

TOP STORY

Law Firm Not Liable to Adverse Party for Groundless Suit

By John M. McNichols – November 25, 2020

A lawyer who files suit solely to earn legal fees is not liable to the adverse party even if the suit is groundless. According to the [Supreme Court of Kentucky](#), a lawyer's desire to earn fees is not an improper purpose sufficient to sustain a claim for wrongful use of civil proceedings against an attorney who represented its adversary in a prior litigation. The high court also held that negligence claim would not lie because an attorney owes no duty of care to an adverse party. [ABA Section of Litigation](#) leaders view the decision in [Seiller Waterman, LLC v. RLB Properties](#) as consistent with existing legal principles and expect that other high courts will come to similar conclusions if presented with the same issue.

RLB's Suit Against Its Adversary's Counsel

The conflict began when RLB Properties engaged Skyshield Roof and Restoration to repair damage to a building that RLB owned in downtown Louisville. When one of RLB's tenants sued Skyshield for deficient repairs, Skyshield filed a third-party claim against RLB and a mechanic's lien against RLB's building, alleging outstanding charges for its repair work. RLB moved to dissolve the lien and counterclaimed against Skyshield, ultimately obtaining a \$3 million judgment plus attorney fees when Skyshield defaulted.

RLB thereafter sued Skyshield's law firm, Seiller Waterman LLC, and several of its attorneys for, among other things, wrongful use of civil proceedings, sometimes referred to as a malicious prosecution claim, and negligence. RLB alleged that both the lien and the third-party claim were baseless, and that the law firm filed them merely to advance its client's interest and obtain fees for itself. On the law firm's motion, the trial court dismissed all of the claims as either legally deficient or barred by the statute of limitations. In so holding, the trial court observed that RLB's claim for wrongful use of civil proceedings failed to allege an improper purpose, and that its negligence claim failed because, as an adversary in litigation, RLB was not in the class of non-clients to whom a lawyer owes a duty of care. The [Kentucky Court of Appeals](#) agreed with the legal deficiency analysis, but reversed the portion of the decision resting on statute of limitations.

Malice Required for Wrongful Use of Civil Proceedings Claim

Both the law firm and RLB petitioned the Supreme Court of Kentucky for review, and the high court reinstated the trial court's ruling in full. The Supreme Court held that the trial court properly dismissed RLB's claim for wrongful use of civil proceedings because RLB failed to allege an improper purpose. Citing both the Restatement of Torts and the Restatement of the Law Governing Lawyers, the court ruled that the law firm's desire for fees was not an "improper purpose," even if the firm had "act[ed] without probable cause to believe the client's claim will succeed." While the suit against RLB was eventually deemed meritless, the court concluded that a "lack of probable cause alone cannot support a legally sufficient inference that the attorney acted with an improper purpose," and that "[i]ndependent evidence of malice is required."

The Supreme Court of Kentucky also ruled that the trial court properly dismissed the negligence claim against Seiller Waterman because no duty of care flowed from the law firm to its client's adversary.

Caution Suggested When Considering Professional Negligence Suits

Section of Litigation leaders agree that caution should be exercised when counseling a client who wants to sue opposing counsel from prior litigation. Although a baseless lawsuit can be frustrating, parties still have recourse beyond filing suit. "If a client wants to sue the opposing counsel, I would remind them of the attorney's ethical duties and the possibility of sanctions. That avenue still exists, even if civil liability is out of reach," observes [Tiffany Rowe](#), Washington, D.C., cochair of the Section's [Professional Liability Subcommittee](#). Moreover, Section leaders note, the standard to bring a wrongful use of civil process action is high. To identify a sufficient motive, "you would have to see some kind of personal animosity as the driving force behind the litigation, like using the burden of litigation to punish someone, perhaps for pre-existing personal reasons," comments [Michael S. LeBoff](#), Newport Beach, CA, cochair of the Professional Liability Subcommittee.

Section leaders also agree with the high court's ruling that no duty flows from an attorney to their client's adversary. "This part of the opinion rests on the very basic idea that if you don't require a duty of care as an element of the claim, you will have essentially limitless liability," observes Rowe. Moreover, "if an adverse party could bring this claim, it would be a serious

imposition on an attorney's ability to provide zealous advocacy to her client," she adds. This does not mean, however, that attorneys never have duties to non-clients. "Attorneys may have duties to persons other than the client. It's just it's quite a stretch from there to say that you could have a duty of care to an adverse party, particularly in the litigation context where you are duty-bound to work against that party's interests," observes LeBoff.

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- Martha L. Kohlstrand, "[Conduct Underlying Malicious Prosecution Triggers Coverage](#)," *Litigation News* (Sept. 29, 2020).
- Kristen L. Burge, "[Framing Legal Malpractice as Negligence Saves Claims](#)," *Litigation News* (Dec. 12, 2018).

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