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New Jersey Appellate Division Expands Exception to the 'American Rule' for Recovering Attorneys' Fees

On May 9, the New Jersey Appellate Division upheld an attorneys' fee award to an information technology consulting firm as damages for a law firm's tortious interference with a non-compete agreement, recognizing an exception to the "American Rule," which generally holds each party responsible for its own attorneys' fees. In *Accounteks.net, Inc. v. CKR Law, LLP, and Christian Montes*, No. A-1067-20, 2023 WL 3311577 (N.J. Super. Ct. App. Div. 2023), Accounteks Consulting brought multiple claims against its former employee Christian Montes, stemming from Montes' alleged breach of a non-compete clause in his employment agreement when Montes began working for Accounteks' client CKR Law LLP. Accounteks asserted separate claims against CKR for tortious interference with contractual relations for hiring Montes because it had reviewed the employment agreement and was aware of Montes' non-competition obligations and decided to hire him despite those obligations. The trial judge entered judgment against the defendants, which included an award of attorneys' fees against CKR based on Accounteks' tortious interference claim. Although New Jersey courts generally adhere to the American Rule on attorneys' fees, a court may grant a fee award to a prevailing party to the extent such fee shifting is specifically permitted by law or agreement. New Jersey courts have also recognized an exception to the American Rule for third-party litigation, such as a separate action against an employer that poached an employee from another company in violation of a non-compete agreement, as articulated by the New Jersey Supreme Court in *DiMisa v. Acquaviva*, 198 N.J. 547 (2009). The *Accounteks.net* court noted, however, that New Jersey courts had not addressed the issue of whether the third-party litigation exception applies when a plaintiff sues a third party and a tortfeasor in the same action. Relying on a decision from the Colorado Court of Appeals opinion in *Prospero Associates v. Redactron Corp.*, 682 P.2d 1193, 1198-99 (Colo. App. 1983), the New Jersey Appellate Division agreed that "[t]here is no reason why attorneys' fees should be recoverable when the aggrieved party files separate lawsuits against the contract breacher and the tortfeasor, but should be denied when he consolidates both into one lawsuit." The *Accounteks.net* court explained: "A plaintiff should not have to file two lawsuits, one against the party that breached the contract, and a separate one against the tortfeasor, to recover attorney's fees against the tortfeasor in an action for damages to enforce a non-compete agreement … [C]onsequently the judge did not err by awarding attorney's fees as damages against CKR, based on its tortious interference with the non-compete agreement." Based on this ruling, employers should keep the following in mind:

1. If seeking to enforce a non-compete agreement, employer plaintiffs should consider joining the new employer, as attorneys' fees may be recoverable from the third-party company. In fact, it should be more efficient and cost-effective to bring those claims in the same action rather than to bring them in two separate actions.
2. Because *Accounteks.net* simplifies the procedure for obtaining attorneys' fees from third-party tortfeasors, employers should carefully examine any non-compete agreements or other contractual restraints before hiring new employees.

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