

THE TRIAL OF A LEGAL MALPRACTICE CASE: SELECTED PRACTICAL ISSUES

BY: DAVID C. PISHKO
ELLIOT PISHKO MORGAN, P.A.
WINSTON-SALEM, NC

The trial of a legal malpractice action raises several practical issues which differentiate this cause of action from other professional malpractice claims. Generally, the plaintiff alleges that, as a result of his former attorney's negligence, he lost a previous legal proceeding or obtained a less than favorable result. Determination of the amount of damages in the legal malpractice action therefore requires an assessment of what would have happened in the underlying proceeding but for the alleged attorney negligence. The assessment of these damages is problematic, in large part because the plaintiff's former champion, who advocated the merits of the plaintiff's position in the underlying action, is now undermining that position. Although the Court of Appeals has recently set out the general rules for assessing damages in these cases, there remain several unanswered questions.

I. TRYING THE CASE WITHIN THE CASE

In *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 157 N.C. App. 60, 577 S.E. 2d 918 (2003), the Court of Appeals stated that:

In a legal malpractice case, a plaintiff is required to prove that he would not have suffered the harm alleged absent the negligence of his attorney. *Rorrer v. Cooke*, 313 N.C. 338, 361, 329 S.E. 2d 355, 369 (1985). A plaintiff in order to prove this causation element must establish three things: (1) the underlying claim, upon which the malpractice action is based, was valid; (2) the claim would have resulted in a judgment in the plaintiff's favor; (3) the judgment would have been collectible or enforceable. *Id.* In other words, a legal malpractice plaintiff is required to prove the viability and likelihood of success of the underlying case as part of the present malpractice claim. This has been referred to as having to prove "a case within a case." *Kearns v. Horsley*, 144 N.C. App. 200, 211, 552 S.E. 2d 1, 8 (2001). This is true even if the negligent actions of the attorney resulted in a total foreclosure of the underlying case being heard on its merits. *See id.* at 211-12, 552 S.E. 2d at 8-9.

Under the case within the case method of proof, the plaintiff in a legal malpractice action presents the evidence in support of the underlying claim before the jury (or fact finder) in the malpractice

action. See *Chocktoot v. Smith*, 571 P. 2d 1255, 1258 (Ore. Sup. Ct. 1977). The malpractice jury, in essence, then determines the outcome of the underlying case and from that determination reaches the malpractice verdict. See *id.* A malpractice plaintiff is not required to prove what outcome a particular fact-finder in the underlying case (i.e. the original jury...) would have reached. Instead, the malpractice jury must substitute its own judgment in applying the relevant law, as instructed by the trial court, to the facts of the underlying case. See *id.* at 1258-59; See also *Smith [v. Childs]*, 112 N.C. App. [672] at 680, 437 S.E. 2d [500] at 506 (“[p]roof of legal malpractice necessitates an attempt to show what should have occurred without some error on the part of the attorney”).

Id. at 66, 577 S.E. 2d at 923.

The “case within the case” method described in *Hummer* was derived from what may be the “typical” legal malpractice case, where a plaintiff’s attorney makes a mistake, like missing the statute of limitations, which precludes his client from presenting his claim to a jury. For example, in *Kearns v. Horsley*, 144 N.C. App. 200, 552 S.E. 2d 1 (2001), the plaintiff tripped and fell in a motion picture theater. She employed the defendant attorney to represent her. The attorney failed to file the lawsuit within the applicable statute of limitations, and the plaintiff therefore filed an action for legal malpractice. The trial court granted the defendant attorney’s motion to bifurcate the case and required the plaintiff to try her case against the movie theater first. The jury returned a verdict of no negligence in that part of the case. Because of this jury determination that the underlying claim against the movie theater had no merit, the plaintiff could not establish that her attorney’s negligence caused her any injury, and therefore her case was dismissed. The Court of Appeals affirmed the bifurcation order.

This method of proof applies even when the underlying action is not a jury trial. For example, in *Hummer, supra*, the defendant attorneys represented the plaintiff school teacher in connection with the plaintiff’s dismissal from the Durham public schools. The attorneys failed to mail a letter requesting that the school board review the school superintendent’s decision to dismiss the plaintiff. As a result of this failure, the plaintiff was deprived of his right to a review and also became ineligible to file a petition for judicial review. The plaintiff brought an action against her attorneys for malpractice. The jury found for the plaintiff and awarded damages. In upholding the verdict, the Court of Appeals stated that the plaintiff was not required to prove what outcome the school board would have reached if the letter had been mailed on time. Rather, the malpractice jury must substitute its own judgment in applying the relevant law to the facts of the underlying case.

II. USE OF EXPERT CAUSATION WITNESSES.

The *Hummer* Court further ruled that expert testimony as to what the school board would have done if the defendant attorneys had requested a hearing was inadmissible. Such expert testimony would simply be telling the jury what result it should reach as a legal conclusion from the facts and circumstances of the plaintiff's dismissal.

In this respect, legal malpractice actions differ significantly from medical malpractice actions. In medical malpractice, expert testimony is generally required in order to prove that the defendant doctor deviated from the applicable standard of care and also that this negligence caused harm to the plaintiff. For example, expert testimony is necessary to prove not only that a baby should have been delivered hours earlier by cesarean section, but also that, had such earlier delivery taken place, the baby would not have suffered brain injury. A jury is not capable of determining the causation issue without the assistance of expert testimony. According to *Hummer*, a jury is not only capable of determining on its own what result a school board should reach in a teacher dismissal case, but is not permitted to have expert assistance in reaching its conclusion.

The *Hummer* decision reflects a change in the law with respect to the use of expert causation witnesses in legal malpractice actions, which has not yet been approved by the Supreme Court. The leading case in the area of legal malpractice case, *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E. 2d 355 (1985), involved a medical malpractice case which was tried to a jury verdict in favor of the defendant doctor. The Supreme Court affirmed summary judgment in favor of the defendant attorney in part because of the lack of evidence that the jury would have reached a different verdict had the plaintiff's attorney not deviated from the standard of care. The Court noted that the affidavit of the plaintiff's expert witness did not adequately address the proximate cause question, stating that:

The affidavit offers no specific fact suggesting how [the defendant attorney's] alleged departure from the...standard of care in prosecuting medical malpractice suits could or might have caused the jury to decide against [the plaintiff], or how further preparation and investigation by [the attorney] would have produced a different result.

Id. at 362, 329 S.E. 2d at 370. The Court clearly suggested, therefore, that expert testimony could be used to establish the causation element of the plaintiff's claim.

In *Bamberger v. Bernholz*, 96 N.C. App. 555, 386 S.E. 2d 450 (1989), *rev'd*, 326 N.C. 589, 391 S.E. 2d 192 (1990), the plaintiff, in response to the defendant attorney's motion for summary judgment, submitted affidavits of two attorneys stating the opinion that the plaintiff could or might have obtained a judgment in the absence of the defendant attorney's negligence and that the attorney's departure from the standard of

care caused the plaintiff “to lose a substantial possibility of recovery....” A majority of the panel in the Court of Appeals held that this evidence was sufficient to establish proximate cause. This opinion was reversed by the Supreme Court, which adopted the dissent in the Court of Appeals that, notwithstanding this expert testimony, the plaintiff’s underlying case could not have been won. Essentially, the appellate court could substitute its own opinion as to the merits of the underlying case for those expressed by experts at trial.

In *Greene v. Pell & Pell, L.L.P.*, 144 N.C. App. 602, 550 S.E. 2d 522 (2001), the plaintiff filed a legal malpractice action against his bankruptcy attorney, alleging that the attorney should have asked the bankruptcy court for a stay of the sale of property. The Court of Appeals affirmed the trial court’s entry of a directed verdict in favor of the defendant’s attorney because the plaintiff failed to prove that the stay would have been granted if requested. The Court stated that: “To guess at whether the bankruptcy judge, now deceased, would have granted the motion would be speculation.” *Id.* at 604. Further, the Court noted that the plaintiff presented the testimony of an expert witness who stated that he saw no error on the part of the bankruptcy judge. Presumably, under *Hummer*, the jury should have been instructed in bankruptcy law and then permitted to make its own decision as to whether a stay should have been granted.

At this point, the role of expert causation witnesses in legal malpractice actions remains unclear.

III. ADMISSIBILITY OF ATTORNEY ADMISSIONS

An attorney sued for malpractice finds herself in the awkward position of having to take a position contrary to that taken in the underlying action. For example, a plaintiff’s attorney who misses a statute of limitations on a personal injury action typically contends that the plaintiff was not harmed by her negligence because the underlying action was without merit. Under these circumstances, should the malpractice plaintiff be permitted to introduce statements made by the attorney concerning the merits of the case while the attorney represented the plaintiff? Perhaps the attorney told the client that the case was solid and should result in a recovery in excess of \$100,000.00. Or the attorney may have filed a Complaint in the action, thus certifying, pursuant to Rule 11 of the North Carolina Rules of Civil Procedure, that the claim is well grounded in fact and is warranted by existing law. Such statements seem to constitute admissions against interest admissible under Rule 801(d) of the North Carolina Rules of Evidence.

In *Byrd v. Arrowood*, 118 N.C. App. 418, 455 S.E. 2d 672 (1995), the Court of Appeals stated that:

We . . . find no merit in plaintiff’s argument that defendants’ certification of the complaint against the church under N.C.G.S. §

1A-1, Rule 11 (1990) is sufficient by itself to prove that there is a genuine issue of fact on the issue of whether plaintiff could have won her underlying claim. The signature of an attorney under Rule 11 simply certifies upon reasonable inquiry that the complaint is well grounded in fact and warranted by existing law....This signature does no demonstrate that there is a genuine issue of material fact, in light of evidence gathered after the complaint is filed, as to whether a plaintiff would actually have prevailed on the underlying claim.

Id. at 423, 455 S.E. 2d at 675.

Further, under the “case within a case” method, the jury would never hear any admissions by the defendant attorney. If the plaintiff is required to first try the underlying case as if no attorney malpractice had occurred, such statements would not be relevant to the issue to be determined. Once the jury in the malpractice case determines that the underlying case should be resolved in the plaintiff’s favor, admissions by the attorney as to the merits of that claim are unnecessary.

IV. DEDUCTION OF ATTORNEY’S FEES.

Another issue that is yet unresolved in this State is whether attorney’s fees which would have been paid to the negligent attorney should be deducted from the damage award in a malpractice case. For example, in a legal action where the plaintiff establishes that his attorney missed the statute of limitations in a personal injury action and that he would have recovered \$100,000.00 in that action, should the damage amount be reduced by the contingent fee that the negligent attorney would have retained from the recovery in the personal injury action? The attorney’s argument is that, had he not been negligent, the plaintiff would have received a total of \$66,667.00 after payment of fees. On the other hand, the plaintiff has now incurred additional attorney’s fees in order to obtain a recovery against his former attorney. If the attorney in the malpractice action also handles the case on a contingent fee basis, the plaintiff’s ultimate recovery will be reduced a second time. Further, the negligent attorney would have, in effect, been paid a full contingent fee for having mishandled the case.

This issue was considered in *Campagnola v. Mulholland, Minion & Roe*, 148 A.D. 2d 155, 543 N.Y.S. 2d 516 (1989). In that case, the plaintiff hired the defendant attorneys to represent her in connection with an automobile accident which she settled for \$10,000.00 upon the advice of the attorneys. The plaintiff alleged that the reasonable value of her claim exceeded \$10,000.00 and that the attorneys failed to make a claim under her underinsured motorist insurance policy. By way of affirmative defense, the attorneys asserted that any potential award to the plaintiff should be reduced by the fee which the attorneys would have been entitled to had they

competently handled the underlying claim. The trial court dismissed this defense, and the Supreme Court of New York affirmed, stating that:

. . . we agree with the majority and generally more recent line of cases . . . which holds that such a deduction should not be made from a legal malpractice award. . . . In holding that a client in a legal malpractice action may be awarded the full amount of the underlying claim, undiminished by the unearned counsel fees, the Appellate Division, Third Department stated: "We conclude that deducting a hypothetical contingency fee fails to compensate plaintiffs fully for their loss of jury verdicts or settlements, since any fee which plaintiffs may have had to pay the defendant had he successfully prosecuted the suit is canceled out by the attorney's fees plaintiffs have incurred in retaining counsel in the present action."

Id. at 158, 543 N.Y.S. 2d at 518.

V. ELECTION OF REMEDIES

The plaintiff in *Campagnola* would have had an additional problem if the case had been filed in North Carolina. By settling the underlying personal injury action, the plaintiff may have waived her right to recover from her attorney because of the doctrine of election of remedies.

In *Douglas v. Parks*, 68 N.C. App. 496, 315 S.E. 2d 84 (1984), the plaintiff in a personal injury action sued his attorney for malpractice after a directed verdict was entered against him. Prior to instituting the malpractice action, however, the plaintiff employed a second attorney to file a motion to vacate the judgment, and then settled the case with the original tortfeasor before that motion was heard. The Court held that the malpractice claim against the first lawyer was barred because the plaintiff had elected his remedy by accepting the settlement. In so holding, the Court noted that the purpose of the doctrine was "to prevent double redress for a single wrong." *Id.* at 498, 315 S.E. 2d at 85, quoting *Smith v. Oil Corp.*, 239 N.C. 360, 368, 79 S.E. 2d 880, 885 (1954).

In *Stewart v. Herring*, 80 N.C. App. 529, 531, 342 S.E. 2d 566, 567 (1986), the Court of Appeals discussed this doctrine in the context of a legal malpractice action where the plaintiff had accepted an unfavorable settlement agreement in a divorce action, allegedly due to the negligence of her attorney. The Court stated that:

. . .if a party contends that he or she was deprived of a legal claim because of the action of another and he pursues the claim against the original defendant, he cannot then make the claim against the

party he says caused him to lose all or part of the original claim. This is so even if the settlement the plaintiff is able to make on the original claim is not as good as it would have been if there had been no wrongful action by the third party. In this case, the plaintiff contends she had a claim for permanent alimony which was lost by the negligence of the defendant. She then retained another attorney who filed a counterclaim for alimony. The alimony agreement negotiated by the defendant was rescinded and a second alimony agreement signed. By pursuing her claim for alimony against her husband, the plaintiff lost her right to make a claim against the defendant for his negligence in representing the plaintiff in her original alimony claim.

Presumably, therefore, a plaintiff who believes that her attorney has made mistakes which diminish the value of her claim must allow the judicial process to run its full course in order to preserve her legal malpractice claim, even if this means foregoing an opportunity to mitigate her damages.

A question remains as to whether the election of remedies doctrine applies when the defendant in the underlying case sues his attorney for malpractice. For example, if because of mistakes made by his attorney in discovery, a defendant is precluded from introducing significant evidence at trial and, and then decides to settle with the plaintiff in order to minimize his losses, is he then precluded from filing a malpractice action against his attorney? The decision to settle a claim rather than face the possibility of an even greater loss at trial can hardly be considered an "election" of a "remedy," and therefore the doctrine should not apply. This analysis was confirmed by the Court's decision in *King v. Cranford, Whitaker & Dickins*, 96 N.C. App. 245, 385 S.E. 2d 357 (1989). In that case, the clients had been named as defendants in a will caveat proceeding. They lost the trial, but then settled with the plaintiffs in that proceeding. The clients then sued their attorney, alleging that he was negligent in his preparation for and representation at the trial. The trial court granted the attorney's motion for summary judgment based on the election of remedies doctrine. The Court of Appeals reversed, holding that the doctrine did not apply where the client's participation in the underlying case was made necessary by the actions of others and was not an election of remedies. The Court distinguished the *Douglas* and *Stewart* cases, noting that the plaintiffs in those actions had brought claims for monetary relief and, when their claims were affected by their attorney's negligence, they chose to reassert and settle their original claims rather than sue their attorneys for malpractice.