



## Alerts

### Plaintiff Cannot Maintain Legal Malpractice Action Absent Proof of Fraudulent Inducement to Settle

September 30, 2020

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*Jibreel Townsend v. Spear, Greenfield and Richman, P.C., Mark Greenfield, Rand Spear, Esq.* Superior Court of Pennsylvania, No. 2950 EDA 2019 (8/13/20)

#### Brief Summary

A Pennsylvania court affirmed summary judgment in a "settle-and-sue" malpractice action because there was no evidence the plaintiff was fraudulently induced to settle by the defendants. In addition, the misconduct alleged against them—i.e., the failure to name a party and assert a theory of liability—amounted to nothing more than speculative second-guessing of their legal strategy.

#### Complete Summary

This is a "settle-and-sue" case. These types of legal malpractice actions involve situations where a former client sues after underlying litigation has been settled, and claims that the settlement was less than it should have been—or more than it should have been where the client was a defendant in the underlying case—or that the case should not have been settled at all.

In *Townsend*, plaintiff sustained severe injuries to his lower extremities when the driver of another car fell asleep and hit him while he was in his truck. After the accident, plaintiff retained defendants to handle a personal injury action against the driver and the owner of the car. The car owner's daughter, who was a passenger at the time of the accident, was not named as a defendant.

The car was covered by a \$500,000 primary insurance policy and a \$2 million umbrella policy. At a mediation, plaintiff agreed to settle the action for \$702,800.00 allocated as follows:

- \$500,000.00 from the primary policy;
- \$200,000.00 from the umbrella policy; and
- \$2,800.00 for plaintiff's truck.

Plaintiff signed a general release, a settlement agreement, and a schedule of distribution setting forth his net recovery and structured settlement payouts.

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Following the gratuitous and unsolicited advice of new counsel, plaintiff filed suit against his former attorneys a few months later. Based upon theories of professional negligence and fraudulent inducement, plaintiff alleged defendants were negligent in failing to sue the owner's daughter for negligent entrustment. Plaintiff argued that due to the severity of his injuries, a negligent entrustment claim against the owner's daughter would have caused the insurer to tender all of the available policy coverages in settlement—including the \$2 million umbrella policy. Instead, the applicable insurance coverage for the accident was limited to the \$500,000.00 liability policy and jeopardized coverage of the \$2 million umbrella policy. Plaintiff also contended he was fraudulently induced by defendants to settle his personal injury claims for less than full value.

Defendants filed motions for summary judgment, which were granted by the trial court and upheld on appeal. The appellate court agreed that the case was controlled by *Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick*, 587 A.2d 1346 (Pa. 1991), a Pennsylvania Supreme Court decision. In *Muhammad*, the Court held that clients who agree to settle an underlying case cannot state a cause of action based on professional negligence or breach of contract against their former counsel based upon former counsel's handling of the settlement, unless the client can show that his or her consent to the settlement was fraudulently induced.. The court reasoned that a contrary rule would be inconsistent with the policy favoring settlements and was unfair to the attorneys who relied on their client's consent to the settlement.

By way of background, in *Muhammad*, plaintiffs brought a medical malpractice lawsuit following the death of their child. Plaintiffs initially agreed to a settlement negotiated by their lawyers. Before signing any documents, however, plaintiffs had a change of heart and refused to go through with the settlement. Nevertheless, the court enforced the originally agreed upon terms of the settlement. After their appeal of the court's decision in the underlying litigation was rejected, plaintiffs sued their former lawyers claiming that their negligence in failing to sue another hospital and drug manufacturer diminished the settlement value of the case. The *Muhammad* Court affirmed the dismissal of the complaint, observing that lawsuits which merely "second guess" the original attorney's strategy were impermissibly speculative because it is "impossible to state whether a jury would have awarded more damages if a suit had been filed against another potential party or under another theory of liability."

Here, in *Townsend*, the appellate court was careful to note that the *Muhammad* restrictions in "settle-and-sue" type cases did not apply in circumstances where the lawyer's alleged wrongful conduct was unrelated to the lawyer's judgment regarding the amount to be accepted or paid in a settlement. The *Townsend* court noted that following *Muhammad*, courts have recognized a distinction between improperly second guessing an attorney's professional judgment post-settlement in an attempt to obtain more monies and a situation where a settlement agreement is legally deficient or where an attorney wrongfully fails to explain the effect of the settlement documents. Courts have allowed clients to seek redress from counsel in the latter cases, but not in the former. For example, in Pennsylvania, a settle-and-sue action was allowed after a dissolution of marriage case was settled where the lawyer's failure to merge an alimony agreement with the divorce decree resulted in the husband's continued obligation to pay alimony even after the re-marriage of his former spouse. Similarly, a malpractice action was permitted to proceed where the client had discharged her attorneys for failure to properly investigate and prepare her case for trial, and the client was forced to accept the settlement figure proposed by the judge because of her inability to retain replacement counsel.

In *Townsend*, plaintiff argued the *Muhammad* rule did not apply to his malpractice claim because its gist was that defendants' failure to pursue a negligent entrustment claim against the car owner's daughter, which diminished the settlement value of his case. Plaintiff also claimed he had no choice but to accept his attorney's advice and agree to the settlement because he was unaware of any potential legal malpractice.

The court rejected this position, finding that like the plaintiffs in *Muhammad*, plaintiff was merely second guessing his former attorneys' strategy not to sue a party and speculating that he would have recovered more had the party been named. As such, the court found that the claim was no more than an expression of frustration and dissatisfaction with the amount of the settlement. Concluding that the *Muhammad* prohibition applied, the appellate court affirmed summary judgment in defendants' favor because plaintiff failed to make out a *prima facie* case of fraudulent inducement.



## Significance of the Decision

"Settle-and-sue" cases have been viewed with judicial caution in most jurisdictions, because settlements are always going to be less than the best *possible* outcome for the client. Thus, liberally allowing a client to settle and then allowing the former client to sue for malpractice claiming there should have been a better outcome would expose lawyers to potential malpractice claims every time a settlement is negotiated, and this would undermine the policy favoring settlements.

On the other hand, the *Muhammad* rule of allowing a claim against an attorney only where the settlement was induced by fraud seems overly restrictive. Courts in most states have accommodated the competing interests of lawyers and clients in this situation by requiring "settle-and-sue" plaintiffs to prove that but for the lawyer's negligent acts or omissions, plaintiff would have obtained a better outcome at trial or settlement.