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THE PASCHOS LAW UPDATE NEWSLETTER

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I. EMPLOYMENT LAW

United States Supreme Court Holds Limitations Period for Constructive Discharge Claim Runs from Date of Resignation

In *Green v. Brennan*, 2016 U.S. LEXIS 3484 (U.S. May 23, 2016), Marvin Green, who is African American, was serving as postmaster general in Englewood, Colorado, in 2008 when he decided to apply for a similar post in Boulder. After he was turned down, he contacted a Postal Service counselor to investigate whether race played a factor.

Green filed a formal Equal Employment Opportunity complaint in August 2008, and thereafter, he claims, his supervisors began bullying and harassing him. In 2009, his superiors suspended him without pay after accusing him of intentionally delaying the mail. Green signed an agreement on Dec. 16, 2009, agreeing to leave the Postal Service in exchange for a promise the agency would not bring criminal charges against him. But he waited nearly two months to submit his resignation.

On March 22, 2009, Green contacted an EEO counselor to report unlawful constructive discharge, alleging his working environment had become so hostile that he was essentially forced to resign. Several months later, he filed a lawsuit in federal court. The court dismissed his constructive discharge claim, saying it was time-barred because Green did not contact an EEO counselor within 45 days of the last "matter alleged to be discriminatory" – namely, the signing of the agreement on December 16, 2009. After the Tenth Circuit Court of Appeals affirmed the lower court's decision, Green appealed.

On appeal to the U.S. Supreme Court, Green's lawyers argued that the clock for the 45-day filing deadline should have begun on the day Green resigned, not the day he signed the agreement. The Supreme Court agreed noting that in cases where an employee claims he has been fired for discriminatory reasons "the 'matter alleged to be discriminatory' includes the discharge itself and the 45-day limitations period begins running only after the employee is fired." In the case of Green and other federal employees, the Court said when an employee is claiming he was forced from his job due to intolerable conditions, "the 'matter alleged to be discriminatory' includes the employee's resignation, and the 45-day clock for a constructive discharge begins running only after the employee resigns" and not on the last day actually worked.

II. PROFESSIONAL LIABILITY LITIGATION

Attorneys Who Intentionally Breach a Fiduciary Duty May Owe Counsel Fees to a Nonclient

In *Innes v. Marzano-Lesnevich*, 2016 N.J. LEXIS 331 (N.J. Apr. 26, 2016), Plaintiff Peter Innes and his wife, Maria Jose Carrascosa, were involved in a contentious divorce and custody battle over their daughter Victoria. Innes is a citizen of the United States and a resident of New Jersey. Carrascosa is a Spanish national and a permanent resident of New Jersey. They were married in Spain in 1999, and Victoria, their only child, was born in New Jersey in 2000. Victoria is a dual citizen of the United States and Spain. During the course of their domestic relations litigation, the parties entered into an agreement

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whereby Carrascosa's attorneys would hold Victoria's United States and Spanish passports in trust to restrict travel outside of the United States with Victoria without written permission of the other party (the Agreement).

Carrascosa's attorney at the time the Agreement was entered into was Mitchell A. Liebowitz, Esq. Innes was represented by third-party defendant Peter Van Aulen. Carrascosa discharged Liebowitz and retained defendants Madeline Marzano-Lesnevich, Esq. Defendant Marzano-Lesnevich received Carrascosa's file from Liebowitz, including the Agreement and Victoria's United States passport. In December 2004, Carrascosa obtained Victoria's United States passport from defendants, and used the passport to remove Victoria from the United States to Spain on January 13, 2005.

Innes filed a petition under the Hague Convention on the Civil Aspects of International Child Abduction for Victoria's return to the United States and traveled to Spain for a hearing on the petition. The Spanish court denied the petition and ordered Victoria to remain in Spain until age eighteen.

The divorce litigation continued in New Jersey. The Family Part judge entered a judgment of divorce and granted Innes sole legal and residential custody of Victoria. The judgment gave Carrascosa ten days to bring Victoria back to the United States, but Carrascosa failed to comply with the order.

In October 2007, Innes filed a complaint in the Law Division against defendants, Van Aulen, and Liebowitz. Innes alleged, in part, that they improperly released Victoria's United States passport to Carrascosa and intentionally interfered with the Agreement. Innes requested relief, including damages and attorneys' fees. The trial court denied defendants motion for summary judgment, concluding that defendants owed a duty to Innes, and also denied defendants motion to exclude any claim for counsel fees.

At the conclusion of trial, the only issue submitted to the jury was whether defendants were negligent in releasing Victoria's United States passport to Carrascosa. The jury determined that defendants were negligent and awarded damages to Innes and Victoria. The trial court denied defendant's motion for a new trial and their motion for judgment notwithstanding the verdict, but granted Innes motion to amend the judgment for counsel fees and costs. The judge explained that an award of attorneys fees was appropriate because the jury decided that the defendants deviated from the standard of care and thereby breached a duty owed to Peter and Victoria Innes when they gave Ms. Carrascosa Victoria's passport. As such, the traditional rule that warrants an award of fees in legal malpractice cases extends to the matter at bar.

Following defendants' appeal, the Appellate Division concluded that awarding Innes attorneys' fees was appropriate even though no attorney-client relationship existed between Innes and defendants. In doing so, the panel concluded that defendants intentionally violated the Agreement. The Supreme Court granted defendants' petition for certification.

The issue on appeal was whether, in prosecuting a fiduciary malfeasance action against an attorney who intentionally violates an escrow agreement, the prevailing beneficiary may recover attorneys fees. The Supreme Court ruled that attorneys who intentionally breach a fiduciary duty can owe counsel fees to a nonclient. Specifically, the court held that here the defendant attorneys can be held liable for counsel fees if, as trustees and escrow agents for both Innes and Carrascosa, they intentionally breached their fiduciary obligation to Innes by releasing Victoria's United States passport to Carrascosa without Innes' permission.

Plaintiff Cannot Seek Voluntary Dismissal to Avoid Dismissal for Failure to Provide an Affidavit of Merit Within the Required Timeframe

In *A.T. v. Cohen, M.D., et al.*, 2016 N.J. Super. LEXIS 62 (April 27, 2016), T.T. brought an

action individually and on behalf of her daughter A.T., asserting medical malpractice claims against all defendants. The complaint alleges that A.T. suffers from Erb's palsy as the result of a brachial plexus injury caused at her birth in 2011. An answer was filed on December 5, 2013 on behalf of all defendants with the exception of one physician.

On April 7, 2014, defendants moved for summary judgment on the grounds that plaintiff had failed to file an Affidavit of Merit (AOM) as required by N.J.S.A. 2A:53A-27. In opposition to the motion, plaintiff attached an AOM dated May 22, 2014. During oral argument on the motion, plaintiff's counsel requested the court permit the filing of a motion for voluntary dismissal without prejudice before consideration of the pending summary judgment motion. Counsel advised that the failure to file a timely AOM was an "oversight," and in response to a question from the judge, conceded that the firm did not have a "seasoned New Jersey medical malpractice attorney." The judge granted the request to adjourn the summary judgment motion for a month.

A new attorney entered an appearance as co-counsel for plaintiff and filed a motion for a voluntary dismissal under Rule 4:37-1(b). At oral argument on that motion, counsel requested leave to dismiss the complaint without prejudice, advising the judge that if his review of the file deemed it appropriate, he would re-file the complaint with an AOM. As A.T. was a minor, there remained many years prior to the running of the statute of limitations. Counsel also asked the judge to again adjourn the summary judgment motion.

The judge denied the additional adjournment and granted summary judgment to defendants, ruling that plaintiff's failure to file an AOM within the statutory period required the dismissal of her complaint with prejudice. She stated:

The plaintiff seeks a dismissal without prejudice, on terms that if it gets re-filed then the Affidavit of Merit would be with it. That's . . . engaging in a fiction to make it look like I'd be doing something that . . . really wasn't allowed, which would be extending the time beyond the 120 days. . . . I would be extending the time for the Affidavit of Merit beyond the time set forth in the statute.

Plaintiff moved for reconsideration. In denying the motion, the judge reiterated her reasoning expressed during her original ruling and found that no new information had been presented to her.

The issue on appeal is whether a minor plaintiff can take a voluntary dismissal without prejudice under Rule 4:37-1(b) to avoid a dismissal with prejudice of her complaint for the failure to provide an affidavit of merit within the required timeframe. The court concluded that Rule 4:37-1(b) cannot be used to circumvent the time strictures in the AOM statute even if the statute of limitations has not expired. The court provided that permitting a voluntary dismissal in these circumstances would render the AOM statute and its underlying purpose meaningless.

Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.

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