SELECTED TOPICS IN PENNSYLVANIA LEGAL MALPRACTICE AND LIABILITY LAW

April 2017

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ABUSE OF PROCESS

A claim of abuse of process relates to the improper use of process often after proceedings have started. The action is grounded upon wrongful use of legitimate process of the court. It is a common law tort, as distinguished from wrongful use of civil proceedings, which is statutory and 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), *app den'd*, 729 A.2d 1130 (Pa. 1998); Rosen v. American Bank of Rolla, 627 A. 2d 190 (Pa. Super. 1993).

Abuse of process is, in essence, "the use of the legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process." McGee v. Feege, 535 A.2d 1020, 1026 (Pa. 1987). *Accord,* Shiner v. Moriarity, 706 A.2d 1228 (Pa. Super.), *app den'd*, 729 A.2d 1130 (Pa. 1998); Werner v. Plater-Zyberk, 799 A.2d 776 (Pa. Super. 2002).

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 improperly issued, that it was obtained in the course of proceedings that were brought without probable cause or 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). Bad intentions of the attorney do not alone establish a claim. Clausi v. Stuck, 74 A.3d 242 (Pa. Super. 2013); Shaffer v. Stewart, 473 A.2d 1017 (Pa. Super. 1984). Filing a complaint in the hope that it will induce a settlement is not abuse of process. Holst v. Oxman, 2006 U.S. Dist. LEXIS 11384 (E.D. Pa. 2006).

But a claim will lie where there is perversion of the legal process to achieve a purpose which is not the authorized goal of the procedure in question. Cruz v. Princeton Ins. Co., 972 A.2d 14 (Pa. Super. 2009). Legal process may not be used as a "tactical weapon to coerce a desired result that is not the legitimate object of the process." McGee v. Feege, 535 A.2d 1020 (Pa. 1987). Any type of legal process, encompassing the entire range of proceedings incident to litigation, may be abused. Shiner v. Moriarity, 706 A.2d 1228 (Pa. Super.), *app den'd*, 729 A.2d 1130 (Pa. 1998); Rosen v. American Bank of Rolla, 627 A. 2d 190 (Pa. Super. 1993).

Abuse of process is specifically governed by a two year tort stature of limitations and is one of the enumerated torts under that statute. 42 Pa. C.S. § 5524(1). This is generally considered to be two years from when the process was abused despite delay in conclusion of the underlying case. P.J.A. v. H.C.N., 2017 Pa. Super. LEXIS 87 (Pa. Super. 2/13/17) (*per curiam*) (Claim of abuse of process for allegedly false and improper New Matter was filed too late since more than two years had elapsed since the New Matter was filed).

Although an attorney is accorded absolute immunity for communications made in the ordinary course of judicial proceedings that are pertinent and material to the relief requested, Bochetto v. Gibson, 860 A.2d 67 (Pa. 2004), the Superior Court has held that this doctrine of judicial immunity does not apply to bar a claim under the Dragonetti Act or a claim for abuse of process, Freundlich & Littman, LLC v. Feierstein, 2017 Pa. Super. LEXIS 116 (Pa. Super. 2/23/17).

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), *app den'd*, 729 A.2d 1130 (Pa. 1998); Cruz v. Princeton Ins. Co., 972 A.2d 14 (Pa. Super. 2009).

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. McHugh v. Litvin, Blumberg, Matusow & Young, 574 A.2d 1040 (Pa. 1990); Guy v. Liederbach, 459 A.2d 744 (Pa. 1983); Heldring v. Lundy, Beldecos & Milby, P.C., 151 A.3d 634 (Pa. Super. 2016); Cost v. Cost, 677 A.2d 1250 (Pa. Super. 1996); Schenkel v. Monheit, 405 A.2d 493 (Pa. Super. 1979). "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 relationship exists only with the consent of both parties and courts have said attorneys should have the option to decline the representation. The refusal of the undertaking must be clearly and specifically communicated to the client and the client must be given the opportunity to seek other representation before the statute of limitations runs. The failure to notify the prospective client may be actionable itself and an attorney-client relationship may exist even if the attorney only agrees to investigate whether to take the case or not. Connelly v. Wolf, Block, Schorr & Solis-Cohen, 463 F. Supp. 914 (E.D. Pa. 1978).

The existence of a relationship does not depend upon payment of a fee, and an attorney who volunteers a specific service can be liable if the attorney knows or has reason to know that the person to whom services were volunteered detrimentally relied upon the attorney's undertaking. Reese v. Danforth, 406 A.2d 735 (Pa. 1979). An implied attorney-client relationship exists if (a) the supposed client sought advice or help from the attorney, (b) that advice was within the attorney's professional competence, (c) the attorney agreed, explicitly or implicitly, to provide the requested assistance, and (d) the supposed client's belief that the attorney was representing him was reasonable. Capital Care Corp. v. Hunt, 847 A.2d 75 (Pa. Super. 2004), *citing* Minnich v. Yost, 817 A.2d 538 (Pa. Super. 2003). *Accord*, Lefta Associates v. Hurley, 902 F.Supp.2d 559 (M.D. Pa. 2012) (Memo); U.S. v. Trombetta, 2015 WL 4406426 (W.D. Pa. 2015) (Memo).

The only exception to these rules 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, 459 A.2d 744 (Pa. 1983); Schenkel v. Monheit, 405 A.2d 493 (Pa. Super. 1979); Cost v. Cost, 677 A.2d 1250 (Pa. Super. 1996). This class is limited to those legatees who "would otherwise have no means by which to obtain their expectancies under the testamentary instruments naming them." Minnich v. Yost, 817 A.2d 538 (Pa. Super Ct. 2003). Additionally, a plaintiff cannot challenge the explicit provision of a Will which excludes the plaintiff. Only a narrow class of actual legatees have standing to sue. Hess v. Fox Rothschild, LLP, 925 A.2d 798 (Pa. Super. 2007). Rejecting the Superior Court's reliance on *obiter dicta* about "non-named beneficiaries" in a foot note in the Guy opinion, the Supreme Court has held that "an executed testamentary document naming an individual as a legatee is a prerequisite to that individual's ability to enforce a contract between the testator and the attorney he hired to draft that particular testamentary document." Estate of Agnew v. Ross, 2017 Pa. LEXIS 129 (Pa. 1/19/17).

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, 622 A.2d 983 (Pa. Super. 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, 677 A.2d 1250 (Pa. Super. 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, 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., 176 A.2d 455 (Pa. Super. 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, 313 A.2d 750 (Pa. Super. 1973).

Determining the identity of the client can be problematic in a complex corporate context. Although a law firm's retention agreement with a special committee established by a corporation to investigate suspicion of fraudulent transactions by corporate leaders stated explicitly that the firm was being engaged solely as counsel for the committee and not as counsel for the corporation, the Pennsylvania Superior Court has held that the liquidation trustee of the bankrupt corporation could maintain legal malpractice, breach of fiduciary duty and negligent misrepresentation claims against the law firm, at least at the pleadings stage of the case, for alleged failure to conduct the investigation properly so as to reveal the fraudulent conduct before the corporation's collapse. Kirschner v. K&L Gates LLP, 46 A.3d 737, 755-56 (Pa. Super. 2012), *app. denied*, 65 A.3d 414 (Pa. 2013). The Court

also upheld the pleading of claims against the law firm for vicarious liability for the conduct of expert financial consultants retained by the firm to assist in the investigation. *Id.* at 760-61.

The client may usually assign a legal malpractice claim because it is analogous to a property right, and such an assignment does not violate public policy. Hedlund Mfg Co., Inc. v. Weiser, Stapler & Spivak, 539 A.2d 357 (Pa. 1988); Ammon v. McCloskey, 655 A.2d 549 (Pa. Super. 1995).

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, 968 A.2d 1253 (Pa. 2009); Rizzo v. Haines, 555 A.2d 58 (Pa. 1985); Heldring v. Lundy, Beldecos & Milby, P.C., 151 A.3d 634 (Pa. Super. 2016). 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*.

A sufficient complaint in a legal malpractice action must satisfy the elements of the cause of action, and preliminary objections will be sustained if the allegations in the complaint fail to include facts establishing a basis for the action in a deficiency in the attorney's underlying representation of the client. Ibn-Sadiika v. Riester, 551 A.2d 1112 (Pa. Super. 1988); Jones v. Rudenstein, 285 A.2d 520 (Pa. Super. 1991); 412 N. Front St. Assocs. v. Spector Gadon & Rosen, 151 A.3d 646 (Pa. Super. 2016).

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, 714 A. 2d 1027 (Pa. 1998); Poole v. Warehouse Club, Inc. 810 A. 2d 1183 (Pa. 2002); Heldring v. Lundy, Beldecos & Milby, P.C., 151 A.3d 634 (Pa. Super. 2016); Epstein v. Saul Ewing, 7 A.3d 303 (Pa. Super. 2010); Sokolsky v. Eidelman, 93 A.3d 858 (Pa. Super. 2014). Proof of the underlying case must be by a preponderance of the evidence. Duke & Co. v. Anderson, 418 A.2d 613 (Pa. Super. 1980); Ferenz v. Millie, 535 A.2d 59 (Pa. 1987). The attorney's liability will not be established solely by proof that a bad result occurred in the underlying action. Mazer v. Security Ins. Grp., 368 F. Supp. 418, 422 (E.D. Pa. 1973), *aff'd en banc*, 507 F.2d 1338 (3d Cir. 1975). Even though a malpractice plaintiff may face particular hardship by being forced to show she would have prevailed in the underlying case, attorneys will face greater hardship and potential problems in the absence of such a rule. Gans v. Gray, 612 F. Supp 608 (E.D. Pa. 1985).

Regarding trial of a "case within a case," the federal district courts in Pennsylvania have held that, "where the relevant underlying proceeding was decided by a court sitting without a jury, then the 'case within a case' of the legal malpractice action should also be decided by a court rather than a jury"

because "'[w]e see no reason why a malpractice plaintiff should be able to bootstrap his way into having a lay jury decide the merits of the underlying "suit within a suit" when...only an expert judge could have made the underlying decision.'" Scaramuzza v. Sciola, 2006 WL 557716, *8 (E.D. Pa. 3/3/06) (Memo), *quoting* Harline v. Barker, 912 P.2d 433, 440 (Utah 1996), *and citing* Harsco Corp. v. Kerkam, Stowell, Kondracki & Clark, P.C., 965 F. Supp. 580, 584 (M.D. Pa. 1997) (whether the attorney's alleged procedural error at trial was the proximate cause of the verdict against the client was an issue of law that the court could decide on summary judgment in the client's legal malpractice case).

The "case within a case" is determined on the basis of "the evidence available to the original factfinder in the underlying action." Scaramuzza v. Sciola, 2006 WL 557716, *11 (E.D. Pa. 3/3/06) (Memo). Therefore, where the plaintiff client supported a motion for summary judgment in a legal malpractice action with an expert report to the effect that, without the defendant attorney's breach of the standard of care the client would not have suffered an adverse verdict, the federal district court dismissed that report as merely "legal conclusions and... not evidence." *Ibid*. *Accord*, Barcola v. Hourigan, Kluger & Quinn, P.C., 82 Pa.D.&C. 4th 394 (Lackawanna Co. 2006); *but see* Rice v. Saltzberg, Trichon, Kogan & Wertheimer, P.C., 2006 WL 3696602 (Phila. CCP, 2006), *aff'd w/o op.*, 918 A.2d 799 (Pa. Super. 2006) (Table), *app. denied*, 929 A.2d 1162 (Pa. 2007) (permitting client's expert to testify about extent of injuries, settlement value, verdict value). The Court of Appeals for the Third Circuit once held that, under Pennsylvania law, expert evidence may be sufficient for a jury to find that the plaintiff would have been successful in the underlying litigation, making it unnecessary to recreate the prior trial within a trial to prove damages in a malpractice action. Honeywell, Inc. v. Am. Standard Testing Bureau, Inc., 851 F.2d 652 (3d Cir. 1988).

A client can maintain a legal malpractice claim against an attorney who sued a mere trade name rather than an actual business entity because of the attorney's alleged negligence in failing to sue the correct party against which the judgment that was recovered could be collected. Heldring v. Lundy, Beldecos & Milby, P.C., 151 A.3d 634 (Pa. Super. 2016), *relying on* Kituskie v. Corbman, 714 A.2d 1027 (Pa. 1998), for the expanded proposition that "collectibility of a judgment is an important consideration in pursuing litigation – one that lawyers are obligated to take into account." The Heldring Court also held that the legal malpractice claim was not barred by collateral estoppel because the parties and issues are different from the underlying action but that the client's claim for unjust enrichment failed because the client and attorney had an express written contract for the underlying action.

Clients who communicated only with their personal counsel cannot maintain a legal malpractice claim against other attorneys retained on their behalf by personal counsel when those other attorneys communicated contract-drafting advice only to the personal counsel, who was not a client, and not to the actual clients. Mahonski v. Engel, 145 A.3d 175 (Pa. Super. 2016).

As to evidence to support a legal malpractice case, the federal courts in Pennsylvania have effectively held that the doctrine of res ipsa loquitur does not constitute a theory of legal malpractice. Gans v. Mundy, 762 F.2d 338, 341 (3d Cir. 1985) (*quoting* Mazer v. Security Ins. Gp., 368 F. Supp. 418, 422 (E.D. Pa. 1973), *aff'd en banc*, 507 F.2d 1338 (3d Cir. 1975): "There is no presumption that

an attorney has been guilty of a want of care, arising merely from a bad result") ; Scaramuzza v. Sciola, 2006 WL 557716, *6 n. 7 (E.D. Pa. 3/3/06) (Memo).

A claim against an attorney for negligence has traditionally been subject to a so-called "attorney judgment" rule, where a claim is barred if an informed judgment by an attorney later proves to be incorrect. The Pennsylvania Superior Court has explained the rule this way: "An informed judgment on the part of counsel, even if erroneous, is not negligence." Composition Roofers Local 30/30B v. Katz, 581 A.2d 607, 610 (Pa. Super. 1990). Similarly, the Supreme Court had earlier said that "An attorney's considered decision involving at a minimum the requisite exercise of 'ordinary skill and capacity', and which is an 'informed decision', does not constitute malpractice." Rizzo v. Haines, 555 A.2d 58 (Pa. 1989). However, in a medical malpractice case involving the comparable "error of judgment" rule applicable to physicians' decision-making, the Supreme Court has held that jury instructions on such a rule are impermissibly likely to confuse juries about the applicable standard of care and might suggest to juries that a physician is not liable for a negligent exercise of judgment and that the physician's adherence to the standard of care is a subjective issue. Passarello v. Grumbine, 87 A.3d 285 (Pa. 2014). No court appears to have applied Passarello to the "attorney judgment" rule, which in any event would be available to a court as a shorthand reference to the absence of negligence in ruling against the viability of a legal malpractice claim as a matter of law.

See **CONTRACT ACTION,** below, at 8-9, regarding breach of contract claim against attorneys.

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).

Where employees of a Pennsylvania school district filed federal civil rights claims against the district, the district could not maintain a third-party claim for contribution against its attorneys for allegedly deficient advice about dealing with the employees because the attorneys represented only the district and had no duty to the employees and because "An attorney cannot be held liable for conspiring with his or her client to violate Section 1983 so long as the attorney's alleged conduct falls within the scope of the representation." Hawa v. Coatesville Area Sch. Dist., 2016 U.S. Dist LEXIS 122440 (E.D., Pa. 9/9/16) (Memo).

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, 937 A.2d 1082 (Pa. 2007).

CONTRACT ACTION

In Pennsylvania, the client can both sue the attorney in assumpsit, on the theory that the attorney committed a breach of contract, and also sue the attorney in trespass, on the theory that the attorney failed to exercise the standard of care that he was obliged to exercise. Guy v. Liederbach, 459 A.2d 744 (Pa. 1983).

Traditionally in Pennsylvania, to maintain a claim against an attorney for breach of contract, the client had to allege that the attorney failed to follow a specific instruction of the client or, in other words, to fulfill a specific provision of their contract. Duke & Co. v. Anderson, 418 A.2d 613 (Pa. Super. 1980); Hoyer v. Frazee, 470 A.2d 990 (Pa. Super. 1984); Rogers v. Williams, 616 A.2d 1031 (Pa. Super. 1992). Then, in Bailey v. Tucker, 621 A.2d 108 (Pa. 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.

Construing and applying Bailey, the Superior Court has now held to the contrary of Duke & Co., *et al.* that a breach of contract claim against an attorney does not require proof that an attorney failed to follow a specific instruction of the client and that a plaintiff need only demonstrate that an attorney has breached his implied contractual duty to provide legal services in a manner consistent with the profession at large. Gorski v. Smith, 812 A. 2d 683 (Pa. Super 2002). The Court in Gorski also cited Fiorentino v. Rapoport, 693 A.2d 208 (Pa. Super. 1997), *app. den'd*, 701 A.2d 577 (Pa. 1997), as supporting this interpretation of Bailey.

Nevertheless, prior to Gorski, the Court of Common Pleas of Philadelphia County construed Bailey and Fiorentino as consistent with Duke & Co., Hoyer, and Rogers in requiring the breach of a specific contractual term or instruction to maintain a breach of contract claim against an attorney. Costello v. Primavera, 39 D. & C. 4th 502 (Phila. CCP 1998), *aff'd*, 748 A.2d 1257 (Pa. Super. 1999) (Table), *app. den'd*, 760 A.2d 854 (Pa. 2000) (Table). Also, the U.S. Court of Appeals for the Third Circuit has held, contrary to Bailey, which the Court distinguished as *obiter dictum*, that a breach of contract claim against an attorney requires the violation of a specific contractual provision. NY Central Mut. Ins. Co. v. Edelstein, 637 Fed. Appx. 70 (3d Cir. 2016), *relying on* Bruno v. Erie Ins. Co., 106 A.3d 48 (Pa. 2014) (applying "gist of the action" doctrine to distinguish tort from contract claims). *Accord*, Rinker v. Scott Amori, Esq., 2016 U.S. Dist. LEXIS 36712 (M.D., Pa. 2016) (Memo); Seidner v. Finkelman, 2016 Phila. Ct. Com. Pl. LEXIS 378 (Phila. CCP 2016).

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, 621 A.2d 108 (Pa. 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.

See **CAUSE OF ACTION FOR LEGAL MALPRACTICE**, above, at 5-7, regarding a tort claim in professional liability against an attorney, and **DAMAGES IN LEGAL MALPRACTICE CLAIM**, below, at 11-13, regarding damages in a contract claim.

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.

"The burden of proving the plaintiff guilty of contributory negligence falls squarely on the defendant." Good v. City of Pittsburgh, 114 A.2d 101 (Pa. 1955). It is error for a trial judge to charge a jury that the plaintiff is obliged to show a case that is free from contributory negligence. Rice v. Shuman, 519 A.2d 391 (Pa. 1986); Brown v. Jones, 172 A.2d 831 (Pa. 1961). While the plaintiff does not have to affirmatively establish there was an absence of contributory negligence, if the plaintiff reveals factors which demonstrate contributory negligence, he or she may not recover. Brown v. Jones, 172 A.2d 831 (Pa. 1961).

CRIMINAL ATTORNEY LIABILITY

In Bailey v. Tucker, 621 A.2d 108 (Pa. 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, 542 A.2d 127 (Pa. Super. 1988), *alloc. den'd*, 627 A.2d 730 (Pa. 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, 555 A.2d 58 (Pa. 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. Pashak v. Barrish, 450 A.2d 67 (Pa. Super. 1982).

Proof of actual loss requires proof of both causation and damages. Kituskie v. Corbman, 714 A.2d 1027 (Pa. 1998). In a case of first impression, the Superior Court held that causation of actual loss is determined by a "but for" standard, not by an "increased risk of harm" standard. Myers v. Seigle, 751 A.2d 1182 (Pa. Super. 2000), *app. den'd*, 795 A.2d 978 (Pa. 2000) (Table).

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); Kituskie v. Corbman, *supra*. Myers v. Seigle, *supra*. This often called proof of the "case within a case."

"Proof of damages is as crucial to a professional negligence action for legal malpractice as is proof of the negligence itself." Schenkel v. Monheit, 405 A.2d 493 (Pa. Super. 1979). *Accord*, McCartney v. Dunn & Conner, Inc., 563 A.2d 525 (Pa. Super. 1989) (disallowing an award in a legal malpractice action based upon speculations regarding settlement negotiations); Myers v. Robert Lewis Seigle, P.C., 751 A.2d 1182 (Pa. Super. 2000), *app. denied*, 795 A.2d 978 (Pa. 2000). One court has stated that expert evidence may be sufficient for a jury to find that the plaintiff would have been successful in the underlying litigation, thus proving damages in a malpractice action without a full-blown case within a case. Honeywell, Inc. v. Am. Standard Testing Bureau, Inc., 851 F.2d 652 (3d Cir. 1988).

In a legal malpractice action based on breach of contract for representation in a criminal matter, the Pennsylvania Supreme Court has held that the recoverable damages in such a suit in assumpsit "will be limited to the amount actually paid for the services plus statutory interest." Bailey v. Tucker, 621 A.2d 108, 115 (Pa. 1993). However, the Superior Court has reversed a Philadelphia trial court's dismissal of a legal malpractice action for breach of contract where the client had not paid the defendant law firm for its services in an underlying civil matter and thus had no damages under Bailey. In so holding, the Superior Court ruled that the limitation on damages in Bailey applied only to legal malpractice cases arising from underlying criminal representation and that, to the contrary, ordinary contract damages were available to a plaintiff client in a legal malpractice action based on breach of contract for civil representation, including consequential damages. Coleman v. Duane Morris, LLP, 58 A.3d 833, 838 (Pa. Super. 2012), *app. granted*, 68 A.3d 328 (Pa. 2013) (*per curiam*), *disposed without decision*. In June of 2013, the Supreme Court granted allowance of appeal to decide whether the *Bailey* holding applies to legal malpractice claims arising from representation in an underlying civil rather than criminal matter, but the defendant-appellant law firm withdrew its appeal in September of 2013.

In accord with the American Rule under which each party is responsible for its own attorney's fees and costs in the absence of a statutory or other recognized authority, Merlino v. Delaware county, 728 A.2d 949 (Pa. 1999), a plaintiff in a legal malpractice case should not be able to recover its fees and costs in prosecuting the malpractice case. The Court in Bailey v. Tucker, *supra*, made no reference to recovery of such fees and expenses. *Accord*, Feld & Sons, Inc. v. Pechner, Dorfman, Wolfe, Rounick & Cabot, 458 A.2d 545 (Pa. Super. 1983).

The entry of a judgment against the client as a result of the lawyer's negligence constitutes real damage sufficient to bring a legal malpractice action, even if the judgment has not been paid and satisfied. Ammon v. McCloskey, 655 A.2d 549 (Pa. Super. 1995).

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. Corbman, 714 A.2d 1027 (Pa. 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*, 555 A.2d 58 (Pa. 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, 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., 263 A.2d 336 (Pa. 1970). The Pennsylvania Supreme Court in Rizzo v. Haines , 555 A2d 58 (Pa. 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, 276 A.2d 542 (Pa. 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, 542 A.2d 164 (Pa. Super. 1988); Sack v. Feinman, 413 A.2d 1059 (Pa. 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, 555 A. 2d 58 n.10 (Pa. 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 requirement for expert testimony is the same in bench trials as it is for jury trials. Lentino v. Fringe Emp. Plans, Inc., 611 F.2d 474 (3d Cir.1979). The court believed the standard of care itself was a question of fact best left to presentation of evidence with cross-examination and rebuttal.

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. No. 1042.3 (a), 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 because that is not a professional liability claim for legal malpractice. Sabella v. Estate of Milides, 992 A. 2d 180 (Pa. Super. 2010); Miller v. St. Luke's Univ. Health Network, 142 A.3d 884 (Pa. Super. 2016), *app. den'd*, 2016 Pa. LEXIS 2934 (Pa. 2016). A certificate is also not required for a negligence claim brought against a professional by a person who is not a client. Bruno v. Erie Ins. Co., 106 A.3d 48 (Pa. 2014) (suit by homeowners against their insurer and engineer retained by insurer to assess mold contamination in their house). However, a plaintiff cannot avoid the requirement of a certificate of merit for a legal malpractice claim by arguing that the suit really constitutes a wrongful use claim rather than a professional liability claim. Koral v. Mixon, 87 A.3d 875 (Pa. Super. 2013) (Table) (Memo avail. from Superior Ct. Website at No. 1859 EDA 2014, 10/4/13), *app. den'd*, 624 Pa. 697 (Pa. 2014) .

Noteworthy is the practical reality that, at least prior to trial and despite a defendant attorney's view that expert testimony is necessary, a plaintiff client can satisfy this requirement of a certificate of merit by stating that expert testimony is not needed, pursuant to Rule 1042.3 (a) (3). However, "the consequence of such a filing is a prohibition against offering expert testimony later in the litigation, absent 'exceptional circumstances'." Liggon-Redding v. Estate of Sugarman, 659 F.3d 258 (3d Cir. 2011) (applying requirement of certificate of merit as substantive rule of law, not mere procedure)

Although what constitutes the standard of care for a defendant attorney in a legal malpractice action in Pennsylvania is an issue of fact that ordinarily requires expert testimony to establish, that attorney need not present expert testimony on the standard of care in order to prevail on a motion for summary judgment if the plaintiff client has not presented expert testimony. Gans v. Mundy, 762 F.2d 338, 342 (3d Cir. 1985); Zimmer Paper Products, Inc. v. Berger & Montague, P.C., 758 F.2d 86, 93-94 (3d Cir. 1985).

IN PARI DELICTO DEFENSE

Under the common law doctrine of *in pari delicto* ("in equal fault"), " no court will lend its aid to a man who grounds his action upon an immoral or illegal act." Feld and Sons, Inc. v. Pechner, 312 458 A.2d 545 (Pa. Super. 1983) (quoting Fowler v. Scully, 72 Pa. 456, 467 (1872)) (citations omitted). The doctrine is applied to render the transaction between the parties without any force and to leave them in the condition in which they are found. Thus, when a client is guilty of immoral or illegal conduct, he will be barred from recovering anything beyond the attorney's fees paid, even though the attorney acted negligently or illegally. Feld and Sons, Inc., *supra*, 458 A.2d at 554.

Where the liquidation trustee of a bankrupt corporation sued a law firm in legal malpractice for not having detected fraudulent transactions by its leaders during an investigation for which the firm was retained, the Superior Court has held that the firm could not rely on the defense of *in pari delicto* by imputing the wrongdoing of the corporations's leaders as agents to the corporation as principal in order to bar the trustee's claims. The Court held that the defense was not available by imputation unless the party seeking to rely on it had dealt with the principal in good faith and the wrongdoing by

the principal's agent had somehow provided benefit to the corporation. Here, the law firm was alleged not to have behaved in good faith, and the corporation was rendered bankrupt by the wrongdoing. Kirschner v. K&L Gates LLP, 46 A.3d 737, 763-64 (Pa. Super. 2012), *app. denied*, 65 A.3d 414 (Pa. 2013) (Table).

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, 275 A.2d 53(Pa. 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, 507 A.2d 351 (Pa. 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, 860 A.2d 67 (Pa. 2004).

LIMITATION OF ACTIONS

The applicable statute of limitation for a claim of professional negligence against an attorney is two years under 42 Pa. C.S. § 5524. Garcia v. Community Legal Services Corporation, 524 A.2d 980 (Pa. Super. 1987); Moore v. McComsey, 459 A.2d 841(Pa. Super. 1983). A four-year limitations period applies to a legal malpractice claim sounding in breach of contract 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, 621 A.2d 108 (Pa. 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 statutory period commences upon the happening of the alleged breach of duty'." Wachovia Bank, N.A. v. Ferretti, 935 A. 2d 565, 572 (Pa. Super. 2007), *quoting* Robbins & Seventko Ortho. Surg, Inc. v. Geisenberger, 674 A.2d 244, 246-47 (Pa. Super. 1996).

Pennsylvania favors strict application of the statutes of limitation, and public policy considerations do not warrant tolling of the statute of limitations on legal malpractice action past the time the client could have reasonably been aware of the attorney's breach of duty, despite any dilemma arising from the possibility that the client could potentially have to simultaneously litigate the underlying case and prosecute the legal malpractice action 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 Ortho Surg., Inc. v. Geisenberger, 674 A.2d 244 (Pa. Super. 1996).

As an exception to the occurrence rule, the courts in Pennsylvania will apply the discovery rule "when the injured party is unable, despite the exercise of due diligence, to know of his injury or its cause." Knopick v. Connelly, 639 F.3d 600, 609 (3d Cir. 2011); Robbins & Seventko Ortho Surg., Inc. v. Geisenberger, 674 A.2d 244 (Pa. Super. 1996). However, a "[l]ack of knowledge, mistake or misunderstanding, will not toll the running of the statute." Id., at 246-47, *quoting* Pocono Int'l Raceway v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pal 1983). "'The point of time at which the injured party should reasonably be aware that he or she has suffered an injury is generally an issue of fact to be determined by the jury.... Only where the facts are so clear and reasonable minds cannot differ may the commencement of the limitations period be determined as a matter of law'." Knopick v. Connelly, *supra*, at 611, *quoting* Coregis Ins. Co. v. Baratta & Fenerty, Ltd., 264 F.3d 302, 307 (3d Cir. 2001) (*quoting* Sadtler v. Jackson-Cross Co., 587 A.2d 727, 732 (Pa. Super. 1991)).

The statute will begin to run when the client "is put in a position to discover the injury and its cause, either through inquiry or retention of a new lawyer. Knowledge may also be imputed to plaintiffs when an adverse action is taken against them, be it through a court order or through a third party action." Knopick v. Connelly, 639 F.3d 600, 609 (3d Cir. 2011). However, the defendant attorney's continuous representation of the plaintiff client does not operate in Pennsylvania to toll the limitations period. Glenbrook Leasing Co. v. Beausang, 839 A.2d 437 (Pa. Super. 2003), *aff'd per curiam*, 881 A.2d 1266 (Pa. 2005).

Whether the discovery rule applies to toll the statute of limitations is ordinarily an issue of fact for determination by the jury unless the facts regarding the plaintiff's reasonable diligence are so clear that reasonable minds could not disagree on the outcome of the issue. Fine v. Checcio, 870 A.2d 850 (Pa. 2005).

The doctrine of fraudulent concealment can similarly serves to estop the defendant attorney 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 caused 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), *aff'd per curiam*, 881 A.2d 1266 (Pa. 2005). The limitations period might also be tolled by assurances by the attorney to the client that everything is going well with nothing to be concerned about. Knopick v. Connelly, 639 F.3d 600 (3d Cir. 2011).

Where the trial court agreed, at the request of the defendant attorney in legal malpractice action, to decide whether the plaintiff client's claim was barred by the statute of limitations or tolled by the equitable discovery doctrine, the defendant was held to have waived the issue on appeal that, as a fact issue, the applicability of the statute of limitations should properly have been for the jury to decide. O'Kelly v. Dawson, 62 A.3d 414 (Pa. Super. 2013).

See **CONTRACT ACTION**, above at 8-9, for discussion of the four-year time period for breach of contract claims.

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, 437 A.2d 18 (Pa. Super. 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.

A plaintiff must show the proceedings were instituted without probable cause, with malice and were terminated in favor of the plaintiff. Cosmas v. Bloomingdales Bros., Inc., 66 A.2d 83 (Pa. Super. 1995); Amicone v. Shoaf, 620 A.2d 1222 (Pa. Super. 1993).

A claim exists where a prosecutor or private complainant "instituted proceedings without probable cause, with malice, and that the proceedings were terminated in favor of the plaintiff", with probable cause defined as a "reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary prudent man in the same situation in believing that a party is guilty of the offense". Strickland v. Univ. of Scranton, 700 A.2d 979 (Pa. Super. 1997); Cosmas v. Bloomingdales Bros., Inc., 66 A.2d 83 (Pa. Super. 1995).

Where the evidence is undisputed, probable cause is a matter for the court and not the jury. Strickland v. Univ. of Scranton, 700 A.2d 979 (Pa. Super. 1997); Jaindl v. Mohr, 637 A.2d 1353 (Pa. Super 1994), *aff'd*, 661 A.2d 1362 (Pa. 1995).

Assistant District Attorneys have official immunity which protects them from malicious prosecution actions. Douris v. Schweiker, 229 F. Supp. 2d 391 (E.D. Pa. 2002), *aff'd*, 100 Fed. Appx. 126 (3d Cir. 2004).

In an action for malicious prosecution, compensatory damages may include 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 v. Evans, 437 A.2d 18 (Pa. Super. 1981)

MISREPRESENTATION

Claims for negligent and intentional misrepresentation, which exist generally in the law and have been permitted against accountants in Pennsylvania, 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, 587 A.2d 1346 (Pa. 1991) the Pennsylvania Supreme Court prohibited negligence or breach of contract claims arising 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); Phinisee v. Layser, 2014 WL 4682077 (E.D. Pa. 2014) (Memo).

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, 688 A. 2d 1179 (Pa. 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, 644 A.2d 1262 (Pa. Super. 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, 647 A. 2d 247 (Pa. Super. 1994).

Recently, the Superior Court has stressed that the focus of the Muhammad ruling's bar to a client's suits against his or her attorney is upon the allegedly wrongful advice of the attorney about the amount of the settlement to which the client has agreed. Silvagni v. Shorr, 113 A.3d 810 (Pa. Super. 2015), *app. den'd*, 28 A.3d 1207 (Pa. 2015). Thus, the Muhammad ruling did not apply to bar a client's suit against her former attorney for erroneous advice about electing to take against her late husband's will, even though the client had agreed to a settlement of her estate claim upon the advice of a subsequent attorney. Kilmer v. Sposito,146 A.3d 1275 (Pa. Super. 2016).

STANDARD OF CARE

The basic standard of care for an attorney in Pennsylvania is stated in Enterline v. Miller, 27 Pa. Super. 463 (1904):

> 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, 405 A.2d 493 (Pa. Super. 1979) adopted the following simple standard: "The failure of the attorney to exercise ordinary skill and knowledge." There is not a presumption that an attorney lacks this skill and knowledge merely from a bad result; rather an attorney is presumed to have upheld his duty of representation until the opposite is made to appear. Mazer v. Security Ins. Gp., 368 F. Supp. 418 (E.D. Pa. 1973), *aff'd*, 507 F.2d 1338 (3d Cir. 1974).

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, 470 A.2d 990 (Pa. Super. 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. Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa. 1992).

The Rules of Professional Conduct specifically indicate 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 Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa. 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. Accordingly, the Superior Court has upheld a trial court's refusal to include in his jury charge in a malpractice action the plaintiff client's requested instructions drawn directly from the Rules of Professional Conduct regarding fiduciary duties in an attorney-client relationship. Smith v. Morrison, 47 A.3d 131, 135-36 (Pa. Super. 2012).

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, 937 A.2d 1082 (Pa. 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 client's first attorney 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, 647 A. 2d 247 (Pa. 1994).

WRONGFUL USE OF CIVIL PROCEEDINGS

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". This statutory tort is generally deemed to have superseded, at least as a practical matter for civil actions, the prior common law of malicious use of process, under which an actual arrest of the person or seizure of property was required. Matter of Larsen, 616 A.2d 529 (Pa. 1992); Ludmer v. Nernberg, 553 A.2d 924 (Pa. 1989); Publix Drug Co. v. Breyer Ice Cream Co., 32 A.2d 413 (Pa. 1943). No arrest or seizure is required under the Dragonetti Act. 42 Pa. C.S. § 8351(b).

The 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.

Filing a lawsuit or a counterclaim is the commonplace instance of initiation of a civil proceeding, but filing preliminary objections is not initiation, not procurement or continuation. Pawlowski v. Smorto, 588 A.2d 36 (Pa. Super. 1991). Likewise, service of a subpoena on a non-

party in the course of a civil proceeding does not satisfy this requirement of the Act. Rosen v. American Bank of Rolla, 627 A.2d 190 (Pa. Super. 1993). The Superior Court has also held that the filing of affirmative defenses in New Matter that contain allegedly false allegations and that seek to achieve an improper purpose is not subject to the Dragonetti Act because that filing does not constitute the procurement, initiation, or continuation of civil proceedings that is a requirement for a claim under the Act. P.J.A. v. H.C.N., 2017 Pa. Super. LEXIS 87 (Pa. Super. 2/13/17) (*per curiam*). The Court in P.J.A. also cautioned that a counterclaim asserted solely as a defense would not constitute the sort of "continuation" of a proceeding that was held to be actionable under the Act in Mi-Lor, Inc. v. DiPentino, 654 A.2d 1156 (Pa. Super. 1995).

Due to a possible ambiguity in the drafting of § 8351(a)(1), there is some controversy about whether gross negligence alone (or lack of probable cause alone) is sufficient to bring a claim without also showing an improper purpose. The text of the Pennsylvania Standard Jury Instructions seems to indicate that improper purpose is also required, and that was specifically held by a trial judge in Winner Logistics, Inc. v. Labor Logistics, Inc., 2011 Phila. C.C.P. LEXIS 67 (C.P. Phila. 2011). *Accord*, Schmidt v. Currie, 470 F.Supp.2d 477 (E.D., Pa. 2005), *aff'd*, 217 Fed.Appx 153 (3d Cir. 2007).

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) a reasonable belief in supporting law by a client based on advice of counsel sought in good faith, *or* 3) a reasonable 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. Behar v. Frazier, 724 A.2d 943 (Pa. Super. 1999). A objective standard applies to determining the reasonableness of an attorney's belief. Bannar v. Miller, 701 A.2d 232 (Pa. Super. 1997).

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. The absence of evidence showing a bad motive may establish a reasonable belief in the propriety of the action. Kelly Springfield Tire Co. v. D'Ambro, 596 A.2d 867 (Pa. Super. 1991). Probable cause exists when the attorney reasonably believes in the facts and viability of the legal theory. Gentzler v. Atlee, 660 A.2d 1378 (Pa. Super. 1995). Probable cause exists where the attorney acts primarily to aid her client in obtaining a proper adjudication. Korn v. Epstein, 727 A.2d 1130 (Pa. Super. 1999). The requirement of probable cause applies to the lawsuit as a whole, not to any specific claim or claims in the lawsuit. Rosen v. Tabby, 1997 WL 667147 (E.D. Pa. 1997) (Memo), *aff'd*, 175 F.3d 1011 (3d Cir. 1999) (Table). An attorney can rely on the facts as indicated by the client and is under no duty to verify the accuracy of his client's representations. Kit v. Mitchell, 771 A.2d 814 (Pa. Super. 2001); Hong v. Pelagatti, 765 A.2d 1171 (Pa. Super. 2000); Hart v. O'Malley, 647 A.2d 542 (Pa. Super. 1994); Meiskin v. Howard Hanna Co., 520 A.2d 1303 (Pa. Super. 1991).

The attorney is under no duty to institute an inquiry to verify his client's representations. Kalikow v. Franklin Chalfont, 26 Pa. D.&C. 4th 305 (C.P. Bucks 1996). Nor must a complete investigation and expert opinion be obtained before filing the suit. Mansmann v. Tuman, 970 F. Supp. 389 (E.D. Pa. 1997). The lawyer is not expected to prejudge his client's claim and it is her

duty to present that claim even if the lawyer is aware that the chances of success are slight. Morris v. DiPaolo, 930 A.2d 500 (Pa. Super. 2007); Broadwater v. Sentner, 725 A.2d 779 (Pa. Super. 1999); Gentzler v. Atlee, 660 A.2d 1378 (Pa. Super. 1995); Jaindl v. Mohr, 637 A.2d 1353 (Pa. Super. 1994); Meiskin v. Howard Hanna Co., 520 A.2d 1303 (Pa. Super. 1991). Although an attorney is accorded absolute immunity for communications made in the ordinary course of judicial proceedings that are pertinent and material to the relief requested, Bochetto v. Gibson, 860 A.2d 67 (Pa. 2004), yet the Superior Court has held that this doctrine of judicial immunity does not apply to bar a claim under the Dragonetti Act or a claim for abuse of process, Freundlich & Littman, LLC v. Feierstein, 2017 Pa. Super. LEXIS 116 (Pa. Super. 2/23/17).

The existence of probable cause is for the court to decide. Gentzler v. Atlee, 660 A.2d 1378 (Pa. Super. 1995); Jaindl v. Mohr, 637 A.2d 1353 (Pa. Super. 1994); Meiskin v. Howard Hanna Co., 520 A.2d 1303 (Pa. Super. 1991). However, it may be submitted to a jury when facts material to the issue of probable cause are in controversy. Broadwater v. Sentner, 725 A.2d 779 (Pa. Super. 1999).

"Gross negligence" is defined as the "want of scant care" or lack of slight diligence or care or a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party. Hart v. O'Malley, 781 A.2d 1211 (Pa. Super. 2001). Gross negligence in this context is described as "that care which a careless person would use" and is not demonstrated merely because a case is lost. Keystone Freight v Stricker, 31 A.3d 967 (Pa. Super. 2011).

What constitutes a favorable termination depends upon the circumstances. A settlement of a case is not a favorable termination. Rosenfeld v. Pennsylvania Automobile Ins., 636 A.2d 1138 (Pa. Super. 1994). A mutual agreement to withdraw the case, even without payment, may be considered a settlement and not a favorable termination. D'Elia v. Polino, 933 A.2d 117 (Pa. Super. 2007). A withdrawal is considered favorable where it was made "in the face of imminent defeat" and a discontinuance on the eve of trial was found to be a voluntary termination. Bannar v. Miller, 701 A.2d 232 (Pa. Super. 1997). A voluntary discontinuance due to lack of standing was found to be a favorable termination. Shaffer v. Stewart, 473 A.2d 1017 (Pa. Super. 1984). However, an action which is promptly terminated after being filed may not be considered a favorable termination. Sports International Ltd. v. Obermayer, Rebmann, Maxwell & Hippel, 1996 WL 50632 (E.D. Pa. 1996); Selas Corp. of America v. Wilshire Oil Co. of Texas, 57 F.R.D. 3 (E.D. Pa. 1972); Zappala v. Caroselli, Beachler, McTiernan & Conboy, 2011 WL 8908956 (Phila. CCP 8/24/11) (unpub'd op.), *aff'd*, 53 A.3d 936 (Pa. Super. 2012) (Table), *dism'd as improvidently granted*, 112 A.3d 646 (Pa. 2014) (Memo). An action must be terminated completely in the defendant's favor; a partial dismissal does not constitute a favorable termination. Clausi v. Stuck, 74 A.3d 242 (Pa. Super. 2013); DaimlerChrysler Corp. v. Askinazi, 152 F. Supp. 655 (E.D. Pa. 2001); Braden v. City of Phila., 1998 WL 633988 (E.D. Pa. 2001). Settlement with a related party may preclude a finding of favorable termination. Electronic Laboratory Supply Co. v. Cullen, 712 A.2d 304 (Pa. Super. 1998).

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); Miller v. St. Luke's Univ. Health Network, 142 A.3d 884 (Pa. Super. 2016), *app. den'd*, 2016 Pa. LEXIS 2934 (Pa. 2016). However, expert

testimony is required to prove the case where complex legal practice issues are involved. Sabella, *supra*; Bannar v. Miller, 701 A.2d 242 (Pa. Super. 1997); Schmidt v. Currie, 470 F. Supp. 477 (E.D. Pa. 2005).

Venue is proper for a wrongful use claim in the county where the underlying action took place and terminated in favor of the Dragonetti plaintiff. Harris v. Brill, 844 A.2d 567 (Pa. Super. 2004); Kring v. Univ. of Pittsburgh, 829 A.2d 673 (Pa. Super. 2003). However, that is not the only county in which venue is proper, and a corporate defendant in a wrongful use claim can also be sued where it has an office and regularly conducts business. Baylson v. Genetics & IVF Institute, 110 A.3d 187 (Pa. Super. 2015).

As one of the elements of the statutory action is a favorable termination, and the claim cannot be ripe until then, it is generally believed that the two year tort statute of limitations, 42 Pa. C.S. § 5524, runs from termination of the action.

Part of the Dragonetti Act, 42 Pa. C.S. § 8355, requires that all pleadings be well grounded in fact and warranted by existing law or a good faith argument for extension of existing law, that it is not interposed for bad faith or improper purpose such as to harass, maliciously injure or cause unnecessary delay. Courts may impose penalties not exceeding $10,000 for violation of this provision.

After the plaintiff has proven the elements of the statutory tort under § 8351 of the Dragonetti Act, the plaintiff then must also prove some resulting damages specified in § 8353. Miller v. St. Luke's Univ. Health Network, 142 A.3d 884 (Pa. Super. 2016), *app. den'd*, 2016 Pa. LEXIS 2934 (Pa. 2016). These damages may include actual monetary harm, harm to reputation, reasonable expense to defend the underlying suit, specific pecuniary loss, emotional distress and punitive damages in appropriate cases. But monetary harm does not include the attorney fee for prosecuting the wrongful use action. Hart v. O'Malley, 781 A.2d 1211 (Pa. Super. 2001). Medical testimony is not required to show emotional distress damages in a wrongful use claim. Shiner v. Moriarty, 706 A.2d 1228 (Pa. Super. 1998), *app. den'd*, 729 A.2d 1130 (Pa. 1998). Damages under the Dragonetti Act are not presumed, but must be proved under § 8354 by a preponderance of the evidence. Miller v. St. Luke's Univ. Health Network, *supra*.

Where a hospital in a Dragonetti Act claim sought to recover its attorney's fees, neither the attorney-client privilege nor the work-product doctrine protected from discovery the legal bills of an outside attorney retained by the hospital to investigate the underlying situation, because the reasonableness of that damages claim could not be determined without discovery of and about those bills. Saint Luke's Hospital of Bethlehem v. Vivian, 99 A.3d 534 (Pa. Super. 2014), *app. den'd*, 114 A.3d 417 (Pa. 2015). Where Dragonetti defendants put their attorney-client communications into issue by defending on the basis of a good faith reliance on their counsel's advice, the Dragonetti plaintiff has a right to discover those communications despite the attorney-client privilege and the work-product doctrine, although defendants could seek a protective order to limit or control the disclosure of such communications. Brown v. Halpern, 120 A.3d 1062 (Pa.Super. 2015) (Memo) (Table).

Lawsuits under Pennsylvania law for wrongful use of civil proceedings (and for abuse of process) are preempted by the U.S. Bankruptcy Code when the allegedly wrongful conduct took place in federal bankruptcy court. Stone Crushed Partnership v. Kassab Archbold Jackson & O'Brien, 908 A.2d 875 (Pa. 2006); *but see*, U.S. Express Lines, Ltd. v. Higgins, 281 F.2d 383 (3d Cir. 2002) (state claims not preempted), and Paradise Hotel Corp. v. Bank of Nova Scotia, 842 F.2d 47 (3d. Cir. 1988) (same).

Two lower courts in Chester County and one in Lehigh County, Pennsylvania, have granted preliminary objections asserting that the Dragonetti Act is unconstitutional as applied to lawyers because Article V, §10(c), of the Pennsylvania Constitution grants exclusive authority to the Supreme Court to regulate the conduct of attorneys. Villani v. Seibert, No. 2012-09795 (Chester CCP, 8/27/15) (slip op.); Estate of Smith v. Freehand, No. 2011-04211 (Chester CCP, 11/2/15) (slip op.); Eidelman v. Timoney Knox LLP, No. 2016-C-0132 (Lehigh CCP, 5/31/16) (slip op.). The Villani v. Seibert case is before the Pennsylvania Supreme Court on direct appeal at No. 66 MAP 2016, and oral argument took place on December 6, 2016. The Estate of Smith case is newly before the Supreme Court on transfer by the Superior Court at No. 112 MAP 2016 and No. 113 MAP 2016.

Remedies established by the Supreme Court include Pa.R.C.P. 1023.1 to 1023.5, which, similar to Fed. R. Civ. P. 11, permit sanctions by the court after notice to withdraw the offending pleading. Sanctions can include striking of offensive pleadings, penalties and payment of legal costs of the opposing party.

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

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