



## Alerts

### Third Circuit Affirms Plaintiff Must Establish He Would Have Prevailed in Underlying Case But For Attorneys' Alleged Negligence

March 30, 2022

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*Nkansah v. Kleinbard LLC, 2022 U.S. App. LEXIS 7477*

#### Brief Summary

The United States Court of Appeals for the Third Circuit, applying Pennsylvania law, affirmed the summary judgment that the district court granted in defendants' favor on plaintiff's alleged legal malpractice claim, which arose out of an underlying action involving fraud claims. The court held plaintiff failed to show he would have prevailed but for the defendants' alleged negligence.

#### Complete Summary

Plaintiff alleged a legal malpractice claim based on defendants' representation of him in an underlying action involving fraud claims. The defendants in the underlying action moved for summary judgment. In a Rule 56(d) supplemental response opposing summary judgment, the defendants here asked the district court to defer ruling on the summary judgment motion so that an audit of the underlying defendants' businesses could be conducted to obtain financial documents. Although defendants had previously requested these documents, the underlying defendants claimed they did not have them in their possession. Defendants never filed a motion to compel production of the documents or attempted to issue subpoenas to obtain the documents from the companies themselves. The district court in the underlying litigation then rejected defendants' request to conduct the audit, finding plaintiff failed to demonstrate that the underlying defendants had custody or control of documents and that plaintiff's "lack of diligence in seeking this discovery before the eleventh hour of this litigation doomed the request."

Plaintiff then commenced the legal malpractice action against defendants, who ultimately filed a summary judgment motion, arguing that plaintiff had failed to establish an actual loss. In other words, plaintiff failed to demonstrate he would have prevailed on his alleged claims in the underlying action.

The court explained that under Pennsylvania law, to prevail on a legal malpractice claim, a plaintiff must prove three elements: (1) the attorney owed the plaintiff a duty; (2) the attorney failed to exercise ordinary skill and

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knowledge; and (3) the plaintiff suffered actual loss as a result of the attorney's negligence. *Kituskie v. Corbman*, 714 A.2d 1027, 1030 (Pa. 1998). Regarding the third element, courts have stated a plaintiff must "establish by a preponderance of the evidence that he would have recovered a judgment in the underlying action." *Id.* "It is only after the plaintiff proves he would have recovered a judgment in the underlying action that the plaintiff can then proceed with proof that the attorney he engaged to prosecute or defend the underlying action was negligent" and that such "negligence was the proximate cause of the plaintiff's loss." *Id.*

The evidence plaintiff set forth to show they would have succeeded in the underlying action included: (1) defendants should have timely moved to compel the underlying defendants to produce financial records, (2) defendants should have presented certain wire records that showed plaintiff's funds were not immediately deposited in the correct account, (3) the failure of the underlying defendants to appear in a separate Colombian proceeding created an implied confession they had the documents, and (4) plaintiff's expert witness testified plaintiff "could have won" his case.

The court affirmed summary judgment for defendants and held that plaintiff failed to show that prevailing on the motion to produce financial records or presenting the wire records would have resulted in plaintiff succeeding on his fraud claim. Regarding the Colombian proceedings, the court noted that plaintiff was unable to definitively show that the relevant documents actually existed. Finally, the court noted the plaintiff's expert only stated that plaintiff "could have won," and not that he would have in fact, prevailed in the underlying action. Accordingly, the court held the totality of plaintiff's evidence did not raise a genuine dispute of material fact concerning whether he would have prevailed in the underlying action, and summary judgment was thus warranted.

## Significance of Decision

This decision (applying Pennsylvania law) once again demonstrates that a plaintiff in a legal malpractice action must establish that, but for the defendant's alleged negligence, he or she would have prevailed in the prosecution (or defense) in the underlying litigation.