MALPRACTICE ROUNDUP:
Claims Handling Tips for Common Pitfalls Involving Non-Medical Professionals

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I. INTRODUCTION

A large percentage of lawyers who bring accounting and lawyer malpractice cases in Pennsylvania practice primarily in the personal injury field. For this reason, there are two unusual features to Pennsylvania statutes of which they are frequently not aware and these can represent stealth defenses for the professionals. The first defense available is common law contributory negligence as compared with Pennsylvania's modified comparative negligence statute. Unlike most states, the Pennsylvania statute on comparative negligence as it replaced strict contributory negligence only applies to cases involving personal injury and property damage. Similarly, the Pennsylvania statute on contribution among joint tortfeasors only applies to cases involving personal injury and property damage. In a tort case involving solely economic damages, such as accounting and lawyer malpractice cases, if the Plaintiff is 1% negligent there will be no recovery. The second defense available is the law of release. If the Plaintiff settles with one party there will be no recovery against other parties even though the release or agreement with the one party on its face attempts to preserve the claims against others. The case law in support of these defenses is available below.

A. Contributory Negligence

Pennsylvania courts have interpreted the language "Injury To Person Or Property" contained in the Pennsylvania Comparative Negligence Act to exclude economic injury, such as that which results from legal or accounting malpractice. The Pennsylvania Comparative Negligence Act, 42 Pa. C.S.A. Sec. 7102, states in part:

> (a) General Rule. – In all actions brought to recover damages for negligence resulting in death or **injury to person or property**, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff … (Emphasis added.)

Therefore, the Pennsylvania Comparative Negligence Act which overturned the Pennsylvania common law principal that a party's contributory negligence was an absolute bar to recovery in a negligence action only applies to claims resulting in death or injury to person or property. Otherwise the prior common law applies, and a claimant's contributory negligence is an absolute bar to recovery.

In *Gorski v. Smith*, 812 A.2d 683 (Pa. Super. 2003) the Court found that injury to person or property did not include the type of economic damages caused by legal malpractice. Therefore, legal malpractice actions are outside the scope of the Pennsylvania Comparative Negligence Act, and a client's contributory negligence would be a complete bar to recovery. As stated by the *Gorski* Court, *Id.*, at 701-702:

> [O]ur Court has construed the above-highlighted language [negligence resulting in death or injury to person or property] of the [Pennsylvania Comparative Negligence Act] very narrowly. In *Wescoat v. Northwest Savings Association*, 378 Pa. Super. 295, 548 A.2d 619, 621 (1988) our Court held: "The [Pennsylvania Comparative Negligence Act] does not apply to all actions for negligence but only to those resulting in death or injury to person or property." Our Court interpreted the legislature's use of the term property in the act to mean "tangible property." Our Court thus reasoned that the purely monetary loss, which the appellant in the case had sustained, did not constitute damage to tangible property and, as a result, the statute did not apply. Since the comparative negligence statute was held to not apply, our Court ruled that it was necessary to revert to the doctrine of contributory negligence. Our Court concluded: "Where the Comparative Negligence Act does not apply because there was no destruction or damage to property, then the doctrine of contributory negligence bars recovery if the plaintiff's negligence has contributed to his loss." Id., at 623.
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> Appellants argue that since legal malpractice cases do not involve bodily injury or damage to property, (citations omitted) legal malpractice actions are outside the scope of the comparative negligence act, and hence the doctrine of contributory negligence should apply. Based on our review of *Wagner [v. Orie & Zivic*, 431 Pa. Super. 337, 636 A.2d 679 (1994)] and the holdings of *Wescoat, Rizzo v. Michener,* 401 Pa. Super. 47, 584 A.2d 973 (1990), appeal denied, 528 Pa. 613, 596 A.2d 159 (1991)and *Keller v. Re/Max Realty*, 719 A.2d 369 (Pa. Super. 1998), above, we are constrained to agree. (Emphasis added.)

The contributory negligence bar found in *Gorski* has also been applied in accounting malpractice cases. In *Columbia Medial Group, Inc. v. Herring & Roll, P.C.,* 829 A.2 1184 (Pa. Super. 2003), a physicians' group convicted of tax evasion sued their accountants, *inter alia*, for professional malpractice. The *Columbia Medial* Court, *Id.,* at 1192, stated:

> We specifically conclude that the holdings enunciated in *Gorski* concerning contributory negligence and legal malpractice are equally applicable to the claims of professional malpractice which have been presented in the case *sub judice*. Moreover, we conclude that the trial court did not err in finding that issues presented in Appellants' criminal trial and the instant negligence case are identical, and, under the contributory negligence doctrine discussed in *Gorski,* Appellants are barred from seeking recovery against Appellees.

See also Red Rose Motors, Inc. v. Boyer & Ritter, 66 Pa. D&C. 4th 73, 78 (Pa. Com. Pl. 2004). (Citing *Gorski* and *Columbia Medical* for the proposition that a defense of contributory negligence is available to a defendant-accounting firm in a malpractice action commenced by its client.)

B. The Law of Release

The long-standing law in Pennsylvania is that a Plaintiff is only entitled to one recovery for its damages arising from the same incident. As stated in *Seither v. Philadelphia Traction Co.*, 125 Pa. 397, 402, 17 A. 338 (1889):

> The rule is well settled that while separate suits may be brought against several defendants for a joint trespass, and there may be a recovery against each, yet **the plaintiff can have but one satisfaction.** *Livingston v. Bishop*, I Johns 290. **And whenever the plaintiff has actually received satisfaction for the injury he has sustained, the cause of action is discharged.** *Fox v. Northern Liberties*, 3 Watts & S. 103. (Emphasis added.)

In *Seither* Plaintiff was injured in a collision of trolley cars owned and operated by two separate trolley companies. Plaintiff settled with one trolley company, received $6,000 for her injuries and executed a release in favor of that trolley company. Plaintiff then proceeded against the second trolley company, claiming it was completely responsible for the accident. However, the Pennsylvania Supreme Court upheld the dismissal of the action against the second trolley company, holding at *Id.* that:

> The court below held very properly that this agreement and release was a bar to recovery in this action. **The plaintiff had received one satisfaction; he was not entitled to another.** (Emphasis added.)

See also Smith v. Roydhouse, 244 Pa. 474, 479, 90 A. 919, 920-921 (1914) ("The act that operated as a bar to the subsequent action was not the bringing of the earlier suit, but the settlement and extinguishment of the cause of action by receiving money from one charged with the negligence which occasioned the injury for which compensation was claimed.") Therefore, the release of one party caused the release of every other party for the same injury.

As further stated in *Thompson v. Fox*, 326 Pa. 209, 212-213, 192 A. 107, 109 (1937):

> For the same injury, however, an injured party can have but one satisfaction and the receipt of such satisfaction, either as payment of a judgment recovered or consideration for a release executed by him, from a person liable for such injury, necessarily works a release of all other liable for the same injury and prevents an further proceeding against them. (Citations omitted.) This is true even though it was intended, or the release expressly stipulated, that the other wrongdoers should not thereby be released. (Citations omitted.) Nor is it material whether the tortfeasors involved committed a joint tort or concurrent or successive torts, because the principle which underlies the rule is that the injured person is given a legal remedy only to obtain compensation for the damage done to him and when that compensation has been received from any of the wrongdoers, his right to further remedy is at an end. (Emphasis added.)

And, in *Brown v. Pittsburgh*, 409 Pa. 357, 362-363, 186 A.2d 399, 402 (1962), the Pennsylvania Supreme Court confirmed that:

> It has long been the law that for the same injury, an injured party may have but one satisfaction, and the receipt of such satisfaction, either as payment of a judgment recovered or consideration for a release executed by him, from a person liable for such injury necessarily works a release of all others liable for the same injury: Thompson v. Fox, [326 Pa. 209, 192 A. 107 (1937)], and Hilbert v. Roth, 395 Pa. 270, 149 A2d 648 (1959)]. (Emphasis added.)

In 1951, Pennsylvania passed the Pennsylvania Uniform Contribution Among Tortfeasors Act ("UCATA"). Under the UCATA, 42 Pa. C.S.A. Sec. 8326:

> A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasor unless the release so provides, but reduces the claim against the other tort-feasor in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid.

A "joint tort-feasor" is defined by 42 Pa. C.S.A. Sec. 8322 as follows:

> As used in this subchapter "joint tort-feasors" means two or more person jointly or severally liable in tort for the same **injury to**

> **persons or property**, whether or not judgment has been recovered against all or some of them. (Emphasis added.)

The UCATA, therefore, contradicts the prior common law. In a case where the UCATA applies, the release of one tortfeasor does not automatically cause the release of another tort-feasor. Where the UCATA does not apply, prior common law should still be used.

While there is no Pennsylvania case law interpreting the language "injury to person or property" specifically with regard to the UCATA, there are a number of Pennsylvania cases where the language "injury to person or property," or similar language, has been held to mean physical injury to a person or injury to tangible property.

For example, as noted above, Pennsylvania Courts have interpreted the language "injury to person or property" contained in the Pennsylvania Comparative Negligence Act to exclude economic injury, such as that which results from legal or accounting malpractice. *See, Gorski supra* and *Columbia Medical supra*.

Likewise, Pennsylvania Courts have interpreted the language "bodily injury, death or property damage" contained in Rule 238 of the Pennsylvania Rules of Civil Procedure (Delay Damages) to exclude economic injury, such as that which results from legal malpractice in *Rizzo v. Haines,* 357 Pa. Super. 57, 65, 515 A.2d 321, 325 (1986) the Court held that:

> **Rule 238 provides for an award of damages "in an action seeking monetary relief for bodily injury, death or property damage** …" While we recognized that the underlying cases which precipitated the instant action were both personal injury cases, this instant case was an action for legal malpractice**. The rule is explicitly limited by its own language, and we therefore, do not find it applicable to legal malpractice.** (Emphasis added.)

See also Wagner v. Orie & Zivic, 431 Pa. Super 337, 341, 636 A.2d 679, 681 (1994) (A legal malpractice claim does not arise from bodily injury, death or property damage, therefore, delay damages under Rule 238 are not available because "…the "relief" sought by Appellant does not fall into the clear mandate of Rule 238.")

In sum, in accounting and legal malpractice cases, where the damages are solely economic, the common law rule regarding releases applies and a Plaintiff is entitled to only one satisfaction.

II. RECENT CHANGES TO THE STATUTE OF LIMITATIONS FOR PROFESSIONALS IN PENNSYLVANIA

Professionals can also take comfort in a recent decision which should clarify the statute of limitations for a professional negligence claim. We have always taken the position that a lawsuit alleging professional errors and omissions is strictly a negligence action, and not a

breach of contract action, unless a plaintiff can point to a specific provision in a contract that was breached. In other words, even though the plaintiff might assert a breach of contract claim against a professional, that breach of contract claim could not be predicated upon negligently performing professional activities but, rather, a breach of a specific provision in a contract between the plaintiff and the professional. In recent years, however, Pennsylvania Courts had muddied the waters so to say and sanctioned breach of contract actions against, for example, an accountant, despite alleging only an accountant's failure to perform services in accordance with applicable professional standards. Often times, a written fee agreement would be absent but Pennsylvania Courts would still permit the breach of contract action under an oral contract theory. Quite obviously, this created a statute of limitations problem. Meaning that even though the statute of limitations for a professional negligence lawsuit is two years in Pennsylvania, practically speaking it was extended to four years because plaintiffs were allowed to proceed on the breach of contract action. The plaintiff would allege that failure to bring the action within the two-year negligence statute of limitations did not bar a claim for negligence until the four-year statute of limitations for contract actions had expired.

Fortunately, a recent case handed down by the Pennsylvania Supreme Court on December 15, 2014 vindicated our long-held position. In *Bruno v. Erie Insurance Co.,* 106 A.3d 48 (Pa. 2014), the Pennsylvania Supreme Court confirmed that the "gist of the action" doctrine requires the court to examine the precise nature of the claim and then apply the appropriate statute of limitations if the claim is predicated upon negligence. As set forth by the court in *Bruno,* a plaintiff could no longer avail himself to the four-year statute of limitations by merely asserting a breach of contract claim. Instead, the complaint needs to contain specific language identifying the contractual provision which was allegedly breached. The Pennsylvania Supreme Court explained:

> The general governing principal which can be derived from our prior cases is that our court has consistently regarded the nature of the duty alleged to have been breached, as established by the underlying averments supporting the claim in a plaintiff's complaint, to be the critical determinative factor in determining whether the claim is truly one in tort, or for breach of contract. In this regard, the substance of the allegations comprising a claim in a plaintiff's complaint are of paramount importance, and, thus, the mere labeling by the plaintiff of the claim as being in tort, e.g., for negligence is not controlling. If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract – i.e…., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract – then the claim would be viewed as one for breach of contract……if, however the facts established that the claim involves a defendant's violation of a broader social duty owed to all individuals, which is imposed by the

> law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort.

The court in *Bruno* elaborated that the mere existence of a contract does not by itself create a contract claim:

> Consequently, a negligence claim based on the actions of a contracting party in performing contractual obligations is not viewed as an action on the underlying contract itself, since it is not founded on the breach of any of the specific executory promises which comprise the contract. Instead, the contract is regarded merely as the vehicle, or mechanism, which established the relationship between the parties, during which the tort of negligence was committed.

In other words, to support a contract claim subject to the four-year statute of limitations, the plaintiff must identify a specific undertaking in the contract to do something over and above what the professional was obligated to do by a social duty imposed by the law of torts.

The logic of this decision had previously been utilized by Federal Courts in Pennsylvania but the State Courts had made a number of rulings which created ambiguity and permitted parties to attempt to avoid the bar of the two-year statute of limitations on negligence actions in Pennsylvania. This decision is a decisive victory for professionals and once again reasserts that professional negligence claims are subject to a two-year statute of limitations in Pennsylvania.