

# Attorney's Discharge Before Statute of Limitations Expired Severed Any Causal Connection in Malpractice Claim

Lawyers for the Profession® Alert | 4 min read

Aug 27, 2019

*Bush v. Eichholz et al., A19A1388 (Ga. Ct. App. Aug. 16, 2019)*

## Brief Summary

A personal injury client brought suit against its former law firm for legal malpractice. Because the client terminated the representation before the statute of limitations expired, however, the law firm's alleged negligence was not the proximate cause of plaintiff's loss.

## Complete Summary

In July 2014, the plaintiff retained the defendant law firm and one of its partners ("defendants") to represent him in a workers' compensation action and in connection with tort claims arising out of a workplace injury. Plaintiff was injured in the course of his employment as a longshoreman when a crane operator, a Georgia Ports Authority (GPA) employee, accidentally lifted a truck with plaintiff inside. After the truck was dropped to the ground, plaintiff fell from the truck and injured his back.

Defendants sent an *ante litem* notice, a prerequisite to filing suit, to the GPA notifying it of the injury and potential claim. Defendants then received a response, indicating that the GPA had received correspondence from defendants, but had investigated the incident and concluded there was no negligence. Because of this response, defendants determined they no longer wanted to represent plaintiff. Defendants' paralegal then called plaintiff and explained that defendants "would no longer represent him in connection with his prospective personal injury claim against the [GPA]." She also explained to plaintiff that his claim may be subject to a time limitation, and that he should seek alternative representation as soon as possible if he wished to pursue the claim. The paralegal then sent plaintiff a letter by certified mail, dated August 25, 2015, which indicated that defendants would continue to

represent plaintiff in the workers' compensation claim, but not with regard to his "date of loss." Plaintiff claimed he could not recall the conversation and never received the letter.

After becoming "dissatisfied with defendants," plaintiff consulted with another firm, Schneider Hammers, LLC ("Schneider"), on the same date defendants sent the termination letter. The conversation with Schneider concerned representing plaintiff in a workers' compensation claim and a tort action against the GPA. Schneider sent plaintiff a "new client package," containing two retainer agreements, one of which was for the tort claim against the GPA. Plaintiff signed the retainer agreement and returned it to Schneider. Around this time, plaintiff obtained a disk from defendants containing everything in plaintiff's file.

Later, the disk was lost, and plaintiff did not contact defendants for a replacement. In the meantime, plaintiff had sent documents to Schneider, who understood the documents plaintiff sent (which did not include the *ante litem* notice) comprised plaintiff's entire file. Because Schneider believed that an *ante litem* notice was not timely sent, Schneider elected not to pursue the tort claim. Plaintiff then consulted with other counsel in 2016, and he learned the statute of limitations had expired on his claim.

Plaintiff then filed suit against defendants, alleging that he "discharged [them] effective August 2015," but that they committed legal malpractice and fraud. Plaintiff also claimed defendants sent a defective *ante litem* notice and attacked defendants' use of television ads and billboards as "false and misleading" advertising. The trial court rejected these arguments and plaintiff appealed.

In addressing the plaintiff's legal malpractice claim, the appellate court first noted that because the *ante litem* notice was sufficient, any legal malpractice claim based on deficient notice failed. Plaintiff also argued defendants were negligent by preventing him from obtaining counsel to pursue his tort claim against the GPA. The court held, however, that the record established that plaintiff discharged defendants before the statute of limitations expired when he retained subsequent counsel, Schneider, and defendants were thus not the proximate cause of the loss of the tort claim against the GPA.

Plaintiff admitted he discharged defendants in August 2015 and retained Schneider for both the workers' compensation claim and the tort claim, nine months before the statute of limitations expired. Plaintiff argued defendants were not terminated as to the tort claim, but the court held the evidence in the record led to the conclusion that the termination was effective as to the tort claim. The court concluded that defendants' potential liability was severed as of the date of termination, which was before the statute of limitations expired.

Further, plaintiff argued defendants were negligent and caused his loss of the tort claim by failing to provide him with a copy of the *ante litem* notice and not explaining the significance of said notice to him. The court disagreed, however, and found that defendants could not be found negligent, because plaintiff lost the disk of case materials and failed to ask for another copy. The court noted it was not reasonably foreseeable that plaintiff would lose the disk and not contact defendants for a replacement, or that subsequent counsel would not verify whether or not the notice had been sent. Summary judgment in favor of defendants was affirmed on the basis that plaintiff could not establish that defendants' alleged negligence was a proximate cause of plaintiff's loss of the tort claim against the GPA.

# Significance of Decision

This decision is yet another case that supports the proposition that an intervening, superseding cause—such as the client’s retention of subsequent counsel when a claim is still viable, or a trial court’s error—may sever any causal connection between the initial attorney’s alleged negligence and the claimed loss. *See, e.g., Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill.App.3d 618 (2002) and *Rocha v. Rudd*, 826 F.3d 905 (7th Cir. 2016), where plaintiff’s legal malpractice action was dismissed because his claims were still viable when he discharged defendant and retained other counsel; and *Huang v. Brenson*, 2014 IL App (1st) 123231, where the trial court’s error in underlying case constitutes an intervening, superseding cause of plaintiff’s claimed damages.

*For more information contact Terrence P. McAvoy or Alyssa A. Johnson*

## Related People



**Terrence P. McAvoy**

Of Counsel

☎ 312-704-3281