



## Alerts

### "Suit Within a Suit" Requires Full Jury Instructions and Lost Punitive Damages Are Not Part of Legal Malpractice Recovery

January 30, 2013

*Lawyers for the Profession® Alert*

*Osborne v. Keeney*, \_\_\_ S.W.3d \_\_\_, 2012 WL 6634129 (Ky. Dec. 20, 2012)

#### Brief Summary

The Supreme Court of Kentucky held that when trying a legal malpractice action involving a "suit within a suit," the proper procedure is to instruct the jury as if it were trying the underlying case before instructing the same jury on the legal malpractice claim. The Court also concluded that lost punitive damages from the underlying case are not recoverable against the defendant attorney.

#### Complete Summary

In October 2002, plaintiff client was sitting at home watching TV when an airplane crashed through her roof. She hired defendant attorney to represent her in her dealings with her homeowner's insurance company, and in any claim she would make against the pilot. The client obtained approximately \$234,000 from her insurance company, and paid the lawyer 20 percent. Not satisfied, the client wanted to sue the pilot.

In August, 2004, nearly two years after the crash, and after the applicable one-year statute of limitations expired, the lawyer attempted to dissuade the client from suing the pilot. The client insisted, and the lawyer filed a case that was later dismissed on statute of limitations grounds. The lawyer's behavior was so bad, however, that the court observed that his conduct alone was sufficient to warrant dismissal of the client's claim. The client later filed a legal malpractice action against the lawyer, and obtained a substantial recovery from the jury, including \$750,000 as lost punitive damages against the pilot.

The Supreme Court of Kentucky noted that while the suit within a suit approach had been repeatedly affirmed, the actual procedure for trying such a case remained "elusive." Accordingly, the Court directed that in "re-creating the litigation, the usual instructions that should be given in the underlying case, including any special verdict forms, are those to be used in the malpractice trial." In this case, because the trial court failed to instruct the jury regarding the claim of pilot negligence, the instructions skipped a logical and necessary step in the process.

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Next, the Court considered, as a matter of first impression in Kentucky, whether a legal malpractice plaintiff would be permitted to recover punitive damages lost in the underlying case as a result of an attorney's negligence. The Court acknowledged that some jurisdictions permitted such recovery by characterizing the punitive damages as compensatory to the plaintiff.

Based on Kentucky's long history of awarding punitive damages to "punish and discourage the defendant and others from similar conduct in the future," the Court reasoned that punitive damages have nothing to do with a plaintiff's loss or making a plaintiff whole. Because allowing a legal malpractice plaintiff to recover lost punitive damages would not advance the policy underlying punitive damages, the Court concluded that lost punitive damages should not be available. Although unrelated to its policy analysis, the Court bolstered its decision by its analysis of two Kentucky damages statutes.

### **Significance of Opinion**

This decision is significant because it clarifies the procedure to be followed in legal malpractice actions involving a "suit within a suit," and shores up the reasoning for not permitting lost punitive damages to be awarded to legal malpractice plaintiffs.

For further information, please contact [Terrence P. McAvoy](#) or [Noah D. Fiedler](#).

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