What we did in 2022

REPAIRS

When LAWPRO is quickly alerted to real or potential claims, we are often able to rectify the problem, thereby preventing harm to a client and a malpractice claim from arising. Our counsel know how to best fix issues such as dismissal orders due to inadvertent missed deadlines, allegations of improper will drafting, minor errors on a real estate transaction, and *Handley/Aecon* motions.

REPAIRS

Here are a few examples of cases where LAWPRO successfully repaired potential losses in 2022

Annulling accidental admissions: Setting aside deemed admissions

Failure to respond to a Request to Admit during pre-trial litigation procedures can result in deemed admissions. If unintentional deemed admissions effectively settle the core issues of the case, this can be a big problem.

In this case, the Plaintiff provided a Defendant with a Request to Admit containing 57 different statements of alleged fact. Among these 57 statements were five that went to the core of the case and effectively settled the dispute. The Defendant responded to the Request to Admit with a mixture of admissions and refusals to admit. Unfortunately, due to oversight on the part of the Defendant's lawyer, no response, neither admissions or refusals, was provided on the five "core" Requests.

A year passed. Until, on the eve of trial, the Plaintiff applied for summary judgment on the basis of the Defendant's deemed admissions. The Defendant, now aware of the inadvertent error, applied to have the admissions set aside.

Despite acknowledging that the deemed admissions were likely made in error, the Plaintiff refused to consent to setting aside the admissions and contested the motion.

LAWPRO assisted the Defendant in having the deemed admissions set aside. The motions judge agreed that the Rules of Court encourage expeditious and efficient hearing of cases on the merits, and it would not be in the interests of justice for the case to be resolved solely on the basis of a minor oversight by the Defendant's lawyer.

The judge observed that there would be no prejudice to the Plaintiff in having the deemed admissions set aside that could not be resolved through costs.

Mending missed mediation mishaps: Setting aside dismissal orders caused by inadvertence

Everyone makes mistakes. That's why insurance is so important. Thankfully, LAWPRO can sometimes step in and get litigation back on track after an innocent mistake.

In this case, the Plaintiff's lawyer served a trial record a few weeks prior to the five-year deadline. Unfortunately, this record was rejected by the court because mandatory mediation had not yet taken place. The lawyer had inadvertently missed this requirement.

The Plaintiff's lawyer wrote to counsel for the Defendants seeking mediation and a revised timetable for the action. The Defendants, however, refused any extension and the Plaintiff was forced to seek an order for an extension of time from an associate judge at a status hearing.

At the status hearing, the associate judge acknowledged that the Plaintiff had intended to file and serve the trial record prior to the court deadline, and had only failed to do so through the lawyer's inadvertence in missing the mediation requirement. The judge also found that the Defendants would not be prejudiced if the action were allowed to proceed.

However, the judge took issue with a two-year period of unexplained delay on the part of the Plaintiff prior to their filing of the trial record. Specifically, the judge noted that this long period of delay would have made the claim vulnerable to dismissal at a status hearing. The judge therefore refused to grant the requested extension of time and dismissed the action.

The Plaintiff appealed this decision.

LAWPRO assisted the Plaintiff in successfully arguing that the judge made a palpable and overriding error by considering whether the long period of delay would have made the claim vulnerable to dismissal at a status hearing. But for the Plaintiff's lawyer's inadvertent error in missing the mediation requirement, the action would have been properly set down for trial and no status hearing would have occurred.

The appeal judge agreed that the overall justice of the matter also required the action to continue, as the Plaintiff was ready to proceed, there would be no prejudice to the Defendants, and the missed deadline was solely due to lawyer inadvertence.

The appeal was granted and the Plaintiff's claim was allowed to continue.

The unsettled state of settlement agreements: *Aecon/Handley* motions

In multi-party disputes, a settlement with one or more defendants that changes entirely the landscape of the litigation in a way that significantly alters the adversarial relationship among the parties, or the dynamics of the litigation, requires immediate disclosure to any remaining defendants, lest the action be stayed for abuse of process. But what does and does not fit this description can be an opaque question.

In this case, a claim perfecting a construction lien was advanced by a property management service (the "Original Plaintiff") against the owners of an apartment building (the "Owner Defendants") and the asset management company they contracted to manage the building (the "Management Defendants").

Soon after the claim was served, and prior to the Management Defendants advancing their own pleadings, the Original Plaintiff settled with the Management Defendants. Part of that settlement included an assignment of the claim against the Owner Defendants to the Management Defendants.

The Owner Defendants subsequently sought to have the matter dismissed as an abuse of process, claiming this settlement and assignment should have been "immediately" disclosed under the rules stated in *Aecon* and *Handley*.

LAWPRO assisted the plaintiff in successfully arguing that the settlement agreement did not "alter the adversarial orientation of the parties in any material way." The court emphasized that the settlement and assignment occurred prior to the Management Defendants advancing any pleadings, and there was therefore no evidence that the Management Defendants ever disputed the Original Plaintiff's claims. As well, the court noted that the Management Defendants and Owner Defendants were already adverse in interest, as the Owner Defendants had taken the position in their pleadings that the Management Defendants had breached their property management agreement.

The Owner Defendants' motion was therefore dismissed.

Whose claim is it anyway? More problems with *Pierringers*

In a multi-party suit, settling claims against one defendant while the action proceeds against the remaining defendants will often result in a *Pierringer*-type agreement between the plaintiff and the settling defendant. In order to ensure that the settling defendant is relieved from potential liability flowing from cross-claims from the remaining defendants, these agreements will often limit the plaintiff's ability to seek damages from the remaining defendants to those defendants' several liability. That is to say, the proportion of damages attributable to the settling defendant cannot also be sought from the remaining defendants.

In this case, the Plaintiff's settlement with one defendant expressly limited the liability of the remaining defendants that could be pursued by the Plaintiff to the remaining defendants' several liability. However, the matter also involved various third-party claims brought by the remaining defendant.

The third parties to the claim took the position that the settlement agreement between the Plaintiff and the settling party effectively nullified the third-party claims. The remaining defendant took the position that the third parties were not party to the settlement agreement, were not intended to benefit from it, and the language should not be read to interpret it as such.

LAWPRO assisted the plaintiff's lawyer in having this motion dismissed. The motion judge agreed that the settlement agreement did not, in any way, impact the liability of the third parties or limit the remaining defendant's ability to seek damages from the third parties. This decision was upheld on appeal.

Troublesome testamentary typos: Rectifying drafting errors from the use of multiple wills

Complex estates often require complex estate planning for the purposes of, among other reasons, reducing probate taxes. However, the more complex the testamentary document or documents, the more likely an error may occur.

In this case, the deceased had created both a primary and limited will for the purpose of avoiding probate taxes on the shares of a closely held corporation. Both wills were intended to be read harmoniously. Unfortunately, the primary will contained a drafting error in that it expressly applied to "all property" of the deceased, rather than all property excepting the shares of the closely held corporation.

Because of this error, the two wills were contradictory, as both appeared to deal with the shares of the corporation. Not only would the estate be liable for a substantial additional probate tax if the shares were dealt with under the primary will, but the court would not even issue probate under the primary will because of the conflict in the two documents.

The executor of the estate therefore sought construction and, if necessary, rectification of the two wills to comport with the testator's intent.

LAWPRO assisted the applicant in successfully arguing that rectification was not necessary, as the testator's intent could be inferred from the context of both documents along with affidavit evidence provided by the lawyer that drafted the documents as to the testator's intentions at the time of drafting. Therefore, probate was able to be granted excluding the corporate shares, in accordance with the original intentions.

Small fixes now prevent big problems later

Immediately notifying LAWPRO of potential errors or omissions means steps can be taken to resolve the situation before it develops into a malpractice claim. If you make an error or believe you could be accused of making an error down the road, don't try to resolve the problem on your own. A call to LAWPRO means we can provide expedient and experienced advice and assistance.