



Alerts

Expert Declaration Containing Conclusory Assertions Not Sufficient to Sustain Legal Malpractice Action

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Lawyers for the Profession® Alert

Healy, etc., et al. v. Finz & Finz, P.C., ___ N.Y.S.2d ___, 2011 WL 750377 (N.Y. A.D. 2 Dept. Mar 1, 2011)

Brief Summary

The New York Appellate Division granted summary judgment to a law firm that was sued by its former clients in an action arising out of an underlying medical malpractice suit. Both the law firm and its former clients submitted expert declarations regarding whether any law firm could have proven proximate cause in the underlying medical malpractice suit. But the former clients' expert declaration merely contained a conclusory assertion that the law firm chose the wrong expert. The appellate court found that such a conclusory assertion was insufficient to sustain a legal malpractice action.

Complete Summary

A mother was pregnant with triplets, a girl and two boys. The girl had her own placenta; the boys shared a placenta. After one of the boys died *in utero*, the mother's physicians delayed the birth for as long as possible so that the remaining fetuses would gain more weight. The mother went into labor one and one-half weeks later. The girl was born healthy but the remaining twin boy was born with a form of cerebral palsy that was a result of sharing a placenta with his deceased brother.

Plaintiff former clients, the injured boy and his parents, hired defendant law firm to sue the mother's medical providers under a theory that the doctors should have immediately delivered the babies and that the failure to do so caused their surviving son's injury. The medical providers had the claims against them dismissed on the basis that the subject experts, in expert declarations submitted by the law firm, could not testify to when the surviving son's injury actually occurred.

The former clients then sued the law firm for legal malpractice. The law firm moved for summary judgment, submitting three expert declarations in which the experts opined that the baby's injury was caused by his twin brother's death *in utero*. The former clients asserted conclusorily via an expert declaration that the law firm had failed to find an appropriate medical expert in the medical malpractice action. The trial court denied the motion for summary judgment,

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which decision the law firm appealed. The case was on the eve of trial when the appellate court granted a stay of trial to hear the appeal.

The appellate court found that the former clients could not merely assert via an expert declaration that the law firm failed to find an appropriate medical expert when the law firm was able to show that it had, in fact, suitably selected experts. The law firm was able to show that it could not have proven proximate cause in the medical malpractice action, warranting the summary judgment.

Significance of Opinion

This matter presents an interesting “expert within an expert” case. Here, legal malpractice claims were dismissed because the law firm could not have been expected to find a medical expert who could, unequivocally, support the client’s theory. It also evidences a former client’s higher burden to present more than merely a conclusory allegation that a lawyer should have prevailed rather than that the attorney actually could have prevailed.

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