

Withdraw! Withdraw! Withdraw! The Importance of Withdrawal in Legal Malpractice Actions

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This legal malpractice action arose from an underlying suit a condo association (“Loftominium”) originally filed against a developer for defects in a building’s construction. Loftominium retained John Jacoby (“Jacoby”), McDonald Hopkins LLC (“McDonald”), and Nyhan, Bambrick Kinzie & Lowry, P.C. (“Nyhan”) as counsel in its suit against the developer.

Jacoby originally represented Loftominium in its suit while he worked at McDonald. While McDonald had the case, no one appeared on Loftominium’s behalf at two case management conferences. After the second case management conference, the Court dismissed Loftominium’s case for want of prosecution. Jacoby later left McDonald and started working for Nyhan. Loftominium’s case transferred with Jacoby to Nyhan at Loftominium’s request. McDonald did not file a withdrawal or transfer motion with the Court.

After Jacoby arrived at Nyhan, his new firm did not enter an appearance on Loftominium’s behalf and did not challenge the lawsuit’s dismissal. At the time of transfer, four months remained in Illinois’ “savings statute,” which would have allowed Loftominium to refile its claim. Eventually that time period expired; Loftominium learned of the dismissal approximately a year later. Loftominium then filed a malpractice suit against Jacoby, McDonald, and Nyhan.

McDonald moved to dismiss the malpractice suit, arguing Nyhan’s and Jacoby’s failure to seek reinstatement of the suit was a superseding cause of Loftominium’s damages. The circuit court denied McDonald’s motion, holding that it remained Loftominium’s attorney of record because it failed to withdraw. McDonald then was able to obtain an interlocutory appeal.

Question Presented

The Appellate Court determined the interlocutory appeal presented one question of law: Whether a malpractice claim for failure to reinstate an action is extinguished by a party’s counsel’s termination and successor counsel’s retention within the time period permitted to reinstate the action.

Appellate Court Ruling

The Appellate Court first examined the framework for a legal malpractice claim, which requires a plaintiff to establish that (1) the defendant attorney owed the plaintiff a duty of care arising from an attorney-client relationship; (2) the attorney breached that duty; (3) the client suffered actual damages from the breach; and (4) the breach proximately caused the actual damages. In cases involving successive negligent actors, the original negligent actor may avoid liability if, as a matter of law, the second negligent actor's negligence was unforeseeable.

McDonald argued Nyhan's negligence in failing to reinstate the lawsuit absolved McDonald of any negligence, despite McDonald's failure to withdraw its appearance. McDonald supported this argument by claiming Loftominium's correspondence terminating McDonald's retention as counsel automatically ended its status as Loftominium's attorney-of-record. Later (the argument went), Nyhan could have reinstated Loftominium's lawsuit, destroying any connection between McDonald's alleged negligence and Loftominium's damages.

The Appellate Court disagreed, holding the Illinois Rules of Professional Conduct, the Illinois Supreme Court Rules, and the Restatement (Third) of the Law Governing Lawyers all contradict McDonald's argument. The three sets of rules all require an attorney to withdraw from a case as counsel of record to end that attorney's representation. McDonald did not cease to be Loftominium's counsel; Nyhan's negligence did not supersede McDonald's negligence. A jury could still hold McDonald liable.

The Takeaway

Attorneys commonly change law firms. When they do, they often bring their book of business with them to a new firm. Many firms presume this transfer resolves any duties they may owe to that attorney's clients. In effect (the thought goes), those clients' problems become the new law firm's problems.

Despite this mindset, and despite any automatic policies the original law firm has in place, there is a "hard and fast" rule governing withdrawals in the Appellate Court's eyes. Without a withdrawal motion and an order granting it, the first firm will remain as counsel.

When an attorney is about to leave a law firm, the firm should present that attorney with a stack of withdrawals, one for each and every lawsuit the attorney is taking with him or her on the way out the door. Firms need to make this step mandatory when an attorney leaves. Otherwise, they could be held liable for at least a portion of any malpractice claims that subsequently arise. In the case above, a simple two-page motion could have saved McDonald a significant headache and a call to its malpractice insurer.

By Tyler Thompson

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