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New York Accepts Likely-To-Succeed Standard for Appeals In Underlying Cases

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Lawyers for the Profession® Alert

Grace v. Law, ___ N.E.3d ___, 2014 WL 53253632014, N.Y. Slip Op. 07089 (N. Y. Ct. App. October 21, 2014)

Brief Summary

In a case of first impression, the New York Court of Appeals accepted the likely-to-succeed standard governing the necessity of appealing the result in an underlying case allegedly reached after the attorney malpractice. In New York, "prior to commencing a legal malpractice action, a party who is likely to succeed on appeal of the underlying action should be required to press an appeal. However, if the client is not likely to succeed, he or she may bring a legal malpractice action without first pursuing an appeal of the underlying action."

Complete Summary

Plaintiff made an appointment with an ophthalmologist at the VA clinic that was cancelled by the doctor. About a year later, during a scheduled consultation with a different VA opthalmologist, plaintiff learned that had his neovascular glaucoma been diagnosed earlier, his resulting blindness might have been prevented.

Plaintiff retained Law Firm 1 to represent him in an administrative proceeding against the VA. After some delay in the proceeding, Law Firm 1 recommended that plaintiff hire Law Firm 2 to pursue a medical malpractice action, which was filed in January 2008. During the course of the suit, Law Firm 2 learned that the defendant doctor was not a VA employee, but rather an employee of a current client. As such, Law Firm 2 withdrew and Law Firm 1 took over prosecution of the medical malpractice action.

After plaintiff amended the complaint to name the doctor's employer, the defendant doctor and his employer moved to dismiss the claims as barred by the statute of limitations. The VA also moved for summary judgment because the doctor was not a VA employee. Both motions were granted.

Plaintiff then sued both firms for legal malpractice for failing to timely sue the doctor and his correct employer. The firms argued that because plaintiff had not appealed the dismissal of his medical malpractice action, he could not maintain the legal malpractice claim.

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Considering this issue of first impression, the New York Court of Appeals recognized that previous lower court decisions "generally stand for the proposition that an attorney should be given the opportunity to vindicate him or herself on appeal of an underlying action prior to being subjected to a legal malpractice suit." However, the court decided that there should be an exception to the general rule, pointing to decisions from Florida, Nevada, and Utah.

To apply the "likely to succeed" standard, courts analyze whether a client can commence a legal malpractice action without taking an appeal in the underlying action based upon the likelihood of success on that underlying appeal. The New York Court of Appeals analogized this to the case-within-a-case format.

Here, the court considered the merits of the appeal as if it were the appellate court in the underlying matter, just as a trial court would consider the merits of the underlying claim to fulfill the case-within-a-case requirement. It agreed with the lower court's determination that the defendants failed to establish that the plaintiff was likely to succeed on appeal.

Significance of Opinion

This decision is significant because for the first time the New York Court of Appeals considered and accepted the likely-to-succeed standard. This decision is likely to affect other courts faced with the same issue. As a result, more states may hold that a legal malpractice plaintiff's failure to appeal bars the legal malpractice action only where the plaintiff's appeal was likely to have succeeded. Based upon many decisions across the country, this issue of whether or not plaintiff would have prevailed in the appellate court in the underlying litigation should be a question of law for the trial court in the legal malpractice action.

For more information, please contact Terrence P. McAvoy or Noah D. Fiedler.

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