

When Attorney Fees Can Be Awarded in Legal Mal Actions Brought By Non-Clients

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The circumstances in which an award of attorney fees in favor of a non-client in legal malpractice cases are exceedingly rare. In [Innes v. Marzano-Lesnevich](#), 224 N.J. 584 (2016), the New Jersey Supreme Court noted that New Jersey has a strong public policy against shifting of counsel fees. There, the court restated the basic principle of New Jersey law, that courts historically follow the "American Rule," which provides that litigants must bear the costs of their own attorney fees. *Innes* at 592, citing [Litten Indus. v. IMO Indus.](#), 200 N.J. 372 (2009). In fact, the *Innes* court made it clear that New Jersey has limited exceptions to the American Rule. *Id.*, citing *In Re: Niles Trust*, 176 N.J. 282 (2003) ("*[n]o fee for legal services shall be allowed in the tax costs or otherwise, except in eight enumerated circumstances*") (see also, *R. 4:42-9(a)*). The *Innes* court made it clear that any departures from the American Rule are the exception.

In *Innes*, Mr. Innes and his wife, Maria Carrascosa, were involved in a contentious divorce and custody battle over their daughter, Victoria. The parties entered into an agreement whereby Carrascosa's attorneys would hold Victoria's U.S. and Spanish passports in trust in order to restrict travel outside of the U.S. with Victoria without written permission of the other party. However, notwithstanding this agreement, Carrascosa's attorneys released Victoria's U.S. passport to Carrascosa, who used it to remove Victoria to Carrascosa's native Spain, where she has remained for the past 10 years. Also, by order of the Spanish court, Innes was prevented from contacting his daughter.

The *Innes* court held that, because the attorneys were acting in a fiduciary capacity as trustees and escrow agents for both Innes and Carrascosa, if they intentionally breached their fiduciary obligation to Innes by releasing Victoria's U.S. passport without Innes's permission, the attorneys could be held liable for counsel fees.

The New Jersey Supreme Court only held that a prevailing non-client may be awarded counsel fees incurred to recover damages arising from an attorney's intentional violation of a fiduciary duty. Because the attorneys were holding Victoria's passport as trustees and escrow agents, they were fiduciaries for the benefit of both Carrascosa and Innes. Innes was relying on the attorneys to carry out the fiduciary responsibilities under the agreement and to prevent Carrascosa from taking Victoria away from him. Therefore, the Supreme Court held that Innes would be entitled to counsel fees if there was a finding at trial that the defendant attorneys intentionally breached a fiduciary responsibility to Innes, regardless of the existence of the attorney-client relationship.

The dissent noted that, as escrow agents, the attorneys owed a fiduciary duty to Innes, the client of their adversary. See generally, *In Re: Hollendonner*, 102 N.J. 21, 26 (1985) (an escrow agent acts as an agent for both parties). The attorneys breached that duty when they turned over the child's passport without Innes's permission. The dissent noted, however, that a simple breach of a fiduciary responsibility was insufficient to shift fees.

In any event, the *Innes* decision is limited to a claim by a non-client in a situation where the attorney intentionally breaches a fiduciary duty. The *Innes* ruling would not apply, and fees could not be awarded in favor of a non-client, against a lawyer for simple negligence.

The current law on attorney fees, as articulated in *Innes*, began with the case of [Saffer v. Willoughby](#), 143 N.J. 256 (1996), where there was a fee dispute between an attorney and his former client who filed the legal malpractice action against the former attorney. *Saffer*, 143 N.J. at 260. One of the issues in *Saffer* was the effect that a finding of malpractice should have on the fee dispute and on the former client's damages. The *Saffer* court concluded that "[a] negligent attorney is responsible for the reasonable legal expenses and attorney fees incurred by a former client in prosecuting the legal malpractice action" because such fees are consequential damages that are proximately related to the malpractice. *Id.* at 272. However, as noted above, under *Saffer*, attorney fees were awarded to a former client.

In [Packard-Bamberger & Co. v. Collier](#), 167 N.J. 427 (2001), the plaintiffs, in connection with their suit brought against the defendant corporate director, who also served as legal counsel to plaintiff corporation, sought to recover reasonable expenses and attorney fees as a consequence of the defendant's malpractice. Finding intentional misconduct on the part of the attorney-director, the trial court awarded counsel fees. The Appellate Division reversed, and the plaintiffs appealed. The Supreme Court reversed the Appellate Division's decision.

In deciding *Packard-Bamberger*, the Supreme Court extended *Saffer* to claims by a successful claimant against attorneys for intentional misconduct. 167 N.J. at 443. In *Packard*, the court found that the corporation's attorney intentionally withheld information and usurped

a corporate opportunity. 167 N.J. at 437-38, 442.

In *In re Estate of Lash*, 169 N.J. 20 (2001), the court recognized an exception to the American Rule in a case involving an estate administrator malfeasance claim covered by the terms of a surety bond. In *Lash*, the administrator of an estate breached his fiduciary duty by misappropriating estate funds. When the estate could not recover from the administrator, the estate filed a complaint against Fireman's Fund Insurance Company, which issued a surety bond on the estate.

The *Lash* court found that the attorney committed a tortious breach of fiduciary duty and held that the estate was entitled to recover from the attorney damages caused by his breach of fiduciary duty. Also, the *Lash* court noted that in *Saffer*, 143 N.J. 256 (1996), the court held that an attorney may be liable for attorney fees incurred by the aggrieved client in the action for malpractice. The *Lash* court also clarified that the *Saffer* ruling also applied when an attorney intentionally breaches a fiduciary duty to a client arising out of the attorney-client relationship. *Lash*, citing *Packard-Bamberger*, 167 N.J. 427 (2001). However, in *Lash*, the Supreme Court noted that the claim for attorney fees was made by the estate against an attorney-defendant where there was an attorney-client relationship.

In *In re Niles Trust*, 176 N.J. 282 (2003), the court held that when an executor or trustee reaps a substantial economic or financial benefit from undue influence, the fiduciary may be assessed counsel fees incurred by the plaintiffs. In *Niles*, the court found that the trustee's conduct was "inexcusable and reprehensible" because he had embezzled and misused the estate of Laura Niles. 176 N.J. at 290. Also, the court found undue influence. As a result, the trial court declared modifications to a trust null and void. The claimant sought fee shifting based upon a breach of a fiduciary duty,

relying upon *Lash*, 169 N.J. 20 (2001), and *Packard-Bamberger*, 167 N.J. 427. The court found that the fees were damages caused by the attorney's breach of his fiduciary duty. *Niles*, 176 N.J. at 295. Therefore, the fees were to be reimbursed by the attorneys based upon his breach of fiduciary duty. The *Niles* court held that when an executor or trustee commits the pernicious tort of undue influence, there is an exception to the American Rule that permits the estate to be made whole by an assessment of counsel fees against the fiduciary that were incurred by the estate. *Niles*, 176 N.J. at 298-99.

The New Jersey Supreme Court's holding in *Innes* is an extension of *Saffer*, but only with regard to claims by non-clients for an

intentional breach of fiduciary duty. The court in *Innes* only expanded the fee-shifting standard in claims by non-clients against attorneys for an intentional breach of fiduciary duty, but it declined to expand this standard for simple negligence claims. Therefore, unless the non-client can prove that the attorney intentionally breached a fiduciary duty owed, the attorney cannot be held liable for counsel fees.



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