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

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I. GENERAL LITIGATION

A Defendant Cannot Be Subjected To a Venue Based Solely Upon the Business Activities of a Sister Corporation

In *Wimble v. Parx Casino and Greenwood Gaming & Entertainment*, Inc., --- A.3d ----, 2012 WL 758922 (Pa.Super. March 9, 2012), Plaintiff brought a negligence action against Defendants (collectively, "Greenwood Gaming") with regard to an alleged incident in which he tripped over a defective electrical cord and sustained serious injury. Defendants filed preliminary objections arguing that venue in Philadelphia was improper because: (1) the underlying incident occurred in Bucks, not Philadelphia, County; (2) Greenwood Gaming's principal, and only, place of business is located in Bucks County; and (3) Greenwood Gaming does not own property or conduct business in Philadelphia County.

In response, Plaintiff asserted that Greenwood Gaming conducts business in Philadelphia County through subsidiary corporations. Wimble further asserted that "a substantial portion of Greenwood Gaming's advertising dollars are spent in Philadelphia" and that all of the Greenwood Gaming-related entities are "involved in the same type of business."

The trial court concluded that Greenwood Gaming sustained its burden of demonstrating that venue in Philadelphia was improper and transferred venue from Philadelphia to Bucks County.

On appeal, the Superior Court addressed whether the decision to transfer venue was appropriate. The court held that Greenwood Gaming sustained its burden of demonstrating that venue in Philadelphia was improper. The court held that the "mere solicitation of business in a county does not amount to conducting business." Further, the court noted that Greenwood Gaming's related Philadelphia County entities were not subsidiaries, but rather sister entities and there was no precedential support for subjecting the defendant to a venue based solely upon the business activities of a sister corporation.

Based On Considerations Of Judicial Economy and Efficiency, Federal Courts Should Abstain From Hearing A Declaratory Judgment Action That Turns on an Application of State Law, If the Issues in Dispute Will Be Addressed in a Parallel State Court Action

In *Evanston Ins. Co. v. Van Syoc Chartered*, 2012 WL 847423 (D.N.J. Mar. 12, 2012), Plaintiff Evanston Insurance Company sought a declaratory judgment that it owed no duty to defend or indemnify Defendants Van Syoc Chartered, Clifford Van Syoc, Esq., James E. Burden, Esq.,

and Sebastian Ionno, Esq. (“the Van Syoc Defendants”) in an underlying malpractice action pending before the New Jersey Superior Court.

Erhart sued Atlantic City and other defendants for damages related to claims of employment discrimination. In that action, Richard Press, Esq. (moving Defendant in the instant motion) acted as Erhart's attorney. Erhart won a jury verdict including general and punitive damages against Atlantic City. Atlantic City thereafter moved for a new trial, which the court granted as to damages only, and the jury at the new trial returned a compensatory damages award in favor of Erhart, but no punitive damages were awarded. Following further motion practice, the district court entered final judgment which included various additional awards of counsel fees and costs.

Erhart thereafter allegedly decided to appeal the court's order granting a new trial and the lesser damages award; to that end she retained Defendant Clifford Van Syoc, Esq. and Defendant Van Syoc Chartered to represent her. Eventually, the Third Circuit dismissed Erhart's appeal for failure to timely prosecute, allegedly due to Van Syoc's failure to file an appellate brief. Press allegedly notified Van Syoc by letter of his and Erhart's intent to bring a claim against Van Syoc, for malpractice, unless Van Syoc managed to vacate the dismissal, and requested that Van Syoc forward the letter to his insurance carrier, Evanston Insurance Company. Van Syoc allegedly did not forward the August 29, 2007 letter.

On October 2, 2007, Van Syoc submitted an application to renew the Van Syoc Firm's existing Lawyer's Professional Liability Policy with Evanston. The application allegedly contained a representation by Van Syoc that he was unaware of any grounds for any claim under the proposed insurance. Evanston approved Van Syoc's renewed policy which included various exclusions for any claim made against an insured party under the policy of which the insured was aware prior to the effective date of the policy.

Meanwhile, Van Syoc, continuing to represent Erhart before the Third Circuit, filed various motions attempting to vacate the Circuit's order dismissing the appeal. Press again advised Van Syoc to notify Evanston of his and Erhart's impending malpractice action. Van Syoc allegedly first notified Evanston of the claim on October 8, 2008.

Erhart and Press filed their malpractice complaint against, *inter alia*, the Van Syoc Defendants on October 4, 2010 in the Superior Court of New Jersey. Van Syoc notified Evanston of the existence of the complaint and Evanston notified the Van Syoc Defendants “that no coverage was available under the policy” for the malpractice action. Van Syoc appealed this denial of coverage, which Evanston affirmed on December 23, 2010.

Evanston then brought this declaratory judgment action. The motion to dismiss at issue was initially filed by Defendant Richard Press and later joined by the other Defendants. Defendants argued that the Court should abstain from hearing this declaratory judgment action under the abstention doctrine articulated in*Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942) and *Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995). The Brilhart and Wilton cases held, based on considerations of judicial economy and efficiency, that federal courts act within their discretion to abstain from hearing a declaratory

judgment action that turns on an application of state law if the issues in dispute will be addressed in a parallel state court action.

Plaintiff opposed the motion, arguing that the *Brillhart–Wilton* doctrine did not apply in this circumstance for a number of reasons, including that the underlying malpractice action is not sufficiently parallel to the federal declaratory judgment action.

The Court agreed with Plaintiff that the instant declaratory judgment action was not strictly parallel to the underlying malpractice action because Plaintiff Evanston Insurance Company was not currently a party to the underlying action, and the insurance coverage issue was not currently contested in the underlying issue. Further, the Superior Court action was not addressing the issue of insurance coverage. Therefore, the Court had to determine whether, despite this lack of strict parallelism, the Court should still exercise its discretion to abstain in this circumstance.

The Court reasoned that while the coverage issue was not yet pending in the underlying malpractice action, if Erhart and Press ultimately prevailed against the Van Syoc defendants, the coverage issue would inevitably arise and be addressed either as a third-party complaint filed by Van Syoc or as a separate complaint filed by either Evanston Insurance Company or Van Syoc. Thus, the court concluded that discretionary abstention was warranted because of the closely related underlying state court action.

Further, the court noted that other issues of case management, such as settlement negotiations, could potentially be more efficiently addressed if all interested parties were included in cases pending in the same court. Consequently, the court found that this factor favored abstention. The Court granted Defendant's motion to dismiss, without prejudice to Plaintiff Evanston's recommencing the declaratory judgment action in the Superior Court.

Plaintiff's Summary of Events Prepared Prior to Retaining Counsel Are Not Protected By the Attorney-Client Privilege

In *Marshall v. JPMorgan Chase Bank, N.A.*, 2012 WL 1205752 (N.J.Super.A.D., April 12, 2012), unpublished, plaintiff Doreen Marshall appealed from a Law Division order that required her to turn over in discovery a handwritten summary she prepared to assist her in keeping an accurate record of the hostile work environment that eventually became the subject of the present litigation alleging a violation of the Law Against Discrimination (LAD). The three or four page summary described in detail the claimed offensive conduct of her supervisor, defendant Gregory Mezzacapo, and the branch manager, defendant Mohamed Fouda. The summary, which plaintiff showed to her present attorney before she retained him, was not prepared at his direction or under his supervision. After retaining present counsel, she provided him with a copy of the consolidated summary. The trial judge found that the summary was protected by the attorney-client privilege but had to be disclosed as a matter of equity.

The Superior Court noted that unquestionably, a summary, or chronology of events, prepared by a plaintiff at his or her attorney's request, and then turned over to the attorney, is protected by the attorney-client privilege. However, the record in this case demonstrates that plaintiff created

the consolidated summary simply by combining, in one document, a series of non-privileged notes that she had previously written on various scraps of paper. As she testified in her deposition, she created the consolidated summary so she would have a more organized version of her original notes to show to her prospective attorney when she first met with him. The court found that nothing in the record suggested, much less established, that plaintiff created the summary at the request of counsel.

The court held that because the summary was not prepared at the request of counsel or under his supervision, although plaintiff shared it with her present counsel before retaining him, it was not protected by the attorney-client privilege and affirmed the order directing that it be turned over to defendant.

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