

Hold-On-Tight v. Whole: The Collectibility Question in Legal Malpractice Claims

OPINION AND ORDER

INTRODUCTION

Appellant May Q. Whole brings this appeal from the trial court's entry of a \$500,000 judgment in favor of Respondent Hold-On-Tight Company [hereinafter "Hold-On-Tight"]. On appeal, Ms. Whole argues that the court below erred by holding that it was her burden to plead and prove that the judgment in the underlying legal malpractice case was uncollectible. Deciding an issue of first impression in this jurisdiction, we conclude that pleading and proving collectibility should be the plaintiff's burden, and therefore reverse the trial court.

FACTUAL BACKGROUND

Teetering Totters, Inc. [hereinafter "Teetering"], a playground equipment manufacturer, entered into a \$500,000 contract with Hold-On-Tight for the purchase of grab-bars, handles and swing-set chains. However, Hold-On-Tight was paid only \$100,000 of the contract price. Evidence in the record indicates that Teetering was experiencing severe economic difficulties at the time, bordering on insolvency.

Hold-On-Tight retained Attorney Whole to represent it in a breach of contract action for the unpaid balance of the contract. Teetering counterclaimed, alleging that Hold-On-Tight's equipment was sized for adults instead of children, and arguing that Hold-On-Tight's delivery of nonconforming goods relieved it of its obligation under the contract and entitled it to a refund of the \$100,000 it had already paid.

A week before trial on the matter was scheduled to begin, the trial court judge postponed the trial date by two weeks. Due to a scheduling conflict, Hold-On-Tight's expert witness was unable to testify at the rescheduled trial. The trial court found that the expert witness Ms. Whole

retained as a replacement was not reliable and excluded the witness' testimony. A jury found in favor of Teetering and also awarded Teetering \$100,000 on its counterclaim against Hold-On-Tight for a refund of the initial payment.

Hold-On-Tight then sought recovery in this malpractice action against Ms. Whole, alleging that her failure to secure a competent trial expert had caused it to lose the underlying case. The trial court entered judgment for the full amount against Ms. Whole. The trial court did not require Hold-On-Tight to plead and prove that its damages would have been collectible from Teetering, rejecting Ms. Whole's argument to the contrary. The trial court held that it was Ms. Whole's burden to plead and prove uncollectibility as a defense. The trial court's finding of negligence is not at issue in this appeal; Ms. Whole raises only the issue of collectibility. We turn to that issue.

DISCUSSION

No court in this jurisdiction has previously considered the relevance of collectibility to a legal malpractice action or the proper allocation of the burden of proof. Accordingly, we look to relevant case law from courts that have addressed the issue. *Paterek v. Petersen & Ibold*, 890 N.E.2d 316, 319-21 (Ohio 2008) (weighing authority from other jurisdictions); *Carbone v. Tierney*, 864 A.2d 308, 317-18 (N.H. 2004) (same). As these are questions of law, we review the trial court's rulings *de novo*. *Carbone*, 864 A.2d at 317.

To succeed on a claim for legal malpractice, the plaintiff must establish (1) an attorney-client relationship, (2) negligence, and (3) that the negligence caused the loss of a valid claim. *See Paterek*, 890 N.E.2d at 319-321; *Carbone*, 864 A.2d at 314. *See generally* Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* § 8:13 (2010). In accordance with traditional negligence standards, the plaintiff has the burden of proving each of these elements. *Id.* § 31:17.

“The principles of proof and causation in a legal malpractice action usually do not differ from an ordinary negligence case.” *Daugert v. Pappas*, 704 P.2d 600, 603 (Wash. 1985).

The causation element includes both cause-in-fact and proximate cause. *Id.* § 31:6. Cause-in-fact refers to the causal relationship between the injury and the conduct and, in legal malpractice actions, is often proven by the “case-within-a-case” method. *Id.* Proximate causation, on the other hand, is focused on limiting the defendant’s liability to “the kinds of harms he risked by being negligent.” Dan B. Dobbs, *The Law of Torts* §180 (2001). The analysis “is related not only to the degree of connection between the conduct and the injury, but also with public policy.” *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 135 Cal.Rptr.2d 46, 52 (Cal. 2003). Although sometimes referred to as “the proximate cause defense,” proximate cause is an element of the plaintiff’s case, not an affirmative defense. *See Korando v. Uniroyal Goodrich Tire Co.*, 637 N.E.2d 1020, 1024-25 (Ill. 1994).

Collectibility of the underlying judgment is related to proximate causation. Richard H.W. Maloy, *Proximate Cause: The Final Defense in Legal Malpractice Claims*, 36 U. Mem. L. Rev. 655, 676 (2006). As one court noted:

In the legal malpractice context, the elements of causation and damage are particularly closely linked. It is difficult to consider a plaintiff’s claim that the defendant attorney’s proper handling of an underlying matter would have resulted in a favorable judgment that could be collected, without evaluating the amount of such a favorable judgment. The plaintiff has to show both that the loss of a valid claim was proximately caused by defendant attorney’s negligence, and that such a loss was measurable in damages.

Hecht, Solberg, Robinson, Goldberg & Bagley, LLP v. Superior Court, 40 Cal.Rptr.3d 446, 454 (Cal.Ct.App. 2006) (internal citations omitted). *See also Whiteaker v. State*, 382 N.W.2d 112, 114 (Iowa 1986) (“Proof of damage proximately caused by negligence is a fundamental element of a malpractice claim.”).

All jurisdictions that have considered the issue recognize that collectibility of the underlying judgment is relevant to a legal malpractice claim. *Paterek*, 890 N.E.2d at 320-21; *Kituskie v Corbman*, 714 A.2d 1027, 1030 (Pa. 1998). “To find collectibility of a lost judgment irrelevant would go beyond the usual purpose of tort law to compensate for loss sustained and would give the client a windfall opportunity to fare better as a result of the lawyer’s negligence than he would have fared if the lawyer had exercised reasonable care.” *Paterek*, 890 N.E.2d at 20. *See also Klump v. Duffus*, 71 F.3d 1368, 1374 (7th Cir. 1995) (“In a malpractice action, a plaintiff’s “actual injury” is measured by the amount of money she would have actually collected had her attorney not been negligent.”) *Kituskie*, 714 A.2d at 1030 (“[T]he plaintiff in a legal action should be compensated only for his actual losses.”) Evidence of collectibility “provides a realistic picture of what the malpractice claimant actually lost.” *Paterek*, 890 N.E.2d at 320. We agree, and therefore hold that a trial court may consider evidence of collectibility in a legal malpractice action.

There is, however, a split in authority over which party has the burden of pleading and proving collectibility. The majority of jurisdictions place the burden on the plaintiff. *Mallen and Smith, supra*, at § 31:17; *Paterek*, 890 N.E.2d at 324 ; *Carbone*, 864 A.2d at 318. This approach is consistent with traditional negligence principles that place the burden of proving each element of the claim on the plaintiff. *Lavigne v. Chase, Haskell, Hayes & Kalamon*, 50 P.3d 306, 311 (Wash.App.2002) (placing the burden on defendant attorney “departs too far from general principles of negligence”); *Klump*, 71 F.3d at 1374 (assigning burden of proof to the plaintiff is “consistent with a plaintiff’s burden of proof in negligence actions generally”); *Beeck v. Aquaslide ‘N’ Dive Corp.*, 350 N.W.2d 149, 160 (Iowa 1984) (noting that the principle applies outside of the legal malpractice field).

The majority rule has been criticized as unfair because “the issue of collectibility would not have existed if not for the negligence or other improper conduct of the attorney” and because “collectibility is frequently difficult to prove.” Joseph H. Koffler, *Legal Malpractice Damages in a Trial within a Trial – A Critical Analysis of Unique Concepts: Areas of Unconscionability*, 73 Marq. L. Rev. 40, 74 (1989). Thus, a growing number of jurisdictions have departed from this rule, requiring uncollectibility to be raised as an affirmative defense, with the burden of proof on the defendant lawyer. See, e.g., *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 31-32 (Alaska 1998); *Clary v. Lite Machs. Corp.*, 850 N.E.2d 423, 440 (Ind.Ct.App. 2006); *Carbone*, 864 A.2d at 320 (N.H. 2004); *Lindeman v. Kreitzer*, 775 N.Y.S.2d 4, 8-9 (N.Y. App. Div. 2004); *Kituskie*, 714 A.2d at 1032 (Pa. 1998). According to this view, the plaintiff’s burden of proving loss of a judgment on a valid claim does not logically include the burden to prove collectibility. *Kituskie*, 714 A.2d at 1031. Courts have also justified this approach because “the legal malpractice action is likely to have been brought years after the underlying events ... because of the defendant attorney’s failure to act timely in the first instance.” *Lindeman*, 775 N.Y.S.2d at 8-9. See also *Power Constructors*, 960 P.2d at 31-32; *Smith v. Haden*, 868 F.Supp. 1, 2 (D.D.C. 1995). Placing the burden of proof on the plaintiff “ignores the possibility of settlement between the plaintiff and the underlying tortfeasor and also overlooks that the passage of time itself can be a militating factor either for or against collectibility of the underlying case.” *Kituskie*, 714 A.2d at 1032. Policy therefore favors “requiring the malpracticing attorney to bear the inherent risks and uncertainties of proving uncollectibility.” *Power Constructors*, 960 P.2d at 31-32.

Some courts have attempted to create a narrow exception to the majority rule, placing the burden on the plaintiff except when the malpracticing attorney’s negligent conduct “makes it

impossible to prove the collectibility of the claim.” *Fernandes v. Barrs*, 641 So.2d 1371, 1376 (Fla. Dist. Ct. App. 1994), *disapproved of on other grounds by Chandris, S.A. v. Yanakakis*, 668 So.2d 180 (Fla. 1995). *See also Jernigan v. Giard*, 500 N.E.2d 805, 807 (Mass. 1986) (suggesting that a malpracticing attorney “may not rely on the consequences of his own negligence to bar recovery against him.”). In *Fernandes*, the defendant attorney’s negligence caused the plaintiff to miss the statutory deadline for filing a personal injury complaint against a state-run community college. 641 So.2d at 1376. Because the attorney’s negligence not only cost the plaintiffs a valid claim but also made it “impossible” for them to prove whether they would have been successful in pursuing a legislative override to the statutory damages cap, the burden was appropriately on the defendant attorney to prove uncollectibility. *Id.* *But see* Mallen and Smith, *supra*, at §31:17 (questioning the “impossibility” of proof in *Fernandes*).

Although we acknowledge the concerns raised by the minority jurisdictions, we decline to depart from traditional negligence rules that place the burden on the plaintiff to prove each element of the case. To hold a malpracticing attorney responsible for a damages award that could not have been collected would be to hold the attorney responsible for a harm that could not have been avoided by adhering to the standard of care. Uncollectible damages are beyond the scope of what was risked by the negligent conduct, and therefore beyond the scope of damages that can be traced to the attorney’s negligence. Accordingly, it would be unjust to impose liability on the attorney for harm that could not have been prevented no matter how skillful the prosecution of the claim. *See Paterek*, 890 N.E.2d at 320.

While we understand that “the need to determine collectibility is caused by professional negligence,” *Power Constructors*, 960 P.2d at 32, the same could be said about negligence actions generally. It is well-established in our law, however, that negligent conduct by itself is

insufficient to impose liability; the law does not impose liability unless the plaintiff can also establish a “causal connection” between the breach of a legal duty and the harm suffered. *See Dobbs, supra*, at §§ 150; *Paterek*, 890 N.E.2d at 322; *Hecht*, 40 Cal.Rptr.3d at 453. A negligent actor may thereby avoid punishment, or at least liability in tort. *See Dobbs, supra*, at §168.

Because our approach is consistent with traditional negligence standards, it does not place any additional burden on a legal malpractice claimant than on any other negligence claimant, for in any negligence case the plaintiff must show that the harm suffered was in fact caused by the defendant and was within the scope of the risk. *See Daugert*, 704 P.2d at 603 (noting the similarity between ordinary negligence and legal malpractice). Furthermore, “difficulty in procuring evidence does not excuse the party upon whom rests the burden of proof from making his case.” *Beeck*, 350 N.W.2d at 161.

For these reasons, we reverse the trial court. The trial court found that Hold-On-Tight lost its case against Teetering because of Attorney Whole’s negligence in procuring a suitable expert. But even if it had prevailed in the underlying litigation, Hold-On-Tight it may or may not have been able to collect the judgment from Teetering. Especially given the evidence of Teetering’s financial condition at the time, it is not clear how much of the judgment it could have collected. Thus, it is not clear what, if any, “actual harm” Hold-On-Tight suffered because of Ms. Whole’s negligence.

We are not persuaded by the argument that the rule for all legal malpractice actions should be different because the malpractice itself is *likely* to have caused difficulty in proving collectibility. *See, e.g., Lindeman*, 775 N.Y.S.2d at 8-9. It would be inappropriate to categorically shift the burden of proof to an entire class of defendants based on wrongful conduct that may or may not be present in a particular case. We do recognize that in some cases the

lawyer's negligent act may itself destroy the proof of collectibility. *See Jernigan*, 500 N.E.2d 805, 807. The facts of the case before us would not implicate this principle, however. While Ms. Whole's negligence may have destroyed any chance Hold-On-Tight had of winning at trial, the negligence did not destroy any evidence bearing on the collectibility of the judgment. We therefore leave for another day to define the parameters of when an attorney's negligence will itself make proof of collectibility sufficiently difficult that the burden should shift to the attorney. We note, however, that this is an exceedingly narrow exception. *See Fernandes*, 641 So.2d at 1376 (noting the "unusual facts" giving rise to that ruling).

The rule we adopt today neither "ignores the possibility of settlement between the plaintiff and the underlying [party]" nor "overlooks the mitigating nature of the passage of time." *Kituskie*, 714 A.2d at 1030. These are, of course, facts that bear on the amount of harm suffered by the victim of malpractice. The plaintiff can – and should – factor these items in to its damage calculation, and present evidence thereof. *See Paterek*, 890 N.E.2d at 322.

Because the trial court did not require Hold-On-Tight to plead or prove collectibility of the underlying judgment, we must remand the case to the district court for findings on that issue. *See Lavigne*, 50 P.3d at 311; *Akin, Gump, Strauss, Hauer and Feld, LLP v. Nat'l Dev. and Res. Corp.*, 299 S.W.3d 106, 123 (Tex. 2009). By way of guidance to the court on remand, we note that "collectibility is not an all or nothing question." *Hecht*, 40 Cal.Rptr.3d at 454. The measure of damages is the portion of the judgment that could have been collected. *Garretson v. Harold I. Miller*, 121 Cal.Rptr.2d 317, 321 (2002); *Taylor Oil Co. v. Weisensee*, 334 N.W.2d 27, 30 (S.D. 1983). The trial court should consider "all possible sources for payment of the judgment, the amount of time the judgment is valid and can be executed upon, and whether or not the judgment is dischargeable in bankruptcy." John H. Bauman, *Damages for Legal Malpractice: An Appraisal*

of the Crumbling Dike and Threatening Flood, 61 Temple L.Rev. 1127, 1137-38 (1988). This can include evidence of the underlying defendant's net assets that would be available to satisfy the judgment or any amount that might have been paid by a third party, such as a guarantor or insurer. *Akin*, 299 S.W.3d at 113. The amount of damages must be shown by proof of the actual circumstances of the underlying party and may not rely on assumptions or speculation. *Hecht*, 40 Cal.Rptr.3d at 454; *Taylor Oil*, 334 N.W.2d at 30.

CONCLUSION

For the forgoing reasons, we hold that evidence of collectibility of the underlying judgment is relevant in a legal malpractice action. We also hold that the burden of proving collectibility is on the plaintiff, in accordance with traditional negligence principles. The ruling of the trial court is therefore reversed and remanded for findings on the collectibility issue.