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To submit ideas for articles, please contact editor Bradley Smith at bsmith@galfandberger.com.

Civil Litigation UPDATE

Pennsylvania Bar Association
Your Other Partner

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Welcome from the Chair

It has been a pleasure serving as chair of the Civil Litigation Section. Please urge your colleagues to join the section in order to be able to take advantage of all of the benefits of membership.

It has been a busy spring. In March, we held a Trial Minicamp at the Lancaster Bar Association where experienced trial lawyers gave hot tips and presented openings, direct and cross examination and closing arguments. The trial minicamp included the following topics:

- How to Introduce and Connect Your Theme throughout Your Trial
- How to Tactically Get the Witness to Tell Your Story by Asking the Right Questions in the Right Way
- How to Use Media and Presentation to Advance Your Trial Theme

The panelists were Judge Royce L. Morris, Dauphin County Court of Common Pleas; Sharon R. López, PBA immediate past president; Jonathan D. Koltash, PBA YLD immediate past chair; C. Edward Browne; Kristen B. Hamilton, PBA Zone 3 Governor; and moderator Jennifer S. Coatsworth, PBA Civil Litigation Section chair-elect. Chief Judge Stengel (retired) gave a wonderful keynote address, talking about his career. Many of the opportunities he was presented with were fortuitous, including running as a judge at a fairly young. He became president of the Lancaster Bar Association while serving as a judge of the Court of Common Pleas of Lancaster County. Thanks to all of our panelists for such an excellent program.

We had a sold out Philadelphia Regional Dinner featuring guest speaker Superior Court President Judge Jack Panella. We were pleased to have numerous Superior Court judges as well as judges from the Courts of Common Pleas for Philadelphia and Montgomery County. Panella spoke about the type of cases Superior Court handles as well as how collegial each member of the court is to work with. He also spoke about the importance of preparation as the Superior Court is very well prepared and is a "hot bench." There was a lot of opportunity for networking, and a wonderful evening was enjoyed by all.

Kathleen Wilkinson

We are looking forward to our Civil Litigation Retreat at the Royal Sonesta, Harbor Court Hotel in Baltimore where we have judges from federal court as well as Superior Court and the Courts of Common Pleas presenting seven hours of CLE credit. We will have an author talk about a best-selling book and will enjoy a Kentucky Derby party.

Soon it will be time for me to turn over the reins to Chair-Elect Jennifer Coatsworth at the Annual Meeting in May. Thank you all for your many valuable contributions to the Civil Litigation Section and to the PBA. We have an excellent section that has weighed in on many issues this year. I look forward to continuing to serve on Council and being part of this wonderful section.

Kathleen D. Wilkson

Case Summaries

Attorney-Client Privilege Must be Used Defensively, Not Offensively

By Erin K. Aronson

A party may not assert attorney-client privilege during the discovery phase of a proceeding, and subsequently waive the privilege while testifying at trial. In *Gregury v. Greguras*, 196 A.3d 619 (Pa. Super. 2018) (Opinion by Bowes, J.), the Pennsylvania Superior Court considered, as a matter of first impression, the effect of a last-minute reversal regarding privilege. The defendant invoked attorney-client privilege throughout discovery, and then summarily reversed course at trial and testified regarding communications with counsel in a self-serving manner. Plaintiffs sought a mistrial, which the trial court denied. On appeal, a divided en banc panel of the Pennsylvania Superior Court vacated and reversed the trial court decision, granting a new trial. The Pennsylvania Supreme Court recently denied a Petition for Allowance of Appeal in *Gregury v. Greguras,* 2019 WL 1449167 (Slip Copy April 2, 2019), thereby affirming the en banc decision of the Pennsylvania Superior Court

The court focused on issues of fundamental fairness and declared that a party cannot invoke privilege "to shield confidential communications from disclosure during the discovery process, only to voluntarily waive the privilege at trial and introduce those communication for [one's] own purposes." The court stressed that discovery is intended to "prevent the surprise and unfairness of a trial by ambush," and cited Pennsylvania courts' "dim view" of attempts to manipulate privilege. Finally, the court held that even if 42 Pa.C.S. § 5928, which codifies the privilege, allows waiver at trial, that interpretation does not control. Rather, "the timing of the waiver must be viewed in the context of . . . discovery and pretrial rules" and considered in relation to the concepts of prejudice and unfair surprise.

Erin K. Aronson

The Pennsylvania Supreme Court's refusal to consider the appeal in this matter confirms that litigants must use caution to ensure that the attorney-client privilege is used as a shield rather than a sword.

Pennsylvania Superior Court Rejects No-Hire Agreements Between Competitors

By Erin K. Aronson

In *Pittsburgh Logistics Systems, Inc. v. Beemac Trucking, LLC,* 202 A.3d 801 (Pa. Super. 2019) (Opinion by Ott, J.), the Pennsylvania Superior Court, on a matter of first impression, held that a no-hire provision in an agreement between two entities is an unenforceable "unfair restraint on trade." The trial court refused to enforce provisions of an agreement between two companies that prohibited one from hiring or soliciting the other company's employees for employment. The court concluded that the provision violated public policy.

On appeal, the Pennsylvania Superior Court affirmed. The court noted that employment restrictions might be valid in an agreement between an employer and employee, where such restrictions are supported by actual consideration. By contrast, the no-hire provision at issue in *Pittsburgh Logistics Systems* limited employees' options without any consideration provided to them and without their consent. The court credited the trial court's determination that "these types of no-hire contracts should be void against public policy" in part because the affected employees may not even be aware they exist. In the absence of any Pennsylvania ruling on this issue, the trial court relied on *Richards Energy Compression, LLC v. Dick Glover, Inc.,* 2013 WL 12147626 (D.N.M. 2013) for its persuasive value, which likewise condemned the practice of subjecting an employee to "servitude" without their knowledge or consent.

In the wake of *Pittsburgh Logistics Systems*, employers may continue to rely on restrictive covenants in employment agreements, but cannot resort to no-hire agreements with competitors.

Erin Kernan Aronson is an attorney in the litigation practice group at Eastburn and Gray PC in Doylestown, Bucks County. She routinely represents clients in litigation relating to employment, corporate, education and real estate matters. She can be reached by email, earonson@eastburngray.com or by phone, 215-345-7000