



## Alerts

### Plaintiff's Successor Counsel Not Liable for Contribution Where Underlying Case Was "Irretrievably Lost" Before He Was Retained

August 20, 2020

*Lawyers for the Profession®*

*McNellis-Wallace v. Hoffman, et. al.*, Superior Court of New Jersey, Appellate Division, Docket No. A-1488-19T1

#### Brief Summary

A New Jersey appellate court held that a defendant in a malpractice case could not maintain a third-party contribution claim against plaintiff's successor counsel where the underlying claim was irretrievably lost due to the original attorney's conduct before successor counsel was retained.

#### Complete Summary

##### The Underlying Medical Malpractice Action

On August 12, 2013, after undergoing a surgery, plaintiff's surgeon informed her that robotic equipment had failed during surgery and nicked her bowel. Plaintiff retained the defendant to pursue a medical malpractice claim against the surgeon and the equipment manufacturer. The claim was subject to a two-year statute of limitations. Believing the surgeon was an employee of the State of New Jersey, the defendant filed the required notice under the Tort Claims Act but served it on the wrong entity. In June 2015, with the limitations clock winding down, defendant told plaintiff he declined to sue the surgeon or the manufacturer, because he did not believe she would prevail on such claims.

Shortly before the limitations period expired, the plaintiff retained new counsel who filed suit on her behalf on the last possible day. The surgeon answered the complaint in October 2015. In doing so, he listed the State of New Jersey as his insurance carrier.

##### Dismissal of Medical Malpractice Complaint

In 2016, the surgeon moved to dismiss plaintiff's complaint for failure to timely file and serve a tort claims notice. In New Jersey, the timeliness of a tort claims notice is determined via a three-step process. First, the court ascertains when the cause of action accrued. Then, it looks at whether a notice of claim was filed within 90 days of accrual. If not, on application by a party, the court may determine whether extraordinary circumstances justify a late notice. Under NJSA 50:8-9, if the court finds that extraordinary circumstances exist, a party

#### Attorneys

Terrence P. McAvoy

Filomena E. Meyer

#### Service Areas

*Lawyers for the Profession®*



may be allowed to file a belated tort claims notice within one year after accrual.

Unaware of the prior notice filed by the defendant, successor counsel sought leave to file a late notice because plaintiff did not discover her surgeon was a public employee until his motion to dismiss was filed. The court denied plaintiff's motion, finding that she received notice of the surgeon's status when he filed his answer in October 2015. Accordingly, the trial court concluded that January 14, 2016 was the last day for filing the 90-day tort claim notice. Since the notice was not filed by then, dismissal of the medical malpractice complaint was warranted.

### **The Legal Malpractice Action and Third-Party Complaint**

In April 2018, successor counsel finally learned of the tort claim notice served by the defendant, plaintiff's initial counsel, and moved to reinstate the medical malpractice action. When that failed, a legal malpractice action against defendant was filed. Defendant then filed a third-party complaint for contribution against subsequent counsel.

Successor counsel filed a motion to dismiss. The court initially granted the motion, explaining that successive lawyers can be joint tortfeasors only if they share joint liability for the same injury to the plaintiff. Here, however, because subsequent counsel was not retained until 2015—less than a month before the two-year statute of limitations lapsed—he had no ability to file a tort claims notice within 90 days of the August 12, 2013 accrual date (or by on, or before, November 2013), or a petition for late filing relief within one year of the same date (or by on, or before, August 12, 2014). Consequently, he was not a joint tortfeasor and could not be liable for contribution.

### **Defendant's Motion for Reconsideration**

Defendant filed a motion to reconsider, arguing the trial court erred in overlooking the court's finding in the medical malpractice action that plaintiff was not on notice that the surgeon was a public employee until the filing of his answer in October 2015. Further, defendant argued this lack of notice tolled the accrual of plaintiff's medical malpractice claim until October 2015, and successor counsel thus had until January 2016 to file a tort claims notice on plaintiff's behalf. Defendant asserted that because subsequent counsel did not file by then, he was a joint tortfeasor for purposes of contribution law. The trial court agreed and reinstated the third-party contribution claim.

### **The Appellate Decision**

Successor counsel appealed, and, noting the trial court was right in initially dismissing the contribution claim, the appellate court reversed. The court concluded that the question of when plaintiff learned her surgeon was a public employee was irrelevant to the issue of accrual. Under New Jersey's Tort Claims Act, a claim accrues on the date of the incident that gives rise to any injury, however slight. And, it is tolled until the plaintiff is reasonably aware that she has been injured by the fault or neglect of an identifiable person or entity.

Here, plaintiff's claim accrued on August 12, 2013, the date of her surgery. On that date, plaintiff was informed she had been injured, was advised as to its negligent cause and the identities of the potentially responsible parties—all the facts sufficient to trigger accrual. Her knowledge of whether or not the surgeon was a public employee was immaterial.

Defendant failed to serve the required notice on the surgeon or his employer within 90 days of the August 12, 2013 accrual date. He also did not petition the court to permit a late notice of tort claim within one year of accrual of the claim—that is, by August 12, 2014—or at any time before defendant withdrew in June 2015. The court noted, however, that even if defendant had petitioned for late notice, it most likely would have been denied, because an attorney's inattention or neglect is not an extraordinary circumstance that justifies late notice. The court concluded that defendant's alleged negligence forever barred plaintiff from any recovery against her surgeon or his employer by August 12, 2014.

Because plaintiff's medical malpractice claim was irretrievably lost by August 12, 2014, during defendant's watch and long before subsequent counsel was retained in July 2015, the court held that successor counsel was not a joint tortfeasor, and the contribution claim was properly dismissed with prejudice.

## **Significance of the Decision**

To be liable for contribution, successor attorneys must have contributed—either by act or omission—to the same injury. Here, the underlying claim was already irretrievably lost before successor counsel was retained, so he cannot be deemed a joint tortfeasor for purposes of contribution. (*See also, Roberts v. Heilgeist*, 124 Ill.App.3d 1082 (1984), where



subsequent counsel was not liable for contribution because underlying claim was time-barred at time of retention).