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A PRACTITIONER'S PERSPECTIVE ON EMERGING LEGAL TRENDS

Legal Malpractice Defendants Gain New Defenses

For litigation attorneys, settling with less than all parties is a tactical decision that they often have to make with their clients. In making this decision, lawyers are wise to be competent in the relevant laws and applicable judicial opinions. At common law, settling with one co-defendant in a matter precludes recovery from any other co-defendants.[1] Attorneys should, therefore, consider the subject matter of the claims at issue as well as the particular identities of the parties. Otherwise, litigation attorneys may find themselves entwined in their own litigation – a malpractice claim.

A recent case from Virginia offers lawyers in that jurisdiction new armor to assist in the defense of legal malpractice claims, arising out of a fact pattern, which included an attorney settling with less than all defendants. In *Shevlin Smith v. Bruce W. McLaughlin*, 769 S.E.2d 7 (Va. 2015), the Supreme Court of Virginia crystallized a handful of legal principles that should significantly impact the defense of legal malpractice claims across the Commonwealth, highlighting national splits along the way. The *Smith* case provides in-depth analyses on issues such as judgmental immunity, collectability as an affirmative defense, and emotional distress damages that attorneys in any jurisdiction should consider when involved in a legal malpractice matter.

Criminal Case

In 1998, the plaintiff, Bruce W. McLaughlin ("Plaintiff"), a lawyer involved in a tumultuous divorce, was accused by his wife and charged with felony sexual abuse against some of his children. Plaintiff hired two attorneys and their firms to lodge his criminal defense, William J. Schewe of Graham & Schewe (the "First Law Firm") and Harvey J. Volzer of Shaughnessy, Volzer & Gagner, P.C. (the "Second Law Firm"). A jury convicted Plaintiff on nine counts of sexual abuse and sentenced him to thirteen years in prison.

While in prison, Plaintiff initiated habeas corpus proceedings and obtained a new trial, which lasted a month. He was found not guilty on all charges and released in December 2002 after being incarcerated for over four years.

Criminal Legal Malpractice Case

Plaintiff then hired Brian Shevlin, of the Shevlin Smith law firm ("Third Law Firm") to pursue legal malpractice claims against the First and Second Law Firms for their failures to obtain taped interviews of the alleged victims and compare them with inaccurate written transcripts that led to Plaintiffs original criminal convictions. The First Law Firm offered Plaintiff $50,000 in settlement. In need of money, Plaintiff, assisted and advised by the Third Law Firm, signed a release agreement (the "Release Agreement") with the First Law Firm, which agreement expressly stated that the Second Law Firm (which had $2 million in malpractice insurance coverage) was not released.

At the time Plaintiff signed the Release Agreement, in late 2005, a statute in Virginia provided that "when a release or covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury, it shall not discharge any of the other tortfeasors from liability for the injury."[2] That statute abrogated the common law, which had previously held that "where there is one indivisible injury, for which settlement has been consummated, unconditional release of [a co-defendant] allegedly liable for the injury bars recovery against [other co-defendants] also allegedly liable, regardless of the theory upon which liability is predicated."[3] Concluding that the First and Second Law Firm were joint "tortfeasors," the Third Law Firm drafted the Release Agreement to not only release the First Law Firm, but also reserve Plaintiff's right to pursue action against the Second Law Firm for the same malpractice, pursuant to Va. Code Ann. § 8.01-35.1(A)(1).

1 At common law, it is generally recognized that "a release of one joint tortfeasor releases all." Stuart M. Speiser et al., 1A The American Law of Torts § 5:42, at 577(2003); *see e.g.*, *Whitt v. Hutchison*, 330 N.E. 2d 678 (Ohio 1975); *Dwy v. Connecticut Co.*, 92 A. 883 (Conn. 1915). Many jurisdictions, however, have codified contribution statutes to alter this harsh common law rule, beginning with the Uniform Contribution Among Tortfeasors Act promulgated in 1939 by the American Law Institute and the National Conference of Commissioners on Unified Laws. Some states have adopted this uniform act or have developed their case law to abrogate this ancient common law rule typically require that a release against one defendant does not release other non-settling co-defendants without expressly intending to do so. *See e.g.*, 10 Del. C. § 6304; Conn. Gen. Stat. § 52-572e; Md. Courts and Judicial Proceedings Code Ann. § 3-1404; *Leung v. Verdugo Hills Hosp.*, 282 P.3d 1250, 1255-56 (Cal. 2012); Gronquist v. Olson, 242 Minn. 119, 126, 64 N.W. 2d 159, 164 (1954).

2 Va. Code Ann. § 8.01-35.1(A)(1).

3 *Cauthorn v. British Leyland*, U.K., Ltd., 233 Va. 202, 207, 355 S.E.2d 306, 309 (1987).

Four months later, however, the Supreme Court of Virginia clarified the law in *Cox v. Geary* by declaring that Section 8.01-35.1(A)(1) did not apply in the legal malpractice context because legal malpractice defendants are not "tortfeasors."[4] Citing principles reiterating Virginia's common law on the subject, the Supreme Court explained that "'an action for the negligence of an attorney in the performance of professional services, while sounding in tort, is an action for breach of contract . . . .' It is the contract formed between an attorney and a client that gives rise to the attorney-client relationship; but for the contract, the attorney owes no duty to the client."[5]

Based on this ruling, the Second Law Firm lodged a plea in bar to attack Plaintiff's complaint on the grounds that Plaintiff's attempt to release only one of the legal malpractice defendants could not stand. The trial court agreed and dismissed the legal malpractice claim as to the Second Law Firm.

Civil Legal Malpractice Case

Plaintiff then targeted the Third Law Firm for legal malpractice based on its handling of the settlement with the First Law Firm and its thwarted attempts to pursue Plaintiff's criminal malpractice claims against the Second Law Firm. The matter was tried before a jury, which returned a $5.75 million verdict in favor of Plaintiff. The Third Law Firm appealed and, in persuading the Supreme Court of Virginia to vacate the jury award and remand the case, the high court amplified various principles of legal malpractice, primarily for the benefit of lawyers.

First Shield: Judgmental Immunity for Attorneys

Most importantly, the Supreme Court adopted the doctrine of "judgmental immunity," utilized in other jurisdictions, which provides that a lawyer cannot be liable "'when [the attorney's] opinions are based on speculation into an unsettled area of the law.'"[6] While the Virginia high court declined to adopt a "per se judgmental immunity doctrine" it announced the following rule:

> [I]f an attorney exercises a "reasonable degree of care, skill, and dispatch" while acting in an unsettled area of the law, which is to be evaluated in the context of the "state of the law at the time" of the alleged negligence, then the attorney does not breach the duty owed to the client.[7]

Applying this rule to Plaintiff's case, the Supreme Court ruled that the Third Law Firm acted in an unsettled area of the law because, at the time the Release Agreement was executed, i.e., before the ruling of *Cox v. Geary*, there were two lines of jurisprudence that justified the disputed release language drafted by the Third Law Firm. First, the Supreme Court recognized its prior identification of legal malpractice claims as a "hybrid claim straddling the line between tort and contract" such that the common law permitted these claims to be brought in either tort or contract law.[8] Second, the Supreme Court acknowledged its prior broad reading of section 8.01-35.1 that suggested the phrase "joint tortfeasors" need not be narrowly defined.[9] Because of this law, the Third Law Firm was found to have acted with "the reasonable degree of care, skill, and dispatch" required in that context, regardless of the subsequent ruling of *Cox v. Geary* that arguably changed the law to the detriment of Plaintiff.

Second Shield: Collectability as an Affirmative Defense

On appeal, the Third Law Firm argued that the trial court erred in refusing to recognize or instruct the jury on "collectability" as part of Plaintiff's measure of damages. "Collectability" limits the measure of a legal malpractice plaintiff's damages to how much the plaintiff could have actually recovered from the defendant in the underlying litigation, but for the defendant-attorney's negligence. In post-verdict motions, denied by the trial court and made part of the subsequent appeal, the Third Law Firm contended that Plaintiff failed to establish evidence that the amount sought by Plaintiff far exceeded what was actually collectable.

The Supreme Court of Virginia agreed, underscoring the point that:

> "[For] a legal malpractice [claim], the fact of negligence alone is insufficient to support a recovery of damages. The client must prove that the attorney's negligence proximately caused the damage claimed." Moreover, "[a]n attorney is liable only for actual injury to his client and damages will be calculated on the basis of the value of what is lost by the client."[10]

4 *Cox v. Geary*, 271 Va. 141, 624 S.E.2d 16 (2006).
5 *Id.* at 152, 624 S.E.2d at 22. The case of *Cox v. Geary* concerned a criminal legal malpractice plaintiff who had been compensated by the Commonwealth, pursuant to statute, for his wrongful incarceration of crimes he did not commit. To obtain the statutory compensation for his injuries, he executed a release of the Commonwealth. The defendants to his legal malpractice claims lodged a defense predicated on the notion that the plaintiff had sustained a single, indivisible injury—wrongful incarceration—such that he could not recover separately against the defendant lawyers, despite the severable liability afforded by section 8.01-35.1(A)(1). The Supreme Court of Virginia agreed with the defendants, based on the principle that a legal malpractice claim, while sounding in tort, is a breach of contract claim.
6 *Smith v. McLaughlin*, 769 S.E.2d 7, 11 (Va. 2015) (quoting *Roberts v. Chimileski*, 175 Vt. 480, 820 A.2d 995, 998 (Vt. 2003).
7 *Id.* at 12 (quoting *Ripper v. Bain*, 253 Va. 197, 202–03, 482 S.E.2d 832, 865–36 (1997); Heward & Lee Constr. Co. v. *Sands, Anderson, Marks & Miller*, 249 Va. 54, 57, 453 S.E.2d 270, 272 (1995)).
8 *Id.* at 14 (citations omitted).
9 *Id.* at 15.
10 *Id.* at 22 (quoting *Campbell v. Bettius*, 244 Va. 347, 352, 421 S.E.2d 433, 436 (1992); *Duvall, Blackburn, Hale & Downey v. Siddiqi*, 243 Va. 494, 497, 416 S.E.2d 448, 450 (1992)).

Thus, the Supreme Court firmly declared that collectability is, indeed, relevant to a legal malpractice plaintiff's damages for a lost claim resulting from an attorney's negligence.

Despite solidifying collectability as a critical factor of damages, the Supreme Court refused to impose the evidentiary burden of this measure on the plaintiff, instead, placing it on the defendant lawyers as an affirmative defense.[11] Nationally, the states are split as to whether collectability constitutes an element of a legal malpractice plaintiff's prima facie case[12] or an affirmative defense.[13] In taking the latter position, Virginia's high court joined the "growing trend" of states refusing to require a plaintiff to show that a favorable judgment in the underlying case would have been collectable. The Supreme Court based this decision on the fact that Virginia affords a long period of time for plaintiffs to collect on judgments, i.e., up to 20 years.[14] It also found determinative the notion that the defendant attorney was in a "better position" to prove uncollectability and that doing so would be more equitable because collectability, as an issue, becomes relevant only after the plaintiff establishes a prima facie case of liability for malpractice.

Third Shield: No Damages for Pain and Suffering or Emotional Distress

Finally, the Supreme Court articulated a bright line rule regarding all non-pecuniary and non-economic injuries caused by an attorney's malpractice. Plaintiff sought damages for his claims of emotional distress arising out of his wrongful incarceration, which formed the basis for both his criminal and civil legal malpractice claims. He pointed to Virginia's statutory law stating that "[e]very attorney shall be liable for any damage sustained by the client through the neglect of his duty as such attorney."[15] Plaintiff contended that the term "any" should encompass his non-pecuniary damages.

The trial court and, in turn, the Virginia Supreme Court, however, disagreed with Plaintiff. The Supreme Court established a categorical bar to any non-pecuniary damages in legal malpractice claims, underscoring its earlier point that legal malpractice claims are breach of contract actions in the Commonwealth.[16] It reasoned that, because "damages for breach of contracts are limited to the pecuniary loss sustained," Plaintiff could not recover for humiliation, injury to feelings, mental anguish, emotional distress, or any other such injuries for legal malpractice actions.[17] Trying not to diminish the realities of such injuries, the Supreme Court pointed out that Plaintiff would be more properly made whole from the Commonwealth of Virginia, itself, should its General Assembly pass a law awarding non-pecuniary damages to those who are tragically, wrongfully incarcerated.

Making the Most of New Tools

Lawyers defending legal malpractice claims should research whether these new tools—judgmental immunity, the affirmative defense of collectability, and the economic loss doctrine—for their Virginia counterparts are available in their state. In combination, these shields may carry great weight and lead to the early dismissal of legal malpractice claims, particularly if summary judgment is a more effective tool than in Virginia. Doing so could help avoid the nearly decade-long twists and turns of Bruce McLaughlin's attempts to make himself whole from the alleged legal malpractice of his three different attorneys. Indeed, these tools are powerful—they reversed an almost $6 million verdict in favor of the diligent, competent attorney trying to make the best judgment call for his client.

This article was authored for the benefit of CNA by Douglas P. Rucker, Jr. and Faith A. Alejandro, Sands Anderson PC, Richmond, Virginia

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11 One justice issued a separate concurrence on this point, taking issue with the majority's decision to stop short of requiring a plaintiff from proving collectability as part of his *prima facie* case. She wrote "Under the rule announced by the Court today, however, a legal malpractice plaintiff seeking damages for a lost claim is no longer required to prove the actual injury caused by an attorney's malpractice." *Id.* at 23-24 (McClanahan, J., concurring).

12 States recognizing collectability as an element of the legal malpractice plaintiff's prima facie case includes Illinois, California, Florida, Georgia, Iowa, Massachusetts, Nebraska, New York, North Carolina, Ohio, South Dakota, and Texas. *Smith v. McLaughlin*, 769 S.E.2d 7, 24 (Va. 2015) (collecting cases).

13 States recognizing collectability only as an affirmative defense, among which Virginia now numbers, include Washington, Alaska, the District of Columbia, Indiana, Maine, Michigan, New Hampshire, New Jersey, Oregon, and Pennsylvania. *Smith v. McLaughlin*, 769 S.E.2d 7, 25 (Va. 2015) (collecting cases).

14 Va. Code § 8.01-251(B).

15 Va. Code § 54.1-3906 (emphasis added).

16 *Smith*, 769 S.E.2d at 27.

17 Id. at 28–29.

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