



Alerts

Legal Malpractice Action Time-Barred and Fraudulent Concealment Claim Rejected

May 7, 2015

Lawyers for the Profession® Alert

Carlson v. Fish, 2015 IL App (1st) 140526, ___ N.E.2d ___ (2013)

Brief Summary

An Illinois appellate court held that plaintiff's legal malpractice action was time-barred by the two-year statute of limitations (735 ILCS 5/13-214.3(b)) because plaintiff knew or reasonably should have known of his claimed damages and that they were wrongfully caused more than two years before he filed suit. The court also rejected plaintiff's fraudulent concealment argument because defendants told plaintiff he could work with other counsel, and plaintiff consulted other firms more than two years before filing suit.

Complete Summary

Plaintiff sued his former attorneys for legal malpractice arising out of their representation of plaintiff in an underlying dispute with his former partners in an options trading firm. The underlying dispute was resolved through mediation and resulted in a settlement agreement. Not long after, plaintiff came to believe his former partners may have defrauded him into accepting far less for his share of the firm than it was worth, and he began to investigate whether he could sue his former partners for fraud.

After the February 2008 mediation, plaintiff agreed to sell his interest in the trading firm for \$17.5 million. About six months later, plaintiff began communicating with defendants about his dissatisfaction with the settlement. Beginning in September 2008, plaintiff sent numerous email messages to defendants expressing his frustration and his belief that his former partners had defrauded him. Between September and November 13, 2008, plaintiff and defendants exchanged emails concerning: (1) plaintiff's anger and frustration over the settlement; (2) possible ways in which plaintiff could remedy the situation (such as suing his former partners for fraud); and (3) whether or not defendants would represent him in pursuing such remedies. In one of the emails, defendants stated to plaintiff in part: "You need to do what you feel is best for you, Bill. If you want to work with another lawyer, you should. No hard feelings." Plaintiff responded by suggesting that if defendants represented him, they might need co-counsel with experience in the areas, stating: "This may have helped us in Round 1."

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On November 19, 2008, as part of his ongoing investigation, plaintiff met with attorneys from another law firm, "DBR." Plaintiff alleged that during this meeting, he first learned of a possible legal malpractice claim against defendants. On November 18, 2010, just less than two years following his meeting with the DBR lawyers, plaintiff filed his legal malpractice action.

The trial court dismissed plaintiff's action on the basis that it was time-barred. Plaintiff argued that the trial court erred because he did not know he had a legal malpractice claim until the lawyers at DBR informed him of it. Alternatively, plaintiff asserted that defendants engaged in fraudulent concealment by failing to disclose that he might have a negligence claim against them, allowing him the five-year statute of limitation under 735 ILCS 5/13–215 (2012).

The appellate court affirmed. The court initially noted: "[t]he application of a statutes of limitations, especially in legal malpractice claims, can be tricky and technical, and, as this case shows, deadly to those who fail to adequately anticipate its possibility." Plaintiff admitted that beginning in September 2008, he suspected his former partners had procured the settlement through fraud. Plaintiff argued, however, that suspicion does not trigger the statute of limitations, and he did know "know or have reason to know" that he had been injured or that his injury had been wrongfully caused until November 19, 2008, when he met with attorneys from DBR. The court rejected plaintiff's argument and pointed out that plaintiff knew before November 19, 2008 that he had been wrongfully injured by his former partners. For example, in his affidavit, plaintiff stated that in September and October 2008, he began to "consider how [he] had been defrauded by his former partners" and by November 11, 2008, was "thinking about a fraud case" against them. The court found further support in the email exchange between plaintiff and defendants beginning in September 2008, in which plaintiff expressed his dissatisfaction with the results of the mediation and raised concerns that his former partners had engaged in fraud.

Plaintiff argued, however, that even if he knew or should have known before November 19, 2008 that he had been injured by his former partners, his legal malpractice claim was timely because he did not know until he met with the DBR lawyers that defendants were at least partly responsible for his injuries. Plaintiff argued that his knowledge that he had a fraud claim against his former partners did not mean that he also knew he had a separate legal malpractice claim. Plaintiff further argued he was not equipped to discern that his lawyers may have committed malpractice until he obtained independent legal advice from the DBR lawyers.

The appellate court disagreed because while investigating whether his former partners had engaged in fraud during mediation, plaintiff certainly could have tried to determine whether his attorneys were negligent. Indeed, that is what plaintiff eventually did — when he met with the DBR lawyers. The fact that plaintiff waited until November 19, 2008 to have that meeting does not mean that his cause of action accrued on that day. Further, the court noted that the emails showed that plaintiff was not happy with his attorneys' representation before his meeting at DBR.

The court stated:

More importantly, as stated already, knowledge that an injury has been wrongfully caused "does not mean knowledge of a specific defendant's negligent conduct or knowledge of the existence of a cause of action." ... [Plaintiff] knew that he had been wrongfully injured no later than November 13, 2008, and thus even though he may not yet have known that defendants' representation was partly responsible and that their conduct gave rise to a legal malpractice cause of action, the statute of limitations commenced because [plaintiff] did have knowledge that he was injured and that his injury was wrongfully caused. In short, [plaintiff's] identification of one wrongful cause of his injuries initiates his limitations period as to all other causes, particularly when, as here, he claims his partners engaged in fraud and the defendants failed to protect him from fraud, those claims are inseparable.

The court concluded that plaintiff's knowledge of a wrongful cause of his injury, even if he had only identified his former partners' fraud as that cause, rather than defendants' failure to protect him from that fraud, commenced the two-year statute of limitations. Because that date occurred before November 18, 2008, plaintiff's action was time-barred.

Plaintiff also argued that defendants fraudulently concealed that their own legal malpractice may have contributed to his injuries, triggering a five-year statute of limitations under 735 ILCS 5/13–215 (2012). Plaintiff asserted that instead of advising him that he might have a claim of legal malpractice against them, defendants reassured him that the settlement was good under the circumstances. The court noted that plaintiff's reliance on *DeLuna v. Burciaga*, 223 Ill.2d 49, 76 (2006) for the proposition that defendants had a duty to affirmatively advise him to pursue a legal malpractice action against them



was misplaced. Plaintiff failed to cite a case holding that a lawyer has an affirmative obligation to advise a client to sue the attorney for legal malpractice. The court also rejected plaintiff's claim that he was "lulled" by defendants into thinking that his only option was a fraud case against his former partners. Plaintiff consulted with three law firms, two mediation firms, and an accounting firm between September and November 2008, and defendants advised plaintiff that if he wanted to work with another lawyer, he should.

Significance of Opinion

This case is significant because the appellate court held that plaintiff's legal malpractice was time-barred, as a matter of law, because plaintiff knew that he was injured and knew or reasonably should have known that his injuries were wrongfully caused more than two years before he filed suit. In doing so, the court relied, in part, on plaintiff's knowledge that the "wrongful cause" was that of his former partners. The court also rejected plaintiff's fraudulent concealment argument, based in part on: (1) no Illinois cases which hold that a lawyer has an affirmative duty to advise a client he committed malpractice, and (2) defendant advised plaintiff that he could work with other counsel.

For more information, please contact [Terrence P. McAvoy](#).

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