07

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WHICH LAWYER WAS RESPONSIBLE?

Analyzing When the Negligence of a Succeeding Attorney on a Matter Can Be Said to Absolve the Former Attorney's Malpractice

When legal malpractice is alleged, it is not uncommon for such claims to arise in circumstances where more than one set of attorneys has represented the alleged victim of the malpractice. Where this has happened, assuming malpractice has, in fact, occurred, a question will arise as to whether one or both of the lawyers involved in the representation should be held responsible, in whole or in part. An argument that can sometimes be made by successor counsel is that injury caused by the malpractice had occurred before successor counsel became involved. Thus, the predecessor counsel should be held liable for the loss in its entirety, and nothing successor counsel did or failed to do afterwards caused or contributed to it. Conversely, an argument can sometimes be made by predecessor counsel that the conduct of the successor counsel was also negligent, and not just intervening negligence, but a "superseding intervening cause" of the injury/loss, such that any negligence on the part of the predecessor counsel cannot be considered a proximate cause of the client's loss – in effect wiping it off the ledger.

While it may be the case that what the first lawyer did or didn't do bears no relationship to what the second lawyer did or didn't do, it is not atypical for the roots of the malpractice to have formed during the course of the first lawyer's involvement. The question is, when does the conduct of the second lawyer merely contribute to the legal malpractice, and when does it constitute a superseding intervening cause such that the first lawyer is taken off the hook and all liability rests with the successor attorney?

I. What is a Superseding Intervening Cause?

The issue of whether negligence constitutes a superseding intervening cause is one that often arises in personal injury litigation. As an example, an individual leaves his car at a garage to be repaired, and a mechanic at the garage leaves the car parked on the street, with the keys in the ignition. The car is then stolen, and while driving the stolen vehicle, the thief runs through a stop sign and hits a woman crossing the street, causing her injuries. To the extent the woman was to sue the garage for her injuries, the courts would in all likelihood find that while the garage's employee was clearly negligent, the intervention of the thief and his reckless driving of the stolen vehicle was a superseding intervening cause of the loss. Conversely, if a person drives a car recklessly, and in so doing causes an accident leading to personal injuries, and subsequently the emergency medical technician ("EMT") who arrives on the scene mishandles the care of an injured individual, the likelihood is that the negligence of the EMT is not going to be seen as a superseding intervening cause of the injuries suffered by the victim of the car accident. Why? What is the differentiator between an intervening cause that contributes to a loss and a superseding intervening cause that absolves the original negligent actor of liability to the victim? The answer lies in a determination of whether the second intervening act was reasonably foreseeable.

In the first scenario, the fact that leaving car keys in the car's ignition on the street might result in the car being stolen is clearly foreseeable. But it is not foreseeable that the driver of the stolen car would necessarily drive recklessly and as a result injure a pedestrian as a result of the keys being left in the ignition. In the second scenario, not only is it reasonably foreseeable that if you are driving recklessly you might injure someone, but it is also foreseeable that during the course of rushed efforts to provide emergency treatment to the individual injured by your reckless driving, the treatment might be delivered negligently, causing further harm.

Guidance in understanding where to draw the line between something being merely an intervening cause of a loss and something being a superseding intervening cause of a loss can be drawn from the Restatement (Second) of Torts. Section 447 of the Restatement provides that a subsequent actor will not be a superseding cause if the original actor at the time of his negligence "should have realized that a third person might so act," if a reasonable person would not regard the subsequent actor's conduct as "highly extraordinary," or if the intervening act was a "normal consequence of a situation created by the actor's conduct and the manner in which it was done is not extraordinarily negligent." The Restatement (Second) of Torts § 452 provides further that "the failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is [also] not a superseding cause," except where the duty to prevent harm is found to have "shifted" from the actor to the third person by passage of time or otherwise.

II. Superseding Intervening Cause and Legal Malpractice

How does this apply in the context of legal malpractice? One way it can often arise is where a lawyer takes on a client, fails to timely bring suit or file a claim or notice of claim against the correct party for a substantial period of time, and then is replaced by a second lawyer who also fails to timely act to protect the client's rights. Another way it could arise is, for example, in the context of a patent application. The first lawyer fails to properly file the application, but in theory the application could be amended or an appeal of the denial of the application could be pursued, but the second lawyer either fails to file the amended application, or botches the appeal. Who is responsible? The first lawyer? The second? Both in some part? The issue will turn on foreseeability of the second lawyer's negligence. Consider this Scenario #1:

Firm A represents a client in a personal injury action

("PI client") against an owner of a property arising from a slip and fall on the property. During this representation, Firm A fails to identify the correct parties at the commencement of an action. Three months prior to the expiration of the applicable statute of limitations, the PI client terminates Firm A and retains Firm B to prosecute the action. During this time, if Firm B identifies additional parties, it could commence a claim against them without leave of court. Firm B fails to identify those additional parties prior to the expiration of the statute of limitations, and the claims are ultimately dismissed.

Compared with this Scenario #2:

Firm A represents a client in a personal injury action ("PI client") against an owner of a property arising from a slip and fall on the property. Because it is a municipal agency, as a prerequisite to commencing such action in court, one of the potential parties must be served with a Notice of Claim within ninety (90) days of the accident. Failure to do so may be remedied only by application to the Court for permission to serve a late Notice of Claim, which may be granted at the Court's discretion, and in no event can such application be made more than one year after the expiration of time to serve a Notice of Claim (as this is the statute of limitations for any such claim against this municipal entity).

During this representation, Firm A fails to identify the correct parties at the commencement of an action and the 90-day period to serve a Notice of Claim lapses. Nine months after the accident, PI client terminates Firm A and retains Firm B to prosecute the action. During this time, if Firm B identifies the proper party, it can only commence a claim against them with leave of court, which is not guaranteed. Firm B ultimately fails to identify the proper party until after the time that an application for leave may be requested and the claims are ultimately dismissed.

In the first scenario, the court would likely rule that the original law firm, Firm A, is off the hook, and can't be found liable for the loss of the client's rights to pursue his claims due to the passage of the statute of limitations. The reason is that, while it was arguably not good practice forthe law firm not to immediately take the necessary steps to preserve and protect the client's rights, and instead allowing several years to pass without doing so, the second lawyer had plenty of time to address the situation and there should have been every expectation that a reasonable lawyer in the circumstances, upon accepting the retention, would have investigated the available claims, identified the parties against whom such claims could be made, and researched the statute of limitations for pursuing such claims.

In the second situation, conversely, Firm A should still be responsible. This is because in that circumstance the legal rights had already been lost, and at best the failure of Firm B to pursue timely actions designed to recapture the lost legal right can be foreseen. Moreover, the fact that it remains an uncertainty whether any action of Firm B at any time could have reinstated the lost legal right makes the argument that the conduct of Firm B was a superseding intervening cause of the loss fatally speculative.

In *Meiners v. Fortson & White*, the Court of Appeals of Georgia addressed the issue of whether substitution of new counsel who negligently fails to cure the negligence of the first counsel (after being specifically apprised of the need to cure such negligence and with six months remaining to do so) absolves the first counsel of liability due to the superseding failure to cure.[1] The Georgia Court, relying on the concept of foreseeability, found that in such circumstances the second counsel's negligence cut off the first counsel's liability as failure to cure after receiving notice was not foreseeable.[2] The California Supreme Court has similarly held that "[a]n attorney cannot be held liable for failing to file an action prior to the expiration of the statute of limitations if he ceased to represent the client and was replaced by other counsel before the statute ran on the client's action."[3] New York is, typically, no different.[4] These principles hold true even if successor counsel is not specifically apprised of the need to cure.

Applying this law to Scenario #1, it appears rather clear on the facts presented that Firm B's failure to timely commence an action against the proper party would constitute an intervening and superseding cause. Under Scenario #2, it is a little less clear. The distinctions between Scenario #1 and Scenario #2 arise from the "Notice of Claim" prerequisite. Prior to the expiration of the 90-day period, PI client has

an infallible legal right to commence an action. Once the 90-day period elapses without serving of such notice, PI client no longer has a legal right to bring a claim. Rather, PI client only has an outlet to potentially, but not certainly, reverse the forfeiture of the legal right. And finally, once the limitations period of one year and ninety days elapses, PI client loses all hope at reviving the right to assert a claim.

So in Scenario #2, can the succeeding attorney be a superseding intervening cause? If the succeeding counsel has six months to not cure, but ***attempt to cure*** by application to the court for leave, is a failure to identify the need to cure and bring such application a superseding intervening cause? How the courts will rule on this issue likely turns on the timing of the forfeiture of a legal right, and a line of cases in New York provides some guidance.

In *Glamm v. Allen*, the New York Court of Appeals tackled the issue of when a legal malpractice claim accrued for failure to timely file a Notice of Claim and failure to seek leave to file a late Notice of Claim. Specifically, the Court noted that it was "pure speculation as to whether or not the court would have allowed [the attorney] to file a late notice," and therefore held that *a claim for malpractice arises at the expiration of the 90-day period within which to file the Notice of Claim*.[5] In other words, under *Glamm*, no claim accrues from a purported failure to make an application for leave to cure a failure to timely serve a Notice of Claim. The point at which the legal right is lost is the triggering event.[6] Although *Glamm* did not address predecessor counsel versus successor counsel, the New York Appellate Division did.

In *Grant v. LaTrace*, the New York Appellate Division denied a predecessor counsel's motion to dismiss on the grounds of superseding intervening cause because the successor counsel could not have cured the predecessor's negligence as of right. Specifically, the Court held:

> [H]ere, the [successor counsel] **could not have moved as of right to remedy defects in service alleged**. The Supreme Court would have had to exercise its discretion in the underlying action to extend the time to serve process (see CPLR 306-b, CPLR 2004), andit is pure speculation as to whether the court would have permitted such late service.[7]

Thus, under this line of cases, the successor firm in Scenario #2 would not be a superseding intervening cause, and the predecessor counsel cannot be absolved of their liability where they represented the PI client at the time a legal right was forfeited.

Notably, while a motion to remedy a right lost dependent upon the exercise of discretion by the court and not definitive legal principles appears comparable to an appeal, the two are distinguished. Appeals are *typically* made upon what can only be described as judicial error (i.e. mistake of law or mistake of fact). In these scenarios, an objective court can determine definitively whether an appeal would have been successful or not. Thus, a legal malpractice action against an attorney for failing to pursue an appeal may exist if it can be shown that the appeal was "likely to succeed," a standard adopted by many states including New York in 2014 in the matter of *Grace v. Law*.[8] Conversely, a motion asking the court for leave to remedy a lost right involves ***no judicial error*** and only the error of the party who allowed the right to be lost in the first instance. Additionally, many jurisdictions, including the District of Columbia,[9] Colorado,[10] Utah,[11]and North Carolina,[12] just to name a few, have expressly held that a successor counsel owes no duty to the client to take action that would lessen the damages resulting from the prior counsel's negligence, and is further not liable for contribution to the prior counsel.

This line of reasoning is consistent with the principle that a predecessor counsel is not entitled to be absolved of liability simply by the termination of their representation and retention of successor counsel.[13]

Notably, the above analysis does not even begin to broach the fact that an attorney's duty of care is not limited to filing a timely action. Professionals in our field owe a duty in the profession to exercise such care, skill, prudence, diligence, etc. as is commonly possessed by an ordinary member of the profession.[14] The New Jersey Appellate Division has expressly held that a lawyer's duty goes beyond timely commencement of an action, but also "dictated that he take ordinary precautions to protect his clients' interest,"

"not delay filing suit until the eleventh hour," and "inform his clients of his failure to act (for whatever cause) at a time sufficiently prior to the running of the statute of limitations to permit plaintiffs to engage another attorney who could then take proper action on their behalf."[15]

So here, the question then becomes whether Firm A owes a duty to the PI client and Firm B to inform each of the failure to timely file a notice of claim. And, if so, does ignorance actually mean bliss? Can Firm A justify being absolved of liability if they did not actually know that they blew a deadline, but should have known and thus informed the PI client and Firm B of the missed deadline?

In view of the relevant case law, it seems that predecessor counsels will not successfully be absolved of liability by retention of a successor counsel in circumstances where a legal right was forfeited against at least one party (causing the alleged damages) during the time of predecessor counsel's representation, even if a successor counsel had an opportunity to attempt to rectify the shortfalls of prior counsel. Thus, plaintiffs' counsels handling matters that tend to require prerequisites prior to the expiration of the statute of limitations should be mindful of potential deadlines and exercise the utmost diligence to ensure that all required parties are in the action or on notice of a claim prior to the expiration of the first time limitation, even when the statute of limitations has not yet elapsed. Moreover, while being terminated as counsel may leave you with a bad taste in your mouth, it does not eliminate your obligation to exercise care, skill, prudence, and diligence in transferring the file, which may include a duty to apprise successor counsel of potential issues.

End Notes

[1] Meiners v. Fortson & White, 210 Ga.App. 612 (1993)

[2] Id.

[3] Steketee v. Lintz, Williams & Rothberg, 38 Cal. 3d 46, 57, 694 P.2d 1153, 1159 (1985)

[4] See, e.g., Pyne v. Block & Associates, 305 A.D.2d 213 (N.Y. App. Div. 2003); Alden v. Brindisi, Murad, Brindisi, Pearlman, Julian, Pertz (People's Lawyer), 91 A.D.3d 1311 (N.Y. App. Div. 2012) (finding no superseding and intervening cause where prior counsel afforded the client and successor counsel "sufficient time and opportunity to adequately protect plaintiff's rights")

[5] Glamm v. Allen, 57 N.Y.2d 87, n. 2 (1982)

[6] Id.

[7] Grant v. LaTrace, 119 A.D.3d 646, 647 (N.Y. App. Div. 2014) (emphasis added) (citing generally Glamm, 57 N.Y.2d 87; Lanoce v. Anderson, Banks, Curran & Donoghue, 259 A.D.2d 965 (N.Y. App. Div. 1999))

[8] Grace v. Law, 24 N.Y.3d 203 (2014)

[9] Waldman v. Levine, 544 A.2d 683, 693 (D.C. 1988)

[10] Stone v. Satriana, 41 P.3d 705, 712 (Colo. 2002) (holding "there is no legal duty for a legal malpractice plaintiff's counsel to ameliorate the injury effected by predecessor counsel")

[11] Hughes v. Housley, 599 P.2d 1250, 1254 (Utah 1979) (holding "no duty should be imposed on succeeding legal counsel in favor of a preceding counsel")

[12] Shealy v. Lunsford, 355 F. Supp. 2d 820, 827-28 (M.D.N.C. 2005) (holding that "where an injury is already complete, such as through the granting of a final default judgment, it cannot be that subsequent actions by the successor attorney that did not increase the amount of the final judgment against the client, "unite[d] in causing a single injury")

[13] See, e.g., Cline v. Watkins, 66 Cal. App. 3d 174, 180 (Ct. App. 1977) (holding that the retention of new counsel is not so "exceptional" so as to warrant a shifting of the duty to prevent harm).

[14] See, e.g., Cummings v. Donovan, 36 A.D.3d 648 (N.Y. App. Div. 2007); Lucas v. Hamm, 56 Cal. 2d 583, 591 (1961)

[15] Passanante v. Yormark, 138 N.J. Super. 233, 239 (App. Div. 1975)

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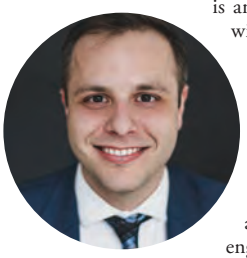

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