



## Alerts

### New Jersey Court Reaffirms Principle that a Plaintiff Must Establish "But For" Causation and Damages in a Malpractice Claim

May 28, 2019

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*Picciolo v. Rittley*, 2019 N.J. Super. Unpub.

#### Brief Summary

The New Jersey Appellate Division affirmed summary judgment for defendants in a legal malpractice action where plaintiff failed to prove actual damages relating to an alleged unauthorized counteroffer in underlying divorce proceedings. The court found that plaintiff failed to establish that but for the defendants' alleged negligence, the outcome of the underlying divorce proceedings would have been more favorable for plaintiff.

#### Complete Summary

This matter was presented to the appellate court after the trial court granted summary judgment in favor of defendants. During the prior representation of plaintiff in the underlying divorce case, defendants received an offer to settle the matrimonial case. The offer included a waiver of alimony and a request that plaintiff pay all of the college expenses for the parties' two children, amongst other terms. The parties disagree as to what happened after receipt of the offer. Plaintiff alleges he was prepared to accept the proposal, while defendants stated that plaintiff demanded changes to the offer. Based on an email communication from plaintiff, which included proposed changes to the offer, defendants made a counteroffer which included alimony payments and only partial contribution toward college expenses.

The counteroffer was rejected and plaintiff and his former spouse continued to live together for another year before reaching a settlement. During that time, plaintiff's wife allegedly assaulted him causing a permanent eye injury. After the settlement, plaintiff this action alleging that if defendants had accepted the original offer on plaintiff's behalf, he would have been in a better financial position and would not have suffered the alleged eye injury.

The court rejected plaintiff's argument and stated that plaintiff's own revision to the original offer was in effect a counteroffer, and that no enforceable settlement agreement was thus reached at that time. The court noted that "because there was no enforceable settlement agreement, plaintiff cannot prove he would have

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prevailed. Assuming there was an enforceable settlement agreement, plaintiff cannot prove actual damages." Noting that plaintiff's expert's "ballpark" estimate of damages was speculative, the court held that plaintiff failed to satisfy his burden of proof of actual damages resulting from the alleged malpractice. In other words, the court affirmed summary judgment for defendants on the basis that plaintiff failed to demonstrate that but for the defendants' alleged negligence, the outcome of the underlying divorce proceeding would have been more favorable for plaintiff.

## Significance of Decision

With this decision, the court reiterated that a plaintiff must establish but for causation and actual damages in order to prevail in a legal malpractice action. The court noted: "[a] legal malpractice plaintiff does not satisfy this burden by mere conjecture, surmise or suspicion."

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