Legal Malpractice Update

The Legacy of *Simko* and *Winiemko*

By Steven M. Wolock and Kathleen H. Klaus

Clients continue to sue their lawyers in ever-increasing numbers.[1] Claims against personal-injury attorneys lead the way, with claims against real-estate attorneys following closely in second place.[2] Few Michigan lawyers would find this surprising. Tort reform and an increasingly competitive market have led lawyers to file cases against their colleagues that probably would not have been filed in an earlier era.

In the mid-1990s, the Michigan Supreme Court issued a series of opinions intended to give guidance on the law of legal malpractice. The Court treated the topics of causation,[3] the attorney judgment rule,[4] duty,[5] the statute of limitations,[6] collateral estoppel,[7] the right to a jury trial,[8] and venue.[9]

Remarkably, since that time, the Supreme Court has not issued a single opinion that has treated a legal malpractice issue in any depth. The Court of Appeals has, however, issued many opinions that have fleshed out the law of legal malpractice. This article discusses caselaw developments with respect to the two most litigated substantive topics in the area: the attorney judgment rule and causation.

The Attorney Judgment Rule

Simko v Blake[10] stands as the seminal Michigan case in the area of legal malpractice. In *Simko,* the Supreme Court firmly embraced the attorney judgment rule, stating that "[w]here an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment."[11]

The case arose out of Blake's representation of Simko in a criminal case. At the trial, Blake, after unsuccessfully seeking a directed verdict after the close of the prosecution's proofs, called only Simko to testify in his own defense. Although the jury convicted Simko, the Court of Appeals reversed the denial of the directed verdict. Simko, however, having spent two years in prison, sued Blake, alleging that he had failed to adequately investigate the case, failed to discover essential witnesses, and failed to call important witnesses, among other things.

Despite arguable factual issues, the Court upheld the summary dismissal of Simko's complaint on the grounds that he had

failed to state a claim.[12] The Court's ruling was anchored in its recognition that litigation is an art, not a science, and that without the protection of the attorney judgment rule, "every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight."[13]

There was, in fact, little new about the Court's appreciation of these realities. As early as 1869, the Michigan Supreme Court, in *Babbitt v Bumpus,* noted that lawyers must cope with the "vagaries and imaginations of witnesses and jurors," the fact that courts "not infrequently" commit error, and the fact that "the best lawyers in the country find themselves mistaken as to what the law is."[14] Thus, the Court 140 years ago held that when attorneys "have acted in good faith, and with a fair degree of intelligence…the errors which may be made by them must be very gross before the attorney can be held responsible."[15]

In deciding *Simko,* however, the Court renewed its commitment to the principles recognized in *Babbitt.* As a practical matter, by its decision, the Court encouraged the lower courts to use summary disposition to weed out those cases in which the plaintiff merely seeks to second-guess the good faith and reasoned judgments of the defendant attorney.

Fast Facts

The Michigan Supreme Court first recognized the need to give attorneys wide latitude to exercise their professional judgment over 140 years ago.

Since *Simko,* the Court of Appeals has often upheld summary disposition on attorney judgment rule grounds.

A legal malpractice plaintiff must prove causation beyond speculation.

Developments Since *Simko*

Since *Simko,* the lower courts have applied the attorney judgment rule to a wide range of litigation decisions. Thus, the Court of Appeals has upheld summary disposition when the plaintiff challenged decisions regarding whether to sue potential parties[16] or call particular witnesses;[17] take discovery depositions of standard of care experts, compel pretrial disclosure of expert opinions, object to certain expert testimony at trial, and object to the reading of a deposition in lieu of testimony at trial;[18] plead alternative theories of causation;[19] raise particular issues on appeal;[20] seek reconsideration of an appellate decision;[21] introduce harmful documents rather than object to their admission;[22] recommend settlement;[23] offer particular rebuttal evidence;[24] raise a statute of limitations defense;[25] pursue particular claims;[26] file a motion for summary disposition before the close of discovery;[27] and use a trust to manage settlement proceeds in lieu of a bonded conservatorship.[28]

The Court of Appeals has also applied the attorney judgment rule to decisions outside of the litigation context. Thus, in *Persinger v Holst,*[29] the Court read *Simko* to bar a claim that an estate-planning attorney should have dissuaded his client from her choice of an agent for purposes of her power of attorney because the attorney allegedly knew that the proposed agent was incapable of handling the client's affairs. The Court reasoned that to hold otherwise would widen the scope of an attorney's duty to "infinite proportions," noting that "[a]n attorney could then be liable for allegedly failing to challenge a client's choice of business partner, personal representative, or other person to whom a client chooses to entrust or align his personal interests."[30] The Court also ruled that the attorney judgment rule barred the claim that the defendant attorney committed malpractice by permitting his client to execute a power of attorney at a time when he should have known she was incompetent.

The *Persinger* decision is a significant one. While the application of the attorney judgment rule in such cases still leaves room for liability when, for example, the lawyer's decisions have been grossly in error or lacked good faith, lawyers are now less vulnerable to suit when their transactional clients make poor business or personal decisions.[31]

Notably, in 2007, the Michigan Supreme Court in *Grace v Leitman* granted leave to consider the operation of the attorney judgment rule.[32] Among other things, the appeal in *Grace* raised the question whether *Simko* was being applied in a manner that too readily treated allegations of attorney negligence as issues of law to be decided by the court rather than a jury. However, after two rounds of briefing and oral argument, the Court vacated its decision granting leave and let *Simko* stand.[33]

The Supreme Court's decision in *Grace* to not trim, expand, or clarify *Simko* is a testament to the fact that the *Simko* decision, while perhaps imperfect, has served and will continue to serve a salutary purpose.

Causation

In the year before it issued the *Simko* decision, the Michigan Supreme Court clarified the proofs necessary to establish the "causation" element of a legal malpractice case. In *Charles Reinhart Co v Winiemko, supra,* the Court formally adopted the "case within a case" method of establishing causation in suits involving errors in the appellate process. As interpreted by the Court in *Winiemko,* the "case within a case" doctrine requires a plaintiff to "show that *but for* the attorney's alleged malpractice, he would have been successful in the underlying suit."[34] The adoption of the "suit within a suit" rubric in *Winiemko* represents the Supreme Court's effort to ensure that a plaintiff in a legal malpractice case establish with sufficient certainty that the attorney's negligence was a "cause in fact" of the plaintiff's injury.[35] Put another way, in appropriate cases, applying the "suit within a suit" doctrine satisfies the requirement that proof of causation is "based on factual evidence, rather than mere speculation."[36]

When "Case Within a Case" Does Not Apply

In 1997, the Michigan Court of Appeals addressed the issue of "causation" in a case in which it could not apply the "suit within a suit" analysis because of the nature of the alleged malpractice. In *Pontiac School Dist v Miller, Canfield, Paddock & Stone*,[37] the Court of Appeals held that a legal malpractice plaintiff must prove "cause in fact" with "substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred."[38] In that case, the plaintiff sued its attorneys for recommending a bond offering that allegedly required payment of excessive interest and insurance costs. The plaintiff claimed that the defendants recommended a bond structure that favored another client of the firm—the bond offering's underwriters. The attorneys lost at trial and appealed the adverse judgment, arguing that the plaintiff failed to prove causation. The Michigan Court of Appeals vacated the judgment and held that the trial court should have granted the defendants' motion for judgment notwithstanding the verdict.

In reaching its decision, the *Pontiac School District* Court noted that the plaintiff failed to provide evidence that its board of directors would have in fact approved a more favorable bond offering proposed by the plaintiff's expert. The Court found that the plaintiff's expert merely established that "a reasonably informed board" would have approved the alternative bond proposal, had the defendants recommended it. Because there was no evidence of what the plaintiff's board would have done, the plaintiff's evidence did not establish "cause in fact" with the requisite certainty.

Winiemko and *Pontiac School District* make clear that it is not sufficient for a plaintiff to establish that its legal matter "could have" turned out differently but for the attorney's negligence; a plaintiff in Michigan must prove, beyond speculation or conjecture, that things would have been better. Thus, at the very least, a plaintiff must adduce evidence that the hypothetical "better result" was in fact likely and not just possible. ■

Steven M. Wolock is a shareholder in the firm of Maddin, Hauser, Wartell, Roth & Heller, P.C. and concentrates in professional liability defense work and coverage litigation. He earned his JD from the University of Michigan Law School in 1985 and obtained a BA from the University of California at Santa Cruz in 1977. Mr. Wolock was selected for inclusion in Michigan Super Lawyers *in 2007 and 2008 and* Best Lawyers in America *for 2008 and 2009.*

Kathleen H. Klaus is a shareholder at Maddin, Hauser, Wartell, Roth & Heller, P.C. and concentrates in professional liability and employment defense. Ms. Klaus graduated from the University of Michigan Law School in 1992 and received a bachelor of arts degree, with honors, from the University of Iowa in 1987. Before joining Maddin Hauser in 2004, Ms. Klaus concentrated in employment, commercial, and bankruptcy litigation in Chicago, Illinois.

FOOTNOTES

1. American Bar Association, *Profile of Legal Malpractice Claims: 2004–2007* (ABA, 2008).
2. *Id.*
3. *Charles Reinhart Co v Winiemko*, 444 Mich 579; 513 NW2d 773 (1994); *Coleman v Gurwin*, 443 Mich 59; 503 NW2d 435 (1993).
4. *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995).
5. *Mieras v DeBona*, 452 Mich 278, 308; 550 NW2d 202 (1996); *Beaty v Hertzberg & Golden, PC*, 456 Mich 247; 571 NW2d 716 (1997).
6. *Gebhardt v O'Rourke*, 444 Mich 535; 510 NW2d 900 (1993).
7. *Id.*
8. *Winiemko, supra* at 604.
9. *Coleman, supra;* but see MCL 600.1629; *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008).
10. *Simko, supra* at 656.
11. *Id.* at 658.
12. Blake had sought dismissal of the complaint pursuant to Michigan Court Rule 2.116(c)(8).
13. *Id.* at 659, quoting *Woodruff v Tomlin*, 616 F2d 924, 930 (CA 6, 1980).
14. *Babbitt v Bumpus*, 73 Mich 331, 338; 41 NW 417 (1869).
15. *Id.*
16. *Estate of Mitchell v Dougherty*, 249 Mich App 668; 644 NW2d 391 (2002); *Gibbons v Thompson, O'Neil & Vanderveen*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 271628); *JMS & Associates v Schwartz*, unpublished opinion per curiam of the Court of Appeals, issued October 3, 2000 (Docket No. 214765).
17. *Schubiner v Sommers, Schwartz, Silver & Schwartz, PC*, unpublished opinion per curiam of the Court of Appeals, issued June 26, 2007 (Docket No. 2744775); *Grace v Leitman*, unpublished opinion per curiam of the Court of Appeals, issued March 16, 2006 (Docket No. 257896), lv gtd, 477 Mich 1064; 728 NW2d 861, vacated, 480 Mich 913; 739 NW2d 634 (2007).
18. *Beztak Co v Vlasic*, unpublished opinion per curiam of the Court of Appeals, issued August 19, 2003 (Docket No. 236518).
19. *Badalamenti v Miller*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2005 (Docket No. 254790).
20. *Kandalaft v Peters*, unpublished opinion per curiam of the Court of Appeals, issued April 17, 2007 (Docket No. 267471); *Flanigan v Herschfus*, unpublished opinion per curiam of the Court of Appeals, issued February 1, 2002 (Docket No. 226977).
21. *Kandalaft, supra.*
22. *Po v Benefiel*, unpublished opinion per curiam of the Court of Appeals, issued September 27, 2005 (Docket No. 255546).
23. *Heller v Donaldson*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 1998 (Docket No. 194219); *Kauer v Clark*, unpublished opinion per curiam of the Court of Appeals, issued July 9, 1996 (Docket No. 175138); *Woods v Gursten*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 1998 (Docket No. 194523).
24. *Crutcher v Breck*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2007 (Docket No. 271599).
25. *Wickham v Lepley*, unpublished opinion per curiam of the Court of Appeals, issued March 30, 2006 (Docket No. 258429).
26. *Lebodovych v Hadley*, unpublished opinion per curiam of the Court of Appeals, issued November 22, 2005 (Docket No. 255797).
27. *Berryman Properties v O'Dea*, unpublished opinion per curiam of the Court of Appeals, issued September 23, 2004 (Docket No. 248718).
28. *Stanke v Stanke*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2007 (Docket No. 263446).
29. *Persinger v Holst*, 248 Mich App 499; 639 NW2d 594 (2002).
30. *Id.* at 508.
31. See also *Stanke, supra.*
32. *Grace v Leitman*, 477 Mich 1064; 728 NW2d 861 (2007).
33. *Id.*
34. *Winiemko, supra at* 586 (citations omitted, emphasis in original).
35. *Winiemko, supra* at 586–587.
36. *Law Offices of Lawrence J Stockler v Rose*, 174 Mich App 14, 25; 436 NW2d 70 (1989).
37. *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602; 563 NW2d 693 (1997).
38. *Id.* at 614, citing *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994).