THE PASCHOS LAW UPDATE NEWSLETTER
THOMAS PASCHOS & ASSOCIATES P.C. ATTORNEYS AT LAW

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Season's Greetings and a Happy New Year to all of our clients and friends, from Thomas Paschos & Associates, P.C.

I. GENERAL LITIGATION

Attorney-Expert Communications Not Discoverable

In *Barrick v. Holy Spirit Hospital*, --- A.3d ---, 2011 WL 5869510 (Pa.Super. November 23, 2011), Carl Barrick and his wife Brenda Barrick brought an action against Holy Spirit Hospital and, Sodexho Management, Inc., Sodexho Operations, LLC, and Linda Lawrence (collectively Sodexho), for injuries suffered when a chair on which Mr. Barrick was sitting collapsed beneath him in the hospital cafeteria.

During the course of discovery, the defendant, Sodexho, served Appalachian Orthopedic Center (Appalachian) with a subpoena to produce documents. Dr. Thomas Green, an orthopedic surgeon who is affiliated with Appalachian, treated Mr. Barrick for the injuries allegedly sustained from this accident. Plaintiff had also retained Dr. Green as a testifying expert. Dr. Green produced the subpoenaed medical records and related correspondence, but withheld the materials created in his role as an expert witness, including correspondence with plaintiff's counsel. Defendant moved to enforce the subpoena and sought to obtain the physician's trial preparation materials and communications with counsel. The Cumberland County Court of Common Pleas ordered the physician to produce his entire file.

Plaintiffs appealed the order granting the motion to enforce the subpoena. The sole issue on appeal was whether the Pennsylvania Rules of Civil Procedure allow discovery of the written correspondence between counsel and an expert witness retained by counsel.

The Superior Court held that the information requested by Sodexho's subpoena exceeded the scope of Pa.R.C.P. 4003.5(a)(1) for two separate and distinct reasons. First, Sodexho intended to use its subpoena to obtain written documents directly from an opposing party's expert witness. Specifically, the record indicates that Sodexho's subpoena was sent directly to Appalachian and sought the written correspondence between Appellants' counsel and their expert witness, Dr. Green. The provisions set forth in Pa.R.C.P. 4003.5(a)(1) do not allow this form of discovery. Rather, section (a)(1) of the rule only entitles a party to serve a very narrowly defined set of interrogatories upon an opposing party. The court noted that although Pa.R.C.P. 4003.5(a)(1) expressly notes that a party may answer the interrogatories by filing a report devised and signed

by the expert, this section of the rule does not authorize any party to discover any written document directly from an expert witness.

Second, Sodexho's subpoena overreached in terms of substance because it sought information beyond the permissive scope of Pa.R.C.P. 4003.5(a)(1) only requires an opposing party's expert witness to “state the substance of the facts and opinions to which the expert is expected to testify and [to] summar[ize][ ] the grounds for each opinion.” Any discovery request for information beyond the boundaries of this clear, explicit, and succinct statement is impermissible under Pa.R.C.P. 4003.5(a)(1). Thus, a discovery request for the content of any correspondence between an opposing party's attorney and the expert witness retained by that party falls outside the express language of Pa.R.C.P. 4003.5(a)(1).

The court further noted that because Pa.R.C.P. 4003.5 defines the scope of all discovery concerning expert testimony, the Supreme Court has made clear that any discovery request not covered by Pa.R.C.P. 4003.5(a)(1) shall be channeled “through the Rule's ‘cause shown’ criterion.” In seeking to obtain written communications from an expert witness, Sodexho's subpoena was a request for “further discovery by other means” within the purview of Pa.R.C.P. 4003.5(a)(2). Thus, the court held that Pa.R.C.P. 4003.5(a)(2) required Sodexho to show cause and acquire a court order before requesting from Appalachian the sought correspondence in regard to Dr. Green's role as an expert witness. Without first showing cause, any direct discovery request for documents from an expert witness is beyond the scope of Pa.R.C.P. 4003.5. Consequently, because Sodexho never made any showing of cause, the court concluded that Sodexho's discovery request was clearly beyond the scope of Pa.R.C.P. 4003.5 and, therefore, the sought correspondence was not discoverable under the Pennsylvania Rules of Civil Procedure.

Furthermore, the court noted that the written communication between counsel and an expert witness retained by counsel is not discoverable under the Pennsylvania Rules of Civil Procedure to the extent that such communication is protected by the work-product doctrine, unless the proponent of the discovery request shows pursuant to Pa.R.C.P. 4003.5(a)(2) specifically why the communication itself is relevant. As such, the court hold that Pa.R.C.P. 4003.3 immunizes from discovery any work product contained within the correspondence between Appellants' counsel and Dr. Green.

For the reasons set forth in its opinion, the court reversed the order of the trial court.

II. EMPLOYMENT LITIGATION

A Plaintiff Who Reports Conduct, as Part of His or Her Job, Is Not a Whistle-Blower Whose Activity is Protected Under the Conscientious Employee Protection Act

In *White v. Starbucks Corp.*, 2011 WL 6111882 (N.J.Super. December 9, 2011), an unpublished opinion, Kari White, a district manager for Starbucks, appeals from the judgment of the Law

Division granting defendant's motion for summary judgment and dismissing her complaint brought under the Conscientious Employee Protection Act (CEPA). The trial court found plaintiff failed to establish she engaged in whistle-blowing activity. Plaintiff alleged that she blew the whistle when she reported to her bosses several problems in the Starbucks stores under her supervision: missing merchandise, a lack of thermometers in two stores, unsanitary conditions, alcohol consumption by employees on the job, a physical attack of a customer, and the electronic transmittal of a pornographic photograph by an employee.

Relying on the appellate court's holding in *Massarano v. New Jersey Transit*, 400 N.J.Super. 474 (App.Div.2008), the trial court concluded that plaintiff did not engage in whistle-blowing activity because "the issues on which she bases her claim fall within the sphere of her job-related duties." The holding in Massarano specifically held that a plaintiff who reports conduct, as part of his or her job, is not a whistle-blower whose activity is protected under CEPA.

Plaintiff attempted to distinguish the holding in *Massarano* by contending that she "was not merely doing her job, but was also objecting to numerous violations of the law." The court found this argument unavailing. Plaintiff testified that it was her job "to oversee the performance of the store managers" in her district. In that capacity, she communicated with the managers concerning alleged violations of law and company policy, including: (1) discussing the missing merchandise with the Hoboken store manager; (2) dealing with the lack of thermometers with the Woodbridge and Newark managers; (3) addressing the unsanitary conditions with the Newark manager; (4) dealing with alcohol consumption by employees while on the job, the alleged physical attack of a customer, and the electronic transmittal of a pornographic photograph by an employee with the Iselin manager; and (5) correcting the improper configuration of tables and chairs at the Westfield store. Her job was to ensure that these alleged violations were addressed and corrected. Plaintiff raised and discussed these alleged violations of law with her supervisors as part of her job responsibilities.

The court found that like the plaintiff in *Massarano*, the record shows that, as part of her job, plaintiff reported violations of law to her supervisor as well as others in management to keep them abreast of the situation and the action she was taking as district manager. Thus, the court held that plaintiff did not engage in the activities covered and protected by CEPA and affirmed the holding of the trial court.

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