



Forensic Accounting Today

Newsletter of Ron J. Anfuso, CPA/ABV, An Accountancy Corp.

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Ron's Corner

What do you do when you have a client who needs a forensic accountant but refuses to hire one? In this edition of *Forensic Accounting Today's* article, I share with you what not to do.

What you must do is make sure you have your client sign an informed written consent. This consent needs to thoroughly explain the value a forensic accountant would have brought to your client's case, and that your client declined to take your advice.

The case discussed here is a legal malpractice suit filed by the plaintiff against his family law attorney. The defense won the case. However, no attorney would wish to spend the time, effort and money required as a defendant to win such a dispute.

When you have a case that requires the work of a forensic accountant and you wish me to explain why to your client, call me. Also, if you have a case for which your client should have hired a forensic accountant but refused and you need advice on the case, give me a call. I will gladly share my expertise in either instance with you as a courtesy.

Ron



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needs, call Ron today!**

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Legal Malpractice Case: Would Hiring a Forensic Accountant Cause a Quantifiable Better Result?

Fourth Appellate District: Michael O'Shea V. Susan F. Lindenberg, et al

Presented by Ron J. Anfuso, CPA, ABV, CFF, CDFA, FABFA

Plaintiff Michael O'Shea hired attorney Susan F. Lindenberg to represent him in a case for child support. After the court awarded O'Shea's ex-wife what he believed was excessive child support, he filed a legal malpractice action. His most significant allegation of negligence was that Lindenberg should have retained a forensic accountant.

The case went to trial and the jury concluded in a special verdict that Lindenberg owed a professional duty of care that she breached. The jury was unable to agree, however, on whether the breach caused O'Shea damages. Thus, the judge declared a mistrial.

Lindenberg moved for a directed verdict on the grounds that the evidence presented at trial did not support a finding of causation that specifically, without the alleged malpractice, O'Shea would have received a better result. The trial court agreed and directed a verdict in Lindenberg's favor. The finding was that O'Shea failed to present sufficient testimony on the issue of causation, and the Appellate Court affirmed the trial court's judgment.

Background

Michael O'Shea and Tauna Vandeweghe married in January 2000 and had two children born in 2001 and 2003 respectively. After separating in 2007, Vandeweghe filed for divorce in New Jersey in July 2014. She also filed a custody and support action shortly thereafter. According to O'Shea the major issue in the support case was his finances, which he characterized as "complicated" due to the structure of one of his businesses, Crest Health Management, LLC. Additionally he was a 20 percent partner in another business and had other sources of income he claimed were not available for support.

On February 10, 2015, O'Shea contacted Lindenberg, a certified family law specialist, to make a special appearance. Lindenberg sought and received

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Reasons to Hire a Forensic Accountant to Assist on a Divorce Case

- When unreported or underreported income is an issue
- When one, or both of the spouses, is self-employed
- When one of the spouses has separate property claims
- When temporary and permanent spousal and child support are an issue
- When a determination of the marital lifestyle is required
- When accounting for reimbursements, tracing, allocation, apportionment and characterization of assets is needed
- When a valuation of a business interest is required
- When determination of business, executive or professional goodwill is needed
- When there has been a commingling of funds (See v. See)
- When there are reimbursement claims for post-separation maintenance of community assets (Epstein)
- When the community has made payments on a separate property residence (Moore/Marsden)
- When an apportionment of community business is necessary (Pereira/Van Camp)

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a continuance until April on permanent custody and support. She also testified at trial that she recommended to O'Shea that he retain a forensic accountant to explain his finances but O'Shea declined, stating he was already paying for a forensic accountant in a separate New Jersey child support case. O'Shea denied she made this recommendation.

After considering evidence submitted by the parties, the family court found O'Shea's average monthly income available for support to be \$60,000, ultimately resulting in an award of \$8,373 per month moving forward.

In the malpractice trial case, O'Shea hired a forensic accountant and relied on his testimony that during all periods relevant, the average monthly income O'Shea had available for support was just \$5,906. The forensic accountant's analysis was "independent" of the family court's ruling, and did not take into account the court's discretion about how to treat the validity of numbers submitted as income, which I believe he should have done.

Relevant Breaches of Duty Related to Forensic Accounting

Purported breaches of duty concerning forensic accounting included the failure 1) to advise O'Shea to retain a forensic accountant; 2) to advise O'Shea of the consequences of not obtaining a forensic accountant; and 3) to procure an informed written consent to forgo hiring a forensic accountant.

Evidence of Causation

The "chain of causation" included the trial testimony of his legal malpractice expert who testified that if Lindenberg did not advise the retention of a forensic expert, failed to counsel O'Shea as to the consequences of not hiring one and memorialized this in writing, she breached her professional duties. He also testified that the amount of child support ultimately awarded depended on the amount of income O'Shea had available for support. Furthermore, he testified that based on the forensic accountant's calculations that O'Shea had \$5,906 income per month, his child support obligations would have been dramatically lowered, and an attorney fee of zero would have been reasonable. The malpractice expert used the difference to quantify \$462,156 as the amount he believed O'Shea had been damaged.

What the malpractice expert did not testify to, however, was a direct connection between the lack of a forensic expert and the outcome of the case. When asked, the expert could not testify to a "reasonable degree of legal certainty" that a forensic accountant's involvement would have resulted in a different outcome.

Even given the generous rules for interpretation of the evidence in this context, there is simply not enough to establish O'Shea would have experienced a better outcome, particularly in the absence of expert testimony on causation. While a forensic expert would have explained, in more detail, certain business-related and financial matters, it is mere speculation to conclude that such testimony was the deciding factor in how the custody case turned out for O'Shea. Accordingly, the Appellate Court found no error in granting Lindenberg's motion for directed verdict.