



## Alerts

### Negligent Misrepresentation Does Not Apply to Prospective Client's Negligence Lawsuit

May 26, 2011

*Lawyers for the Profession® Alert*

*Allen v. Steele*, \_\_ P.3d \_\_\_, 2011 WL 175 8788 (Colo. May 9, 2011)

#### Brief Summary

The Supreme Court of Colorado held that a non-client's civil lawsuit for injuries sustained in an auto accident was not a "business transaction," as required to support a claim against an attorney for negligent misrepresentation.

#### Complete Summary

A driver was injured in an accident, and he and his wife allegedly met with an attorney to discuss filing a negligence suit against the other driver. Plaintiffs claimed that the lawyer told them that their claims were subject to a five-year statute of limitations, that a three-year statute actually time-barred their action, and that they consequently missed the filing deadline. They sued the attorney and her firm, asserting claims for legal malpractice and negligent misrepresentation.

The district court dismissed the legal malpractice claim, finding that plaintiffs had not alleged sufficient facts to establish an attorney-client relationship with the attorney. The court dismissed the negligent misrepresentation claim because plaintiffs had not alleged the "special circumstances" that were present in *Mehaffy, Rider, Windholz and Wilson v. Central Bank Denver*, 892 P.2d 230 (Colo. 1995), in which attorneys had prepared opinion letters to induce a third party's participation in a business transaction, at the direction of the lawyer's client.

The court of appeals reversed the dismissal of the negligent misrepresentation claim. The Supreme Court of Colorado granted the lawyer's petition for *certiorari* to decide the narrow issue of whether a nonclient may state a claim of negligent misrepresentation against an attorney for providing incorrect information during a consultation about a potential civil lawsuit.

Initially, the Court noted that where non-clients are concerned, an attorney's liability is generally limited to a narrow set of circumstances in which he or she has committed fraud or a malicious or tortious act, including negligent misrepresentation. An attorney may be liable to a non-client for negligent

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misrepresentation, which is defined according to Section 552 of the Restatement (Second) of Torts (1977). The elements of a claim of negligent misrepresentation are: (1) one in the course of his or her business, profession or employment; (2) makes a misrepresentation of material fact, without reasonable care; (3) for the guidance of others in their business transactions; (4) with knowledge that his or her representations will be relied upon by the injured party; and (5) the injured party justifiably relied on the misrepresentation to his or her detriment. The most common form of negligent misrepresentation against a lawyer arises when an attorney provides a written opinion to a third party at the request of the lawyer's client, in order to close a "variety of commercial transactions."

The Court then addressed the issue of whether a misrepresentation made to a non-client about a potential civil lawsuit can satisfy the element of "for the guidance of others in their business transactions." The Court noted that that element is an essential one of the tort of negligent misrepresentation. The comments to Section 552 discuss liability in terms of "commercial transactions." Further, common usage supports the Restatement's explanation that a business transaction is a commercial transaction. Other states that define negligent misrepresentation according to Section 552 have limited the claims strictly to cases involving business transactions, which they define synonymously with "commercial transactions."

In analyzing the meaning of a "business transaction" in a different context, the Court stated that the Colorado Rules of Professional Conduct prevent an attorney from entering "into a *business transaction* with a client." Colo. R. Prof'l Conduct 1.8(a) (emphasis in original). If a "business transaction" was viewed so broadly as to encompass a lawsuit against another party, then attorneys could not assist their clients in lawsuits. This would render meaningless the prohibition in Colo. R. Prof'l Conduct Rule 1.8 against lawyers entering into business transactions with the clients. The Court concluded that a "business transaction" in the context of negligent misrepresentation means exactly what common understanding of the term implies: the misrepresentation must be given for the plaintiff's business or commercial purposes. Although a negligence claim has the potential to affect indirectly a nonclient's financial or economic interests, a civil lawsuit does not involve a business or commercial relationship or transaction. Consequently, the Court held as a matter of law that an initial consultation to discuss a potential lawsuit is insufficient to meet the element of "guidance of others in their business transactions."

The Court next addressed whether Section 15(1)(c) of the Restatement (Third) of the Law Governing Lawyers, which only addresses the basis of liability for legal malpractice, may also provide the basis of liability for negligent misrepresentation. The Court stated that Section 15(1)(c) imposes liability for malpractice in the absence of an attorney-client relationship, which contravenes Colorado law. The Court thus held that it may not be used to support a claim of negligent misrepresentation. The Court held that even assuming that plaintiffs met with the lawyer in her office to discuss retaining her in their civil lawsuit, that was insufficient as a matter of law to prove that any misrepresentation was for their guidance in a business or commercial transaction.

### **Significance of Opinion**

The Supreme Court of Colorado was unwilling to expand the claim of negligent misrepresentation in order to circumvent the element of a legal malpractice claim which requires the formation of an attorney-client relationship. The alleged misrepresentations must be for the "guidance of others in their business transactions."

For more information, please contact [Terrence P. McAvoy](#) or your regular [Hinshaw](#) attorney.

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