



## Alerts

### Illinois Legal Malpractice Action Barred By Res Judicata and Rule Against Claim-Splitting

August 27, 2015

*Lawyers for the Profession® Alert*

*Cohen v. Deutschman*, 2015 IL App (1st) 132767-U, \_\_\_ N.E.2d \_\_\_ (2015)  
Rule 23 Order

#### Brief Summary

In a Rule 23 Order, an Illinois appellate court held that *res judicata* barred the plaintiff's legal malpractice suit against a plaintiff's subsequent counsel. Plaintiff's claim also violated Illinois' rule against claim-splitting.

#### Complete Summary

On June 6, 2005, Cynthia Rossetti ("Rossetti" or "plaintiff") underwent a surgery to treat urinary incontinence by the insertion of a sling. Dr. Salus performed the procedure at a clinic. During the next year and a half, Rossetti returned to the clinic complaining of infections. She was treated, but the infections returned. The clinic eventually referred Rossetti to a urologist. On October 25, 2007, Dr. Lewis attempted to surgically remove the sling, but determined the sling had migrated and perforated Rossetti's bladder, and a more complex procedure was required. Rossetti underwent two more procedures to remove the sling.

In January 2008, Rossetti consulted an attorney, MacFarlane, who allegedly agreed to assist Rossetti in pursuing a medical malpractice claim. She advised Rossetti there was time left to file and to contact her after the follow-up surgeries. In June 2009, Rossetti met with MacFarlane and another attorney. The other attorney opined the four-year statute of repose applicable to medical malpractice claims may have expired. MacFarlane disagreed, however, asserting that under the discovery rule, the time for filing would not expire until October 2009, two years after the surgery performed by Dr. Lewis. Within the week, MacFarlane advised Rossetti to consult with another attorney.

Within one month, Rossetti consulted defendants in this case. On July 1, 2009, Rossetti mailed a signed retainer agreement and her medical records to defendants authorizing them to pursue a legal malpractice claim against MacFarlane. On February 5, 2012, defendants filed on Rossetti's behalf a legal malpractice action against MacFarlane in Cook County, but venue was transferred to McHenry County. Rossetti alleged that MacFarlane was negligent in failing to timely file her medical malpractice claim. After Rossetti filed for bankruptcy, the defendants were appointed to pursue the legal malpractice action on behalf the bankruptcy estate.

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On February 7, 2012, MacFarlane filed a third-party complaint for contribution against defendants. MacFarlane alleged that based on the opinions of the medical and legal experts retained by the defendants, Rossetti had a viable medical malpractice claim against the clinic until the limitations period expired on October 25, 2009. Defendants were granted leave to withdraw as plaintiff's counsel, and the trustee retained new counsel to pursue the legal malpractice claim against MacFarlane. MacFarlane then filed a motion for summary judgment, arguing that because Rossetti's medical malpractice claim was still viable when she was discharged as Rossetti's attorney and defendants undertook to represent Rossetti, defendants' representation was a superseding cause that defeated MacFarlane's liability.

Defendants also filed a summary judgment motion as to MacFarlane's third-party complaint. Defendants asserted that contribution was not allowed because the underlying cause of action in the legal malpractice action they filed was Dr. Salus' negligence during the June 6, 2005 surgery, whereas the third-party contribution claim was based on negligence committed by the clinic in the follow-up care of Rossetti, which they maintained was a different cause of action. In other words, it was not the "same injury in tort" for contribution. Defendants also argued that Rossetti's medical malpractice claim was time-barred by the four year statute of repose prior to the time she retained defendants.

On November 5, 2012, the trial court in McHenry County granted MacFarlane's motion for summary judgment. The court concluded defendants' negligence as subsequent counsel, "if any," was an intervening cause. Because the trial court granted MacFarlane's motion, it found the third-party claim for contribution to be moot.

On October 26, 2012, while the summary judgment motions were pending, the trustee filed a legal malpractice against defendants in Cook County, alleging they were negligent in failing to properly investigate Rossetti's medical negligence claims, which would have revealed her claims of medical malpractice and product liability against the manufacturer of the sling were viable until late October 2009. The Trustee alleged defendants were negligent in failing to timely file her underlying claims.

Defendants moved for summary judgment on the grounds that *res judicata* and the rule against claim-splitting barred the trustee from pursuing the legal malpractice case against them. The trial court in Cook County granted defendants' motion for summary judgment, and the trustee appealed. The appellate court affirmed. The court noted the application of the doctrine of *res judicata* requires that there be: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) identical parties or their privies in both actions. Where established, *res judicata* bars all matters that were offered to sustain or defeat the claim, as well as to any and all other matters which may have or could have been offered for that purpose. The trustee argued that the only final judgment on the merits was rendered as to MacFarlane in the McHenry County case. MacFarlane's third-party contribution claim against defendants was dismissed as moot, and it thus did not constitute a final judgment on the merits.

The court held that for *res judicata* to apply there is no requirement that a judgment on the merits be rendered as to all the claims raised or those that could have been raised. The court concluded that here, *res judicata* served to promote judicial economy by preventing repetitive litigation. The court concluded the order granting summary judgment to MacFarlane constituted a final judgment on the merits as to both the trustee's complaint against her and her third-party complaint. The trustee argued the causes of action in the two legal malpractice complaints were not identical because the necessary facts and times of the alleged wrongdoing were vastly different. The court found there was only one cause of action: legal malpractice for failure to file a medical malpractice claim against Dr. Salus and/or the clinic.

The court noted that to avoid *res judicata*, the trustee was required to amend the MacFarlane complaint to add the defendants, rather than file a new complaint. The court also held that considerations of equity and fundamental fairness did not bar the application of *res judicata*. Finally, the court rejected the trustee's argument that the filing of the case against defendants did not constitute claim-splitting.

### Significance of Opinion

This case is significant because the appellate court held that plaintiff's legal malpractice claim against subsequent counsel was barred by *res judicata*, although there was never technically an adjudication "on the merits." This case underscores the importance of litigating all possible claims in one case, if possible.



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

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