorney must plead and prove that if the former client obtained a judgment in the underlying case that

nothing or only a portion of it would have actually been paid because of insurance limits or assets of the defendant. The Pennsylvania Supreme Court recognized that a legal malpractice action is different from any other type of lawsuit because a plaintiff must prove a case within a case and establish that he would have recovered a judgment in the underlying action. But the defendant must show the judgment could not have been collected. If lack of collectability can be shown then the client should be compensated only for actual losses and it would be inequitable for the plaintiff to be able to obtain a judgment against the attorney which is greater than the judgment that the plaintiff could have collected from the third party. Kituskie v. Korbman, 552 Pa. 275, 714 A.2d 1027 (1998).

DELAY DAMAGES

Delay damages pursuant to Pa.R.C.P. 238 are not recoverable against an attorney for claims of legal malpractice since monetary relief for bodily injury or property damage is not sought. Rizzo v. Haines, 515 A.2d 321 (Pa. Super. 1986), *aff'd*, 525 Pa. 484, 555 A.2d 58 (1989). A claim for malpractice is not within the scope of Rule 238 even if the underlying action involved a claim for bodily injury or property damage. Wagner v. Orie and Zivic, 431 Pa. Super. 337, 636 A. 2d 679 (Pa. Super. 1994).

Interest on tort claims against attorneys has been historically precluded under Pennsylvania common law, but it can be allowed in certain cases involving fraud or conversion. Interest can be awarded on liquidated damages if the amount is fixed, the liability of the defendant certain and the delay was brought about by conduct of the defendant. The party is not awarded interest but rather compensation for delay. Marrazzo v. Scranton Knehi Bottling Co., 438 Pa. 72, 263 A.2d 336 (1970). The Pennsylvania Supreme Court in Rizzo v. Haines , 525 Pa. 484, 555 A2d 58 (1989) allowed interest on an award against an attorney who "borrowed" funds from his client and made the following observations:

> In [tort] cases the party chargeable cannot pay or make tender until both the time and the amount have been ascertained, and his default is not therefore of that absolute nature that necessarily involves interest for the delay. But there are cases sounding in tort, and cases of unliquidated damages, where not only the principle on which the recovery is to be had is compensation, but where also the compensation can be measured by market value, or other definite standard.... Into these cases the element of time may enter as an important factor, and the plaintiff will not be fully compensated unless he receives, not only the value of his property, but receive it, as nearly as may be, as of the date of his loss. Hence it is that the jury may allow additional damages, in the nature of interest, for the lapse of time.

This flexible approach concerning interest was also articulated in Murray Hill Estates, Inc. v. Bastin, 442 Pa. 405, 276 A.2d 542 (1971):

> Courts in this Commonwealth should not permit a person guilty of fraudulently withholding the funds of another to profit therefrom. Brooks v.

> Conston, 364 Pa. 256, 72 A.2d 75 (1950). *See also* Lexington Ins. Co. v. The Abington Co., 621 F. Supp. 18)E.D. Pa. 1985). Accordingly, where funds are wrongfully and intentionally procured or withheld from one who seeks their restoration, the court should calculate interest on these monies at the market rate.

While the general rule is that a successful litigant is entitled to interest beginning only on the date of the verdict, it is nonetheless clear that pre-judgment interest may be awarded "when a defendant holds money or property which belongs in good conscience to the plaintiff, and the objective of the court is to force disgorgement of his unjust enrichment." Dasher v. Dasher, 374 Pa. Super. 96, 542 A.2d 164 (1988); Sack v. Feinman, 489 Pa. 152, 413 A.2d 1059 (1980)).

EXPERT TESTIMONY

Expert testimony is generally required in legal malpractice cases unless the issue is so simple or the lack of skill or want of care is so obvious as to be within the range of an ordinary layperson's experience and comprehension. Rizzo v. Haines, 520 Pa. 484 n.10, 555 A. 2d 58 n.10 (1989) (involving funds borrowed from client's lawsuit recovery). In a legal malpractice action the question of whether expert testimony is required depends on whether the issue of negligence is sufficiently clear so lay persons could understand and determine the outcome , or whether the alleged breach of duty involves complex legal issues which require expert testimony to amplify and explain it for the factfinder. Storm v. Golden, 538 A.2d 61 (Pa. Super. 1988). A legal malpractice action that alleges breach of contract requires expert testimony when the assumpsit claims are not true contract causes of action but sound in negligence by alleging an attorney failed to exercise the appropriate standard of care. Storm, *supra*.

The Pennsylvania Rules of Civil Procedure 1042.1 to 1042.8 govern claims against legal professionals and require that a certificate of merit be filed by the claimant's attorney to support the legal malpractice action. This certificate requirement applies to "any action based upon an allegation that a licensed professional deviated from an acceptable professional standard." Under Pa.R.C.P. 1042.3, the certificate must be filed within 60 days of the complaint and certify the following:

> (1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or
>
> (2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or
>
> (3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

This rule applies to claims against the attorney by his client which assert as their basis a breach of professional standards. Where the attorney is sued when representing an adverse party in a transaction, and not the plaintiff, such as where the attorney represents a seller of property and is sued by the buyer for tortious interference with contract, negligent misrepresentation, intentional misrepresentation, promissory estoppel and equitable estoppel, then Rule 1042.3 does not apply. Krauss v. Claar, 879 A. 2d 302 (Pa. Super. 2005). A certificate is not required for a Wrongful Use of Civil Proceedings claim. Sabella v. Estate of Milides, 992 A. 2d 180 (Pa. Super. 2010).

LIBEL AND SLANDER

In libel and slander claims arising from litigation there is an absolute privilege recognized for statements by a party, a witness, counsel, or a judge when they occur in the pleadings or in open court. This has been held to apply to a brief, writ of habeas corpus, statements to a client, letters written to the judge and oral communications to the court. Binder v. Triangle Publications, 442 Pa. 319, 275 A.2d 53(1971). It extends to negotiations, demands and settlement discussions after litigation has started or when it is contemplated. Smith v. Griffiths, 476 A.2d 22 (Pa. Super. 1984). Privilege accorded communications related to judicial proceedings exists to encourage all persons involved in the proceedings to speak frankly and argue freely without danger or concern that they may be required to defend their statements in a later defamation action. Doe v. Wyoming Valley Healthcare System, Inc., 987 A. 2d 858 (Pa. Super. 2009).

However, when an attorney acts outside of his court capacity to state claims against a third person before the media there is only a qualified privilege under the circumstances. Newspaper accounts of judicial proceeding and remarks uttered at press conferences are extrajudicial communications not subject to the internal controls of the court system, which enjoy only a qualified immunity. Pelagatti v. Cohen, 536 A.2d 1337 (Pa. Super. 1987). An attorney who forwards a communication to the State Disciplinary Board regarding conduct of opposing counsel likewise was afforded only a qualified privilege. Post v. Mendel, 510 Pa. 213, 507 A. 2d 351 (1986). An attorney's act of transmitting a malpractice complaint to freelance reporter was considered an extrajudicial act that occurred outside of the regular course of the judicial proceedings and a privilege did not apply to provide the attorney with absolute immunity against a defamation action. Bochetto v. Gibson, 580 Pa. 245, 860 A. 2d 67 (2004).

LIMITATION OF ACTIONS

The applicable statute of limitation for a claim of negligence against an attorney is two years under 42 Pa. C.S. § 5524. Garcia v. Community Legal Services Corporation, 362 Pa. Super. 484, 524 A. 2d 980 (1987); Moore v. McComsey, 313 Pa. Super. 264, 459 A.2d 841(1983). A four-year limitations period applies to a legal malpractice breach of contract claim under 42 Pa. C.S. § 5525. Wachovia Bank, N.A. v. Ferretti, 935 A. 2d 565 (Pa. Super. 2007).

Pennsylvania law provides that the occurrence rule is used to determine when the statute of limitations begins to run in a legal malpractice action. Under the occurrence rule, the statutory

period commences upon the happening of the alleged breach of duty. Bailey v. Tucker, 533 Pa. 237, 621 A.2d 108 (1993). The trigger for the accrual of a legal malpractice action is not the realization of actual loss but the occurrence of a breach of duty. Under the "occurrence rule" the time the statutory period commences upon the happening of the alleged breach of duty. Wachovia Bank, N.A., *supra.*

Pennsylvania favors strict application of the statutes of limitation and public policy considerations do not warrant tolling of statute of limitations on legal malpractice action past the time the client could have reasonably been aware of attorney's breach, despite any dilemma arising from possibility that client could potentially have to simultaneously litigate underlying case and prosecute legal malpractice premised on the underlying claim, given overriding public policy of avoiding stale claims. Wachovia Bank, N.A, *supra.*

The appeal of the underlying action upon which the claim of malpractice is based does not operate to toll the statute of limitations. Wachovia Bank, N.A. v. Ferretti, 935 A. 2d 565 (Pa. Super. 2007); Robbins & Seventko v. Geisenberger, 449 Pa. Super 367, 674 A. 2d 244 (1996).

An exception to the occurrence rule is the equitable discovery rule which will be applied when the injured party is unable, despite the exercise of due diligence, to know of the injury or its cause. Accordingly, the statute of limitations in a legal malpractice claim is tolled when the client, despite the exercise of due diligence, cannot discover the injury or its cause. Robbins & Seventko v. Geisenberger, 449 Pa. Super 367, 674 A. 2d 244 (1996). However, continuous representation of a plaintiff does not toll the limitations period. Glenbrook Leasing Co. v. Beausang, 839 A.2d 437 (Pa. Super. 2003).

The doctrine of fraudulent concealment also serves to estop the defendant from asserting the bar of the statute of limitations. The doctrine provides that the defendant may not invoke the statute of limitations, if through fraud or affirmative concealment, he causes the plaintiff to relax his vigilance or deviate from his inquiry into the facts. The plaintiff must demonstrate fraud or concealment by clear, precise and convincing evidence. While it is for the court to determine whether an estoppel results from established facts, it is for the jury to say whether the alleged remarks constituting fraud or concealment were made. Glenbrook Leasing Co. v. Beausang, 839 A.2d 437 (Pa. Super. 2003).

MALICIOUS PROSECUTION

Malicious prosecution is distinguished from the claim of wrongful use of civil proceedings by being related to the institution of criminal rather than civil proceedings. Pennsylvania follows the Restatement of Torts (Second) §§ 653 and 654. Shelton v. Evans, 292 Pa. Super. 228, 437 A.2d 18 (1981). A criminal proceeding is any proceeding in which the government seeks to prosecute a person for an offense and impose criminal penalties. A criminal proceeding is instituted 1) when process is issued by an official or tribunal who have the function to determine whether the individual is guilty of the offense charged, 2) an indictment is returned or information filed, or 3) an individual is arrested. Restatement of Torts (Second) § 654.

In an action for malicious prosecution, compensatory damages may include all of the plaintiff's actual expenses in defending himself, compensation for loss of liberty or time, harm to reputation, physical discomfort, interruption of business, mental anguish, humiliation, and injury to feelings. Shelton, *supra*.

MISREPRESENTATION

Claims for negligent and intentional misrepresentation, which exist generally in the law, and have been permitted against accountants in Pennsylvania, and which are sometimes brought against attorneys but have not been the subject of appellate rulings in legal malpractice matters. It has been held that an adverse plaintiff asserting claims against an attorney concerning the work performed while representing his client may not "escape the privity requirement merely by invoking section 552 [of the Restatement of Torts (Second) concerning negligent misrepresentation]." First Options of Chi., Inc. v. Wallenstein, 1994 WL 229554 (E.D. Pa. 1994). However, it has been held that in a claim against an attorney by a non-client, § 552 may be used where the information is supplied in regard to a transaction in which the attorney has "a pecuniary interest." First Options, *supra*. Accord, In re Phar-Mor, Inc. Sec. Litig., 892 F. Supp. 676 (W.D. Pa. 1995), which also held that a misrepresentation claim by a third party might lie against an attorney who had committed an intentional tort or whose conduct was motivated by malice

SETTLEMENT OF UNDERLYING LITIGATION

In Muhammad v. Strassburger, 526 Pa. 541, 587 A.2d 1346 (1991) the Pennsylvania Supreme Court prohibited negligence or breach of contract claims from underlying litigation where there has been negotiation and acceptance of a settlement of the underlying case; the only exception is where the settlement was procured by fraud:

> This case must be resolved in light of our longstanding public policy which encourages settlements. Simply stated, we will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed, unless that plaintiff can show he was fraudulently induced to settle the original action. An action should not lie against an attorney for malpractice based on negligence and/or contract principles when that client has agreed to a settlement. Rather, only cases of fraud should be actionable.

In explaining its holding, the Court was concerned that "[l]awyers would be reluctant to settle a case for fear some enterprising attorney representing a disgruntled client will find a way to sue them for something that 'could have been done, but was not'". The holding in Muhammad "bars litigants who have entered a settlement agreement from subsequently maintaining a suit against their attorney for legal malpractice, unless fraud is alleged in the inducement of the agreement" *Accord,* Piluso v. Cohen, 764 A.2d 549 (Pa. Super. 2000).

However, where an attorney gives inappropriate advise regarding the effect of a settlement on remaining claims, the holding in Muhammad does not bar an action by client who claims to be adversely affected. Collas v. Garnick, 624 A.2d 117 (Pa Super 1993). In Collas, the plaintiff asked her lawyer for specific advice as to whether the execution of a general release would have any impact upon her plan to sue the manufacturer of the vehicle in which she had been riding, or any other tortfeasor. Her lawyer incorrectly assured her that a viable cause of action would lie against the designer and manufacturer despite the release, and this was allowed to be the basis of a malpractice action.

Further, an attorney has a duty to explain the effect of a release to his client and can be liable to the client who relies to his detriment upon incorrect advice of the attorney as to the terms of the settlement. McMahon v. Shea, 547 Pa.124, 688 A. 2d 1179 (1997). This case limited the application of Muhammad to cases where the amount of the settlement was claimed to be inadequate. When a client claims that the terms and conditions of a settlement were not explained or incorrect advice was given by the attorney the action is not barred.

The Superior Court in White v. Kreithen, 435 Pa. Super.115, 644 A.2d 1262 (1994) declined to allow a attorney who was involved prior to settlement to plead a defense under Muhammad. In this case the client discharged her attorney and later settled the case for what was claimed to be an inadequate amount due to the negligence of the first attorney. The first attorney was not entitled to the protection under Muhammad. Nor can the second attorney be properly joined to the action by the first attorney. Goodman v. Kotzen, 436 Pa. Super. 71, 647 A. 2d 247 (1994).

STANDARD OF CARE

The basic standard of care for an attorney in Pennsylvania is stated in Enterline v. Miller, 27 Pa. Super. 463 (1905):

> An attorney is not liable to his client for a failure to succeed, unless this is due to his mismanagement of the business intrusted to him, through bad faith, inattention or want of professional skill. Without discussing at length the degree of skill and care required of an attorney, it is sufficient for the purpose of the case in hand to say that he must, at least , be familiar with the well settled principles of law and rules of practice which are of frequent application in the ordinary business of the profession; must observe the utmost good faith toward his client; and must give such attention to his duties, and to the interests of his client, as ordinary prudence demands, or members of the profession usually bestow. For loss to his client, resulting from the lack of this measure of professional duty and attainments, he must be held liable; and such loss forms an equitable defense to his demand for compensation.

The Superior Court in Schenkel v. Monheit, 266 Pa. Super 396, 405 A.2d 493 (1979) adopted the following simple standard: "The failure of the attorney to exercise ordinary skill and knowledge." Pennsylvania Standard Jury Instructions provide:

10.04 (Civ) ATTORNEY MALPRACTICE—STANDARD OF CARE

An attorney must have and use the ordinary skill, knowledge, and care that is ordinarily had and exercised in the legal profession. An attorney whose conduct does not meet this professional standard of care is negligent. You must decide whether the defendant-attorney is negligent under this standard.

In other words, an attorney must at least be familiar with the well-settled principles of law and rules of practice that are customary in the ordinary business of the legal profession.

[An attorney who claims to be a specialist in a particular field of law must have and use the same degree of knowledge and skill as that usually had and used by other specialists in that same legal specialty. This case involves an attorney who told [his] [her] client [he] [she] was a specialist in [specify].]

An attorney cannot be held liable for malpractice as long as he or she uses judgment that is expected by the standard of accepted legal practice and has researched all the applicable principles of law necessary to render that judgment. If, in fact, you find that in the exercise of judgment this attorney selected one of two or more courses of action, each of which in the circumstances has substantial support as proper practice by the legal profession, you should not find the attorney liable for malpractice if the course chosen produces a poor result.

But an attorney who departs from the standard of accepted legal practice cannot be excused from the consequences by saying it was an exercise of his or her judgment. If an attorney's judgment causes him or her to do something below the standard of accepted legal practice, you must find the attorney liable for malpractice. Similarly, an attorney whose judgment causes him or her to omit doing something that in the circumstances is required by the standard of accepted legal practice, is also liable for malpractice.

You may determine the standard of professional learning, skill, and care required of the defendant from the opinions of the attorneys, including the an defendant, who have testified as expert witnesses as to such standard, or from other evidence you believe to be relevant to that determination.

It has been held that a local standard of practice may be applied. Hoyer v. Frazee, 323 Pa. Super. 421, 470 A.2d 990 (1984).

The common law imposes on attorneys the status of fiduciaries for their clients, and thus an attorney's failure to properly perform his fiduciary duties gives rise to cause of action. At common law, an attorney owes his client a fiduciary duty, which demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest; breach of that duty is actionable. Maritans v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 602 A.2d 1277 (1992).

The Rules of Professional Conduct specifically indicates in their preamble that they do not define the standard of care:

> Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. These are not designed to be a basis for civil liability.

The leading case on this issue is Maritans v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 602 A.2d 1277 (1992). The Supreme Court held that the Rules of Professional Conduct and the prior Code of Professional Responsibility are not the proper basis of a civil claim against an attorney but they also do not shield the attorney from conduct which would be actionable at common law. Simply because a lawyer's conduct may violate the rules of ethics does not mean that the conduct is actionable in damages or for injunctive relief. In other words, violations of the code of professional responsibility do not *per se* give rise to legal actions that may be brought by clients or other private parties, but they do not preclude such a claim from being brought against an attorney when founded on elements of a recognized cause of action.

However, the Pennsylvania Supreme Court has also held that attorneys cannot be liable for alleged misconduct under the Pennsylvania Unfair Trade Practice and Consumer Protection Law, 73 P.S. 201-1, *et seq.*, for actions involving collection and distribution of settlement funds because the Rules of Professional Conduct provides exclusive governance of that activity. Beyers v. Richmond, 594 Pa. 654, 937 A.2d 1082 (2007). At the very least, Rules of Professional Conduct could likely inform an expert opinion about the standard of care.

SUCCESSOR COUNSEL

Pennsylvania courts have held that the negligence of a first attorney to his client is not removed when a second attorney assumes the case. The negligence of the second attorney does not exonerate the first. Cox v. Livingston, 6 Pa. 360 (1847); ASTech Intern., LLC v. Husick, 676 F. Supp. 2d 389 (E.D. Pa. 2009); Levin v. Weisman, 594 F. Supp 322 (E.D. Pa. 1984), *aff'd*, 760 F.2d 263 (3rd Cir. 1985).

The first attorney cannot sue the second attorney hired by the client for wrongfully settling the case instead of pursuing it, especially when the settlement was precipitated by the first attorney's negligence. The second attorney who actually negotiated a settlement would have the defense under Muhammad v. Straussburger available and could not be properly joined to the action by the original attorney who was sued by the client. Goodman v. Kotzen, 436 Pa. Super. 71, 647 A. 2d 247 (1994).

WRONGFUL USE OF CIVIL PROCEEDINGS AND ABUSE OF PROCESS

An attorney who knowingly prosecutes a groundless action to accomplish a malicious purpose may be held accountable under the Dragonetti Act, 42 Pa. C.S. § 8351 *et seq*., titled "Wrongful Use of Civil Proceedings", which supersedes prior common law of malicious prosecution for civil actions. This Act provides in § 8351:

> (a) Elements of Action.--A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:
>
> (1) he acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
>
> (2) the proceedings have terminated in favor of the person against whom they are brought.

Probable cause is defined in § 8352 as a reasonable belief in existence of supporting facts, *and* either 1) a reasonable belief in the validity of the claim under existing or developing law, 2) belief in supporting law by a client based on advice of counsel sought in good faith, *or* 3) belief by an attorney that the litigation is not intended to merely harass or maliciously injure the opposing party. Under § 8354, the plaintiff has the burden of proof on these issues. Under § 8353, damages may include actual monetary harm, harm to reputation, reasonable expense to defend the suit, emotional distress and punitive damages in appropriate cases.

An attorney has probable cause for bringing an action if he believes in good faith that bringing the lawsuit is not intended to maliciously injure or harass the other party. Kelly Springfield Tire Co. v. D'Ambro, 408 Pa. Super. 301, 596 A.2d 867 (1991). A doctor failed to make out a *prima facie* case of wrongful use of civil proceedings against an attorney who had represented a patient where the record was devoid of any evidence of an improper purpose or any lack of probable cause. The attorney was under no duty to verify the accuracy of his client's representations by speaking to the doctor. Hong v. Pelagatti, 765 A. 2d 1171 (Pa. Super. 2000).

Whether voluntary withdrawal of a claim is a favorable termination depends upon the circumstances. The withdrawal is considered a favorable where it was made "in the face of imminent defeat". Bannar v. Miller, 701 A.2d 232 (Pa. Super. 1997).

A certificate of merit is not required for a Wrongful Use of Civil Proceedings claim. Sabella v. Estate of Milides, 992 A. 2d 180 (Pa. Super. 2010).

A claim of abuse of process relates to the improper use of process after proceedings have started. The action is grounded upon wrongful use of legitimate process of the court. It is distinguished from wrongful use of civil proceedings, which relates to the improper commencement of a lawsuit without probable cause and with malicious motive to harm the opponent. Abuse of

process deals with perversion of the legitimate process of the court for an improper purpose. To establish a claim for abuse of process it must be shown that the defendant 1) used a legal process against the plaintiff, 2) primarily to accomplish a purpose for which the process was not designed, and 3) harm has been caused to the plaintiff. Cruz v. Princeton Ins. Co., 925 A.2d 853 (Pa. Super. 2007); Werner v. Plater-Zybeck, 799 A.2d 776 (Pa. Super. 2002); Shiner v. Moriarty, 706 A.2d 1228 (Pa. Super. 1998); Rosen v. American Bank of Rolla, 426 Pa. Super.376, 627 A. 2d 190 (1993).

Abuse of process is, in essence, the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process. McGee v. Fegee, 517 Pa. 247, 259, 535 A.2d 1020 (1987). In abuse of process cases, the misconduct for which liability is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, even if properly obtained, for any purpose other than that which it was designed to accomplish. It is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. Sabella v. Estate of Milides, 992 A. 2d 180 (Pa. Super. 2010); Lerner v. Lerner, 954 A.2d 1229 (Pa. Super. 2008).

Medical testimony is not required to show emotional distress damages in an abuse of process claim. Shiner v. Moriarty, 706 A.2d 1228 (Pa. Super. 1998).

This article does not constitute legal representation or advice which would require specific consultation with an attorney.

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