



## Alerts

### Non-Client Awarded Damages for Emotional Distress

May 20, 2014

*Lawyers for the Profession® Alert*

*Innes v. Marzano-Lesnevich v. Leibowitz*, 435 N.J.Super 198, 87 A.3d 775 (April 7, 2014)

#### Brief Summary

A New Jersey lawyer, who represented a wife in a contentious divorce, was sued by the husband for breaching an agreement by releasing his daughter's United States passport to her client. The mother used the passport to take the child and relocate her to Spain. The court denied the lawyer's motion for summary judgment, finding the circumstances sufficient to impose a duty, the predicate of which was the failure to inform counsel that her client believed the agreement to be unenforceable and would not abide by it. The court also upheld an award of emotional distress damages for the loss of child.

#### Complete Summary

In 2004, a husband and wife separated and their daughter resided with the mother. The husband and wife entered into an agreement that prevented either of the parties from traveling outside of the United States with the daughter without written permission of the other party. To that end, the daughter's passports (United States and Spanish) would be held by the mother's attorney. The daughter's Spanish passport was lost, and the mother planned on filing an application for a replacement. During this time, the mother discharged her former attorney and retained the defendant. The defendant then obtained the file from former counsel. The daughter's U.S. passport was in the file at that time, but was missing after the defendant met with the mother in December 2004. There was conflicting testimony regarding whether the defendant provided the mother with the passport or whether the mother took the passport without the defendant's knowledge. Regardless, it was revealed three months later that the daughter was living with her maternal grandparents in Spain, beyond the reach of the father.

The father subsequently filed a claim for legal malpractice against the defendant arguing that it released the daughter's passport in contravention of the agreement that provided the passport to be held by the defendant in trust during a custody dispute. The defendant then brought a third party complaint against the wife, the wife's prior attorney, and the husband's attorney. The third-party complaints were all dismissed and after a jury trial resulted in a judgment in favor of the husband, the defendant appealed.

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On appeal, the defendant argued that the trial court erred in denying motion for summary judgment, which argued that the lawyer did not owe the husband any duty or that defendant made any representations upon which the husband reasonably relied. Specifically, the defendant argued that because he made no affirmative representations to honor the agreement, imposing a duty to maintain possession of the daughter's passport was unreasonable. The defendant further maintained that the agreement had been repudiated.

In affirming the lower court's decision, the New Jersey Superior Court held that it was entirely foreseeable that the wife's possession of the daughter's passport would facilitate her ability to move from the country. While a lawyer typically does not owe a duty of care to non-clients, an attorney may owe a fiduciary duty to persons, though not strictly clients, which the attorney knows or reasonably should know relied on the attorney's professional capacity. The court further held that if the defendant was unwilling to abide by the agreement, then it should have advised the husband's attorney and the wife's former attorney. Giving the passport to the wife was a breach of the defendant's duty, even if the agreement was believed to have been previously repudiated.

Also on appeal was whether the husband's claimed damages for emotional distress were recoverable. Defendant argued that it was improper to submit the issue to a jury because in a legal malpractice action, emotional distress damages cannot be awarded without medical evidence establishing substantial bodily injury or demonstrable "sequelae" proximately caused by the defendants' misconduct. The court ultimately concluded that the defendant's actions were "egregious" and "extraordinary." Despite knowledge of the agreement regarding the passports, the contentious nature of the parties' separation and the husband's reliance on the safekeeping of his daughter's passports, the defendant still breached the duty without notifying the husband's attorney and without seeking approval of the court. The court held that the defendant's conduct was sufficiently "egregious" and "extraordinary" to permit an award of emotional damages.

### **Significance of Opinion**

In general, an attorney cannot be liable for breaching a duty of care owed to a non-client. However, there are limited exceptions to the general rule. In addition, in rare cases and under limited circumstances, courts have allowed the recovery of damages for emotional distress in legal malpractice actions.

For more information, please contact [Terrence P. McAvoy](#) or [Katherine G. Schnake](#).

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