

The Viability of a Legal Malpractice Claim Rests Upon the Existence of Actual Harm

Despite the extent to which counsel has committed egregious error in the handling of a case, it is axiomatic that the existence of a viable malpractice claim depends upon whether the client has sustained actual harm as a result. Long ago, in *Kituskie v. Corbman*, 714 A.2d 1027, 1030 (Pa. 1998), the Pennsylvania Supreme Court had articulated this concept that “[a]n essential element to this cause of action is proof of actual loss rather than a breach of a professional duty causing only nominal damages, speculative harm or the threat of future harm.” This has been the Supreme Court’s view regardless of whether the claim for legal malpractice is characterized as sounding in tort or in breach of contract. This concept follows the third element of a claim for legal malpractice, that the negligence of the faulting attorney “was the proximate cause of the damage to the plaintiff.” *Heldring v. Lundy Beldecos & Milby, P.C.*, 151 A.3d 634, 641 (Pa. Super. 2016). A recent Superior Court decision underscores the proposition that the viability of a legal malpractice claim requires the showing of actual loss as opposed to the showing of the arguable compromise of a legal position.

In *Servin v. Duane Morris LLP*, 2018 WL 1280520 (Pa. Sup. Ct.), a non-precedential decision, defendant law firm had not filed a brief in an appeal to the Second Circuit Court of Appeals, which resulted in the dismissal of the appeal as against its clients for failure to file a brief. The co-defendant in that case, who was a shareholder of one of the clients represented by the defendant law firm, brought suit for legal malpractice and misrepresentation. The co-defendant contended that the defendant law firm’s failure to file a brief not only resulted in the dismissal of its clients’ appeal but also resulted in the Second Circuit’s failure to “evaluate the merits of [co-defendant’s] claims.” The misrepresentation claim was based upon the premise that the defendant law firm had allegedly promised to file the brief and then did not,

to the co-defendant’s detriment. The underlying federal litigation was a claim of a business arrangement pursuant to which they attempted to acquire a fiber optic ring company that failed because of an alleged misrepresentation about the fiber optics rights held by them.

The co-defendants in the underlying appeal asserted claims against the defendant law firm for legal malpractice, based upon theories sounding in tort and breach of contract, as well as misrepresentation based upon the alleged promise that the defendant law firm would file the brief.

The appellate court agreed that “claimants must show that they would have prevailed in the underlying action, that is, that they would have recovered a judgment, and they can then proceed with proof that the attorney who they engaged to prosecute or defend the underlying action was negligent in his or her handling of that action, and that such negligence was the proximate cause of the plaintiff’s loss.”

The co-defendants, now the plaintiffs in the lawsuit against the defendant law firm, acknowledge that, at one point, the defendant law firm “made comments that [the co-defendants and the defendant law firm’s clients] never closed on the initial... deal, and that they were therefore concerned about the validity of’ the claim.” The co-defendants in the underlying appeal contend that one of them had received a “panicked phone call” from the defendant law firm the day before the brief’s deadline seeking permission not to file the brief, which permission was alleg-

edly refused.

In response to the complaint in the malpractice/misrepresentation action, the defendant law firm filed preliminary objections. It did contend that claimants were not its clients and, therefore, lacked privity to assert a malpractice claim. But, more fundamentally, in response to both the legal malpractice and misrepresentation claims, it asserted, among other things, that the claims have no merit because the appeal in the underlying matter had no merit. The defendant law firm argued, and the trial court agreed in granting the preliminary objections, that the appeal in the underlying matter had no merit. As a result, in the trial court’s view, defendant law firm’s failure to file a brief did not result in an actual loss to the plaintiffs because, as a matter of law, they would have lost the appeal regardless. Moreover, the court found that, if there was no actual loss, then defendant law firms’ conduct could not be the proximate cause of damage to the claimants, which is the third element of a misrepresentation claim. Stated differently, the trial court found that the plaintiffs did not have a “viable underlying cause of action” and, accordingly “could not establish a legally compensable injury to support the malpractice claims.”

In affirming the trial court, the three-judge panel of the Superior Court agreed with the trial court’s reasoning in a unanimous opinion. Although the claimants framed their appeal as six different issues, the appellate court viewed them as essentially one issue, i.e., whether “the trial court erred in dismissing the legal malpractice and misrepresentation claims and [rejected the view] that [claimants] were either an intended beneficiary or third-party beneficiary to [defendant law firm] attorney-client relationship with [defendant law firm’s] clients.” The appellate court agreed with the trial court’s reasoning. It agreed

Avoiding Liability



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that claimant must prove the ‘case within a case’ by a preponderance of the evidence. Specifically, it agreed that claimants must show that they would have prevailed in the underlying action, that is, that they would have recovered a judgment, and they can then proceed with proof that the attorney who they engaged to prosecute or defend the underlying action was negligent in his or her handling of that action, and that such negligence was the proximate cause of the plaintiff’s loss.

The appellate court went on to note that claimants “lacked standing to assert the claims in the federal litigation” and, therefore, were “unable to establish they would have succeeded on appeal of the federal litigation, and, therefore, cannot establish their legal malpractice claims.” The court also affirmed the trial court’s rejection of the misrepresentation claim on the same basis.

Servin is just the latest in a long string of cases that stand for the proposition that, unless the client can demonstrate an actual loss as a result of his counsel’s negligence, he or she cannot successfully assert a malpractice case, regardless of whether sounding in tort or breach of contract.