

1 Trial Handbook for Illinois Lawyers - Civil § 22:29 (8th ed.)

Trial Handbook for Illinois Lawyers - Civil | September 2023 Update
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Chapter 22. The Burden of Proof and of Proving Specific Causes and Facts in Certain Cases

§ 22:29. Legal malpractice

Trial Strategy

Actions Against Attorneys for Professional Negligence, 14 Am. Jur. Trials 265

In any legal malpractice action, a plaintiff must plead the existence of a valid underlying cause of action. Four elements must be alleged and proven: (1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney, (2) a negligent act or omission that breached that duty, (3) proximate cause that establishes that but for the attorney's negligence plaintiff would not have suffered an injury, and (4) damages. Because a plaintiff must establish that but for the attorney's negligence he would have been successful in the underlying action, he is required to prove a case within a case, that is, establish a prima facie case in the underlying action, and then prove it, in order to prove the legal malpractice case. This is required because of the damages element of the action. No malpractice exists unless counsel's negligence has resulted in the loss of an underlying action. *Sheppard v. Krol*, 218 Ill. App. 3d 254, 161 Ill. Dec. 85, 578 N.E.2d 212 (1st Dist. 1991).

When an attorney's negligence is alleged to have occurred during the representation of a client in the underlying action, and the underlying action never reached trial because of that negligence, the plaintiff is required to prove counsel's negligence was the proximate cause that resulted in the loss of the underlying action. If the underlying action remained actionable following the discharge of the former attorney, then the plaintiff can prove no set of facts that connect the defendant's conduct with damages sustained as a result of the defendant's negligence. *Cedeno v. Gumbiner*, 347 Ill. App. 3d 169, 282 Ill. Dec. 600, 806 N.E.2d 1188 (1st Dist. 2004).

It is prima facie negligent conduct for an attorney to misadvise a client on a settled point of law that can be looked up by the means of ordinary research techniques. Where there are successive negligent actors, the negligence of the second actor, under certain circumstances, may be deemed a superseding cause, relieving the original negligent actor of liability, as a matter of law. A former client's consultation with a new attorney, regarding possible representation in a wrongful death suit, did not constitute a superseding cause that relieved the former law firm of liability in legal malpractice action for providing client with wrong information concerning the statute of limitations when the firm terminated its representation, where the new attorney did not undertake any representation of the client and had no duty to inform client of the exact amount of time remaining on the limitations period. *Lopez v. Clifford Law Offices, P.C.*, 362 Ill. App. 3d 969, 299 Ill. Dec. 53, 841 N.E.2d 465 (1st Dist. 2005).

The injury in a legal malpractice action is not a personal injury, nor is it the attorney's negligent act itself. Rather, it is a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission. The fact that an attorney may have breached his duty of care is not, in itself, sufficient to sustain the client's legal malpractice cause of action. Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately caused damage to the client. The existence of actual damages is therefore essential to a viable cause of action for legal malpractice. Where the alleged legal malpractice involves litigation, no actionable claim exists unless the attorney's

negligence resulted in the loss of an underlying cause of action. If an underlying action never reached trial because of the attorney's negligence, the plaintiff in a legal malpractice action is required to prove that, but for the attorney's negligence, the plaintiff would have been successful in that underlying action. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 305 Ill. Dec. 584, 856 N.E.2d 389 (2006).

In a legal malpractice action by a former wife against attorneys who represented her in a divorce action, the evidence was insufficient to establish that the former wife was damaged as a result of the attorneys' alleged failure to conduct proper discovery and to obtain an expert witness to value the former husband's interest in his law firm, where the attorney expert testifying for the attorneys stated that they did not breach their standard of care in not hiring such an expert, the former wife's expert admitted he had not reviewed the record of the divorce action, and the former wife failed to present any concrete evidence that she would have received more than the \$2.07 million in assets and the \$1,033,747 in a nonmodifiable maintenance that she agreed to accept in settlement of divorce action, after she terminated the attorneys and obtained substitute counsel, had she not settled out of court. *Weisman v. Schiller, Ducanto and Fleck, Ltd.*, 368 Ill. App. 3d 41, 306 Ill. Dec. 29, 856 N.E.2d 1124 (1st Dist. 2006).

A legal malpractice action filed before one plaintiff turned 18 and within six years of the date on which a second plaintiff reached the age of majority was timely filed as to those two plaintiffs but, unless some other tolling provision or exception applied, was untimely as to the remaining two plaintiffs, both of whom turned 18 more than six years before the action was filed. Fraudulent concealment is ground for tolling statutes of repose, including the statute of repose for legal malpractice. A fiduciary who is silent, and thus fails to fulfill his duty to disclose material facts concerning the existence of a cause of action, has fraudulently concealed that action, as would toll the statutes of limitations and repose, even without affirmative acts or representations. 735 ILCS 5/13-215; *DeLuna v. Burciaga*, 223 Ill. 2d 49, 306 Ill. Dec. 136, 857 N.E.2d 229 (2006).

Damages are not presumed in a legal malpractice case. The plaintiff bears the burden of proving that she suffered damages as a result of the attorney's negligence. In a legal malpractice action against the attorney who represented a minor's guardianship estate in the underlying medical malpractice action relating to injuries that the minor suffered at birth, which action alleged the attorney's failure to communicate to the guardian a \$1 million pretrial settlement offer by the defense in the underlying case, the estate was required to prove, for purposes of the proximate cause element of the legal malpractice claim, that in the underlying action the trial court would have approved the settlement on the minor's behalf. The failure of the attorney who represented the minor's guardianship estate in the underlying medical malpractice action relating to minor's injuries at birth, to inform the guardian of the \$1 million pretrial settlement offer before the attorney rejected the offer, was the proximate cause of the injury to the estate, as an element of the legal malpractice, because in the underlying action, the trial court would have approved of the pretrial settlement on the minor's behalf, where the settlement amount was adequate, in the light of weaknesses in the medical malpractice case, the adverse evidentiary rulings, the risk that the jury would find no medical malpractice, and the motivation of the minor's mother, which was "[n]ot the money" but rather to "go after the doctor so he couldn't do it to another baby." 755 ILCS 5/19-8. *First Nat. Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 313 Ill. Dec. 464, 872 N.E.2d 447 (1st Dist. 2007).

To establish proximate cause in a legal malpractice action the plaintiff must essentially prove a case within a case, which means that but for the attorney's negligence, the plaintiff would have prevailed in the underlying action. Sufficient evidence in a client's legal malpractice action against her attorneys and the law firm that represented her, in a slip-and-fall lawsuit against her landlord, supported the conclusion that the client would not have prevailed in the slip-and-fall lawsuit, so as to support the jury's verdict in favor of the attorneys and the law firm, where the client did not know whether the gutters on her apartment building were leaking at the spot where she slipped on ice, either before or on the day of the accident, and such ice could have formed as a result of natural accumulation. *Orzel v. Szewczyk*, 391 Ill. App. 3d 283, 330 Ill. Dec. 381, 908 N.E.2d 569 (1st Dist. 2009).

To prove the proximate cause element in a legal malpractice action, the client must demonstrate that but for the attorney's negligence, it would have succeeded in the underlying lawsuit, which requires that the client litigate a case within a case. *Magnetek, Inc. v. Kirkland and Ellis, LLP*, 2011 IL App (1st) 101067, 352 Ill. Dec. 720, 954 N.E.2d 803 (App. Ct. 1st Dist. 2011).

In a legal malpractice action, a client is not considered "injured," as would trigger an accrual of a claim, unless and until he has suffered a loss for which monetary damages may be sought. Where an attorney's negligence allegedly occurred during

the attorney's representation of a client in an underlying litigation, the injury does not accrue and the statute of limitations does not begin to run on a claim for legal malpractice until the judgment or settlement or dismissal of the underlying action. Merely hiring new counsel to defend against the lawsuit challenging the attorney's legal advice and incurring fees does not, standing alone, trigger a cause of action for malpractice and an accrual of the limitations period for an action. A client's payment of attorney fees to new counsel in an underlying action in which a vendor to the clients' business sued clients for a breach of fiduciary duty did not constitute an "injury" that would trigger the accrual of the clients' action against the prior attorney and law firm for legal malpractice. Even though, at same time the trial court voiced its opinion that the prior attorney's representation constituted malpractice. At the time of payment of fees to new counsel, an underlying action had not yet ended adversely to the clients. [735 ILCS 5/13-214.3\(b\)](#). [Suburban Real Estate Services, Inc. v. Carlson, 2022 IL 126935, 456 Ill. Dec. 779, 193 N.E.3d 1187 \(Ill. 2022\).](#)

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Footnotes

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