NO. 42864-II (4)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CLARK COUNTY FIRE DISTRICT NO. 5 and AMERICAN ALTERNATIVE INSURANCE CORPORATION

Appellants,

v.

BULLIVANT HOUSER BAILEY, P.C., and RICHARD G. MATSON

Respondents.

OPPOSITION BRIEF OF RESPONDENTS

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I. IDENTITIES OF THE PARTIES

The Respondent parties before this Court on this appeal are Bullivant Houser Bailey, a law firm and Washington Professional Corporation, and Richard G. Matson a shareholder of that law firm, defendants in the trial court.

The Appellants include Clark County Fire District No. 5 (hereinafter "CCFD"), and also, American Alternative Insurance Company (hereinafter "AAIC") which is a party previously dismissed from the underlying superior court litigation almost 10 months prior to the filing of this appeal.

II. RELIEF REQUESTED

Respondents request that this Court affirm the decision of the Clark County Superior Court entered on August 17, 2012 [CP 1234-1236], dismissing all claims by the plaintiffs against these defendants based on the doctrine of judgmental immunity.

III. INTRODUCTION

> *A lawyer would need a crystal ball, along with his library, to be able to guarantee that no judge, anytime, anywhere, would disagree with his judgment or evaluation of a situation.*

Baker v. Fabian, Thielen & Thielen, 578 N.W.2d 446, 52 (Neb. 1998) (quoting Denzer v. Rouse, 180 N.W.2d 521, 525 (Wis 1970)).[1]

[1]Cooney, Benching the Monday-Morning Quarterback, Wayne Law Review 9 (2006).

The appellants' claims for legal malpractice were properly dismissed by the Trial Court based on the Court's application of the doctrine of "judgmental immunity".

Washington law recognizes the doctrine of judgmental immunity as applied to cases which allege professional negligence of attorneys. Halvorsen v. Ferguson, 46 Wn. App. 708, 717-718, 735 P.2d 675 (1987).

> In general, mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice. See Cook, Flanagan & Berst v. Clausing, supra, 73 Wash.2d at 394, 438 P.2d 865; cf. Hansen v. Wightman, 14 Wn. App. 78, 100-01, 538 P.2d 1238 (1975). This rule has found virtually universal acceptance when the error involves an uncertain, unsettled, or debatable proposition of law. See *Mallen & Smith*, Vol. 2 supra §200, at 278 and cases cited therein; see also Martin v. Burns, 102 Ariz. 341, 429 P.2d 660 (1967) (summary judgment); Davis v. Damrell, 119 Cal. App.3d 883, 174 Cal. Rptr. 257 (1981) (summary judgment).

Id. at 46 Wn. App. 708, 717–718, 735 P.2d 675 (1987).

Judgmental immunity is an appropriate legal doctrine, sustaining judicial polices which reflect the undeniable realities of practicing law. No amount of skill, expertise, or diligence will enable lawyers to predict with certainty how a judge or jury will react to certain trial tactics.

Nothing in the appellants' 50-page brief here on appeal or in their 35-page Opposition pleading in the trial court (which included

approximately 550 pages of declarations and exhibits), revises the unassailable precepts of judgmental immunity as applied in this case.

- The application of judgmental immunity is a Question of Law for the trial court to decide as to counsel's (1) right to trial tactical decisions and (2) assessment of "potential" settlement values;

- The use of attorney experts' declarations to refute arguments on the applicability judgmental immunity is irrelevant and is an effort to usurp the role of the Court to assess this legal issue.

- The Trial Court's analysis of the totality of the circumstances leading to its conclusion that Mr. Matson's conduct was reasonable and thus the application of the doctrine of judgmental immunity was appropriate.

- As previously determined in the underlying action by both Superior Court Judge Robert Harris and this Division of the Washington Court of Appeals, the alleged factual predicate related to the non-objected closing arguments made by the underlying plaintiffs' does not warrant any reasoned scrutiny in assessing a post-trial assertion of legal malpractice.

- Attorneys are not and never have been held to the standard of guarantors of the outcome of jury trials, and an attorney's pre-trial estimate of settlement value is an individual judgment consisting of no more than speculation of what a trier of fact might ultimately conclude.

Both the law related to judgmental immunity and the undisputed facts presented to the Trial Court below convinced Judge Wulle that the dismissal of the appellants' speciously claimed and improvidently pled legal malpractice claims was completely appropriate and reasonable. In fact, as appellants themselves acknowledge, the trial court Judge made the

specific determination that it considered Mr. Matson's decisions with respect to the issues in dispute were made in "good faith" and were "reasonable." [Brief of Appellants, p. 17.]

IV. STATEMENT OF THE CASE

Initially, Respondents note and contest appellants' continual and gratuitous allegation, presented as "fact" in the "Factual History of the Underlying Case", and as presumptive fact throughout the appellants' argument that the defendants / appellants "were negligent", or that the defendants have "breached the standard of care", or "caused damages" to the Appellants.

First, it must be noted that this in an appeal of an Order issued by a Trial Court which entirely dismissed the appellants' allegations of such conduct. There have been no findings of fact and no judgments entered in the trial court proceedings of this case other than the dismissal of the plaintiff insurance company's complaint for legal malpractice against these defendants – the subject of a prior appeal, and the dismissal of the same allegations by plaintiff Clark County Fire District No. 5, which dismissal is the subject of this appeal.

Moreover, any number of the "factual" assertions in the Appellants' brief [Appellants' Brief, pp. 5-15], even if considered as true,

are not germane to the issues here, but are "red-herrings." Some examples:

- The bald assertion that the respondents were not "experienced" is gratuitous and has no bearing on the issue of judgmental immunity.

- Matters of the respondents' internal law firm policies respecting "internal review" of attorneys' work has nothing to do with the case-related and in-court conduct of the respondents alleged here.

- The fact that Respondent Matson worked for a large firm has no bearing on his individual judgmental analysis and estimate of the facts of the underlying case, which appellants now challenge in hindsight.

- Appellants' after-the-fact critique of timing of pre-trial discovery which was conducted is irrelevant; the discovery was in fact conducted.

- Respondents' pre-trial consideration of what possible motions might or could have been filed is not an issue on this appeal.

- The fact that Mr. Matson's judgment was that "jury verdicts" of unrelated cases did not provide meaningful analysis of the underlying case and "were not very helpful . . . in trying to analyze" this case is not subject to criticism in hindsight.[2]

- The allegations concerning the timing of pre-trial settlement discussions in the underlying matter are without any meaning. As the underlying defendants' counsel, the respondents could not force the underlying plaintiffs to

[2]As the Trial Court judge reasonably, if colorfully, noted: "Because I've been there 100 times myself, a bazillion times myself, you know. And studying jury verdicts, excuse me if I'm quoting General Schwarzkopf correctly, that is pure bovine scatology. There is no way that somebody else's verdict is going to tell me what my jury's going to do." [RP 69].

enter a settlement agreement. [In any event, overwhelming case authority holds that decisions concerning settlement are within the unilateral province of the client. [See, e.g. 4 Mallen & Smith, Legal Malpractice (2012 ed.), §33:36, pp. 890-891 and cases cited in fn. 1]. "The rule is that an attorney does not have inherent authority to compromise or settle the client's claim . . ."

- The plaintiffs' argument that Mr. Matson did not perform an evaluation of settlement until prior to a mediation is of no moment; Mr. Matson did perform such an analysis and criticism of performing such an analysis prior to a formal settlement mediation is patently without merit.

- The appellants' complaint that the settlement authority which appellants purportedly brought to the mediation was "inadequate" is of no moment, Mr. Matson could not control the fact that the plaintiffs' mediation settlement demand was in excess of $8 million dollars, and, the appellant CCFD's insurance representatives working for appellant AAIC testified that based on their own evaluations that they would allow the case to proceed to trial before authorizing any settlement even near such a settlement value.

- Appellants' assertions that Mr. Matson somehow had a "fundamental erroneous understanding of the law" is based entirely on the hind-sight declarations of experts hired by the appellants, only after they had initially moved the court to dismiss the defense of judgmental immunity "as a matter of law" and then discovered that a retired superior court judge and a practicing employment law attorney determined that Mr. Matson's judgment and conduct was reasonable.

In summary, there are no established "facts" which conclude that these defendants are in fact liable to the Appellants. Further, there is ample evidence in the record before this Court which is directly contrary

to the appellants' unfounded assertions of the existence of defendant's liability for legal malpractice.

It is Respondents' position, as supported by evidence in the record, that the Respondents, defendants below, in fact:

- Met the standard of care in their representation of the Clark County Fire District No. 5 [CP 412];
- That Mr. Matson properly evaluated the underlying case, including the potential settlement value in that without limitation he:
  - Evaluated and/or interviewed the prospective list of witnesses [CP 414, 419-442];
  - Analyzed the underlying plaintiffs' discovery responses [CP 443-444];
  - Mr. Matson prepared detailed briefs for pre-trial mediation and trial [CP 479-502, 448-474];
  - Mr. Matson prepared and presented his clients detailed evaluations of potential damages [415- 416, 504-510];
  - Mr. Matson properly discussed the case and analysis with his clients [CP 416-417];
  - Mr. Matson properly evaluated the potential quantum of plaintiffs' attorneys fees [CP 417];
  - Mr. Matson properly conducted settlement negotiations on behalf of his clients [CP 419-421].

Viewing the record that was before the Trial Court and considering "facts" rather than the bald and unsubstantiated argument and mis-characterizations of the appellants, it is clear that at the Trial Court

properly concluded that the "totality of the circumstances" dictated application of the doctrine of judgmental immunity which required the dismissal of the appellants' hindsight, second-guessing claims as a matter of law.

A. The Underlying Litigation

The alleged sexual harassment by CCFD No. 5 which formed the basis of the underlying plaintiffs' claims occurred during the period from 2000 to 2003. CCFD No. 5 was first notified of a potential claim by the underlying plaintiffs in late 2003. By November 2003 CCFD No. 5 had given notice of these claims to its liability insurer, AAIC. AAIC then forwarded the claim for adjustment to its Third-Party Claims Administrator ["TPA"] VFIS. [CP 317, lines 2-3, fn 2.]

From late 2003 into early 2005, AAIC conducted no investigation of the claims, never attempted to contact the claimants, never directly communicated with their insured, never met or discussed the allegations with Marty James, never contacted counsel for the underlying claimants to discuss settlement or met with any of the participants or witnesses to the purported conduct. [CP 535, Deposition of Lynn Matz, pp. 130-132.] Instead, AAIC, through Glatfelter, directed its insured CCFD No. 5 to not engage in any settlement discussions. [CP 538, Deposition of David G. Vial, pp 40-41.] On April 14, 2005, on behalf of CCFD No. 5, Glatfelter,

the claims administrator for Liability insurer AAIC, assigned the firm of Bullivant Houser Bailey, P.C. ["BHB"] to defend AAIC's insured, CCFD No. 5. [CP 317, lines 1-2, fn. 2.]

In the fall of 2006, Glatfelter went further and assigned a member of its own defense counsel "panel," attorney Katherine Hart-Smith, to separately oversee and represent AAIC's interests relating to the underlying litigation. [CP 314, lines 11-13, fn. 1.] In fact, Ms. Hart-Smith formally appeared as an additional counsel of record in the underlying matter for CCFD No. 5 at the specific direction of AAIC's lead TPA claims handler, Lynn Matz.

In late 2006, prior to mediation of the case, AAIC's panel counsel Hart-Smith corresponded to AAIC's claims administrator, Lynn Matz of Gladfeldter that she "expected" that if a jury hearing the case believed all of the evidence offered by plaintiffs 'it will be a multi-million dollar award." [CP 532-533.]

On March 8, 2007, mediation took place. The day before mediation, underlying plaintiffs increased their joint settlement demand from $6 million to approximately $8.5 million and the appellants were so notified of this fact by Mr. Matson. [CP 540.] Following a full day of mediation, Glatfelter adjuster Lynn Matz independently decided to not offer a single dollar in settlement. [CP 543, Deposition of Lynn Matz, p.

138.] In response to the $8.5 million demand, Ms. Matz further stated that at mediation she said "...if the plaintiff wants these kind of numbers a jury is going to have to give it them." [CP 546, Deposition of Lynn Matz, p. 187.]

In May 2007, Mr. Matson, assisted by AAIC's appointed counsel Katherine Hart-Smith, represented plaintiff CCFD No. 5 at trial in the underlying sexual harassment lawsuit brought in Clark County Superior Court. The underlying case was tried to a jury and their view of the evidence resulted in a verdict awarding economic and non-economic damages to the sexual harassment plaintiffs. [CP 548-552.]

The trial in the underlying matter commenced on April 30, 2007 and lasted more than four weeks. The jury heard more than 50 witnesses.

On May 30, 2007 the underlying plaintiffs' counsel Thomas Boothe gave his closing argument.

During his closing argument, which continued uninterrupted for over an hour, Mr. Boothe made the following comments:

> But I'll leave you with the request that we are gonna [sic] make for an award of $1,000,000 in non-economic damages for each of the four plaintiffs.
>
> The amount that's being sought will not in any way reduce fire services, hurt the Department, it's not going to do anything that will hurt services in any way or raise taxes, do any of the bogies that might be mentioned, it will not happen. We know that.

> What you need to do, please, is put a value on their suffering that other departments will look up and say, 'We can't do that.' Put a value on what they have experienced and compensate them to a level that says, 'If you do this, serious consequences flow, and we compensate people as they are injured.' And in so doing, also let HR departments know that there's a better structure, there's a better way to do this.
>
> HR departments don't exist for the protection of the city. HR departments don't exist for protection of the company. Let them know that they have to be up there with a viable means for somebody who's experiencing harassment to step forward and bring it forth in a safe way. And an award of $1,000,000, compensation of $1,000,000 to Valerie Larwick, to Kristy Mason, to Sue Collins and to Helen Hayden is the best way you can do that. That, and their economic damages. Thank you.

[CP 007, para. 24.]

Despite the vagueness and non-specific nature of these comments, respondents now allege that these particular statements were impermissible direct references to CCFD No. 5's liability insurance, and impermissibly "invited the jury to 'send a message' to the CCFD No. 5 and other governmental agencies." Appellants alleged, without proof, these comments directly and proximately caused the jury to award damages in excess of what the plaintiffs now contend the underlying evidence might otherwise support.

Mr. Matson did not object to the closing Argument by plaintiffs' counsel for the specific reason that in his judgment, they were non-specific and vague, and as a matter of trial tactics he wished to avoid specifically

drawing the jury's attention to the issues and highlight or require further explanation of them. [CP 601, Deposition of Richard G. Matson, p. 128-129.]

The underlying jury ultimately found for the sexual harassment plaintiffs. The total amount of the **jury verdict award was approximately $5 million less than the last settlement demand**. [CP 548-552.]

CCFD No. 5 filed post-trial CR 59 motions for new trial / remittitur seeking to re-determine the jury award. CCFD No. 5 was represented during all post-trial motions and then at the Court of Appeals not by the Respondents, but by its counsel in the trial court, current Appellants' counsel in this appeal. Post-trial motions on behalf of CCFD No. 5 were prepared and argued by the attorneys who are the present counsel for both appellants CCFD No. 5 and AAIC. [CP 559, 556.]

The underlying plaintiffs response to the post-trial motions was that (1) its counsel had not specifically invoked insurance during closing argument, (2) that the amount of damages actually awarded by the jury were rational, "well based," supported by expert testimony and (3) showed that the jury took copious notes during the four-week trial and used both electronic calculators and the plaintiffs' forensic economic expert's

damage calculation spreadsheets in determining their verdict. [CP 576-577.][3]

The trial court ruled that the underlying plaintiffs' counsel's closing argument comment about fire services was "one very small portion [of Plaintiffs' closing argument]," permissible under the circumstances since "the Fire District encompasses a large taxing area," and "indirect" because "[it] was not addressed in such a manner as to incite the jury on beyond reasonable awards," nor was it an "attempt to set forth monetary issues other than that which would directly compensate [Plaintiffs] for the damages they suffered." [Footnote, citation omitted.] For these reasons, the trial court denied defendants' motion for a new trial. [CP 577-578.][4]

B. CCFD No. 5's Underlying Appeal

CCFD No. 5 filed an appeal of the underlying trial court's determinations in this Division of the Washington Court of Appeals. The Court of Appeals issued its opinion in the case in March 2010.[5] [CP 559, et. seq.]

In its underlying appellate brief, the same attorneys who are its counsel of record in this case made the following affirmative factual arguments on behalf of CCFD No. 5 to this Court of Appeals:

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[3]Collins v. Clark County Fire District No. 5, *supra*, 155 Wn. App. at 74-75.
[4]Id., supra at 155 Wn. App. 75.
[5]Collins v. Clark County Fire District No. 5, 155 Wn. App. 48, 231 P.3d 1211 (Div II, 2010).

1. "The insidious effect" of the allegedly improper statements by the underlying plaintiffs' counsel in closing argument "was not readily apparent at the time of his argument." [CP 555.][6]

2. "It may not have been readily apparent to the trial court or Mr. Matson that the sexual harassment plaintiffs' attorney was commenting about the Fire District's liability insurance" during closing argument. [CP 556.][7]

3. "It may not have been readily apparent to the trial court or Mr. Matson that the sexual harassment plaintiffs' attorney was appealing to the jury's sympathy, passion, and prejudice during closing argument." [CP 557.][8]

Indeed, although represented before the Court of Appeals by the same counsel who represents appellants here complaining that during the short time available at the underlying closing argument, Mr. Matson failed to present objections on the character of the comments made by the underlying counsel to the jury in his closing argument, those comments were so vague and indirect on the purported issue of insurance or "sending a message" that plaintiffs' current counsel was unable in briefing or argument to the Court of Appeals to specify the impact of the comments. In its ruling, the Court of Appeals specifically noted that CCFD No. 5's counsel there (plaintiffs' counsel here) **"failed to argue how the jury**

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[6]"Brief of Appellants in Washington State Court of Appeals Case No. 36968-1 II"), at p. 25 (emphasis added) (hereinafter, "Appellant's Brief on Appeal").
[7]Id., at p. 27 (emphasis added).
[8]Id., at 30 (emphasis added).

would necessarily have interpreted Boothe's comments as referring to the Fire District's liability insurance." [CP 586-587.][9]

Thus, on appeal below, CCFD No. 5, through its new counsel Michael Patterson and Daniel Crowner specifically represented to the Court of Appeals that:

1. Neither Mr. Matson or even the trial court anticipated the effectiveness of the underlying plaintiffs' counsel's statements as references to insurance or requesting the jury to "send a message" at the time they were being made during the closing argument;

2. That even the trial court was not in a position to appraise the effectiveness of the statements or understand their impact on the jury's deliberations until after it heard CCFD No. 5's argument in support of its motions for a new trial; and

3. That *Mr. Matson did not need to object* to the sexual harassment plaintiffs' attorney's closing argument to preserve the issue for appeal, because counsel's statements were so flagrant that no instruction would have cured the prejudicial effect.[10]

V. PROCEDURAL BACKGROUND OF THIS CASE

On September 6, 2011 Appellants, plaintiffs below, moved for summary judgment dismissal of several of the attorney defendants' Affirmative Defenses, specifically including the defense of judgmental immunity, and that Clark County Fire District's insurance carrier client

[9]Collins v. Clark County Fire District No. 5, *supra* at 155 Wn. App. 95.
[10]Id. at 155 Wn. App. 95-97.

AAIC lack of standing to bring a legal malpractice claim against counsel it assigned to separately defend its insured. [CP 313, et. seq.]

It is significant to note that in this original motion for summary judgment filed by appellants to dismiss the defendants' defense of judgmental immunity, appellants specifically asserted that the issue of judgmental immunity was to be considered by the court as "a matter of law". Indeed, the plaintiffs' argument stated in their brief on motion for summary judgment was titled "Defendants' 'Judgmental Immunity' Affirmative Defense Fails as A Matter of Law." [CP at 340, lines 17-18.]

Appellant's demand for a dismissal in their initial trial court motion brief requesting dismissal of respondents' defense of judgmental immunity, was essentially supported by only an assertion of plaintiffs' version of factual matters [CP at 341: 22-25; 342:1-25] sparsely intertwined with legal citation, however, in requesting a review of the defense of judgmental immunity as a "matter of law", appellants also supported their case by deposition testimony of plaintiffs' standard of care attorney expert.

Responding to the plaintiffs' motions the attorney defendants filed Cross-Motions on their legal defenses of both a lack of AAIC's standing and the application of judgmental immunity, requesting dismissal of all claims against Mr. Matson and his Firm. [CP 346 et. seq.]

A hearing on the plaintiffs' motion and the defendants' cross-motions was initially held on October 14, 2011 before Clark County Superior Court Judge John P. Wulle. [CP 691.]

The hearing involved lengthy and extensive oral argument, after which Judge Wulle correctly dismissed insurance company AAIC as an improper party to this litigation as lacking legal standing to bring an action for legal malpractice against its assigned defense counsel. Judge Wulle ruled that under clearly established Washington law, defense counsel retained by an insurance carrier to defend that carrier's insured(s) under the carrier's contractual "duty to defend" the insured maintains an attorney-client relationship only with the insured, and not with the carrier. [CP 695-699.] In Washington, the law applicable to the "tripartite relationship" between the insured, the insurer and the defense counsel assigned by the insurer to defend the interests of the insured has been made crystal clear. The assigned defense counsel owes its entire duty to the insured.

Prior to the October 2011 hearing appellants / plaintiffs did not raise any question of the propriety of the Court following their initial request to make a ruling on judgmental immunity as a "matter of law." Further, at the conclusion of the October 2011 hearing, Plaintiffs made an oral request for a CR 56(f) continuance of that hearing on the attorney

defendants' Cross-Motion for Summary Judgment on the defense of judgmental immunity, until they had an opportunity to depose the defendants' retained experts Judge Robert Ladley and Attorney Bruce Rubin. Judge Wulle authorized this continuance. The deposition of Mr. Rubin and Judge Ladley were concluded in July 2012.

A stipulated Order of dismissal of AAIC based on a lack of standing, including a CR 59 certification, was entered [CP 695-699], after which AAIC was no longer a party to the trial court proceeding in this case. AAIC thereafter filed an appeal of the Order of Dismissal in this Court. That appeal has been consolidated with this appeal.

A hearing on the motion dealing with the defense of judgmental immunity was set for hearing on August 17, 2012.

On August 3, 2012 plaintiffs filed an additional pleading styled as a "Response in Opposition to Defendants' Motion for Summary Judgment." [CP 718, et. seq.] As part of that pleading appellants also filed declarations of additional, new attorney experts they had retained to provide opinions contrary to those of the defendants' experts.

Then, faced with respondents' / defendants' evidence, appellants / plaintiffs chose to change their original legal theory and in their revised version, advanced the proposition that the issue of judgmental immunity

was to be determined as a "matter of fact" rather than as they had originally contended, "as a matter of law."

On August 12, 2012, respondents / defendants filed a Reply to the plaintiffs' opposition pleading. Respondents cited authority for the rule that courts resolving disputes on the issue of judgmental immunity may, under the "totality of the circumstances" properly conclude that a legal malpractice plaintiff has failed to establish the existence of negligence as a matter of law. [CP 1215-1218.]

At the August 17, 2012 hearing before Judge Wulle, this issue was fully argued and he concluded that the totality of the circumstances as evidenced in the record before him established that Mr. Matson "did in fact make reasonable decisions" [RP 70, Appellants' Opening Brief, p. 17] and dictated that the doctrine of judgmental immunity be applied to dismiss the appellants' claims of legal malpractice based on the allegations relating to Mr. Matson's pre-trial settlement evaluation, and his decisions with respect to not objecting to the content of the underlying plaintiffs' counsel's closing argument.

VI. ARGUMENT

A. General Standard of Review

In reviewing an order granting summary judgment, the Court of Appeals engages in the same inquiry as the trial court. Higgins v.

Stafford, 123 Wn.2d 160, 168, 866 P.3d 31 (1994). Application of the doctrine of "judgmental immunity" is a question of law that will be reviewed de novo.

The purpose of summary judgment is "to do away with useless trials and issues which cannot be factually supported, or, if factually supported, could not, as a matter of law lead to a result favorable to a non-moving party." Burris v. General Insurance Company of America, 16 Wn. App. 73, 553 P.2d 125 (1976).

As the "non-moving party [Appellants] may not rely on speculation or argumentative assertions that unresolved factual issues remain." Marshall v. Bally's PacWest, Inc., 94 Wn. App. 372, 377, 972 P.2d 475 (1999).

B. The Trial Court Properly Determines Application of Judgmental Immunity As Matter of Law

In their argument Plaintiffs go to great lengths, but to no avail, attempting to discredit Judge Ladley's and Mr. Rubin's opinions regarding judgmental immunity in an effort to establish "questions of fact". In the end, the issue of the experts' opinions is actually of no moment. It is clear that in matters of determination of the applicability of "judgmental immunity," the law is that a judge is entitled to examine the evidence and reach conclusions as a matter of law.

The prevailing national view is that the judgmental immunity negates the breach element – not the duty element. Under existing law, a trial court may decide the breach question when, under the "totality of the circumstances", a conclusion may be reached as a matter of law that negligence has not been established. This position is supported by appellants' own cited authority. See, e.g., Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker, 133 Idaho 1, 981 P.2d 236 (Idaho 1999). [CP 731-732.]

Appellants neglected to note to the trial court that in Sun Valley Potatoes, the Idaho Supreme Court "[a]ssumed that there may be instances **where a court** may find no breach of duty" as a matter of law. Id., 981 P.2d at 240 (emphasis added).

It is apparent from Judge Wulle's comments at the hearing on August 17, 2012 that he did just that in this case.

While questions of professional negligence are usually "left to the trier of fact, there is a recognized exception to this rule. When, under the totality of circumstances as demonstrated by the uncontroverted facts, a conclusion may be reached as a matter of law that negligence has not been established, judgment may be entered as a matter of law. Bergstrom v. Noah, 266 Kan. 847, 875, 974 P.2d 531, 554 (Kan., 1999).

Although analytically, application of judgmental immunity actually goes to the breach-of-duty element of a legal malpractice case, this circumstance has not undermined its vitality as a defense that triggers dispositive rulings, on motion, as a matter of law. Although the breach question in malpractice cases is in many cases for a jury, the cases reflect that where a lawyer makes an informed tactical decision or tries in good faith to chart a course in the face of unsettled law, courts are properly positioned to decide the question on motion, as a matter of law. See e.g., First Union Nat'l Bank v. Benham, 423 F.3d 855, 860-61 (8th Cir. 2005).

To avoid second guessing a trial lawyer's tactical decision, courts across the country have recognized that the determination of Judgmental Immunity is a question of law. "Findings of fact are unnecessary where a court concludes that an attorney's conduct was "reasonable . . . as a matter of law." [Citation omitted.] A plaintiff's "kitchen sink approach cannot overcome this basic restraint on a claim of malpractice," and summary judgment is appropriate where the supposed errors by counsel were not "nearly so egregious that they could now be considered as unreasonable or otherwise sufficient to sustain a claim for malpractice." Estate of Re, 958 F.Supp. at 921." Hatfield v. Herz, 109 F.Supp.2d 174, 180 (S.D.N.Y. 2000).

"[A]n attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment, where the proper course is open to reasonable doubt." Id. Thus, "selection of one among several reasonable courses of action does not constitute malpractice." (Rosner v. Paley, supra, at 738, 492 N.Y.S.2d 13, 481 N.E.2d 553). Absent such "reasonable" courses of conduct found as a matter of law, a determination that a course of conduct constitutes malpractice requires findings of fact (Grago v. Robertson, supra, at 646, 370 N.Y.S.2d 255)." Bernstein v. Oppenheim & Co., P.C., 160 A.D.2d 428, 430, 554 N.Y.S.2d 487, 489-490 (1990).

In Martinson Mfg. Co. v. Seery, 351 N.W.2d 772, 775 (Iowa 1984) the Iowa Supreme Court agreed. "Appellate courts generally have supported trial courts that, upon the required degree of proof, have applied the above principle in ruling the attorney free from liability as a matter of law." See, e.g., Martin v. Burns, 102 Ariz. 341, 343, 429 P.2d 660, 662 (1967); Davis v. Damrell, 119 Cal.App.3d 883, 887-89, 174 Cal. Rptr. 257, 259-61 (1981); Hopper v. Gurtman, 17 N.J. Misc. 289, 296, 8 A.2d 376, 380 (1939), aff'd, 126 N.J.L. 263, 18 A.2d 245 (1941); Rosner v. Paley, 116 Misc.2d 454, 465, 455 N.Y.S.2d 959, 965-66 (1982); Quality Inns Intl., Inc. v. Booth, Fish, Simpson, Harrison and Hall, 58 N.C. App. 1, 13-14, 292 S.E.2d 755, 763 (1982); Collins v. Wanner, 382 P.2d 105,

109 (Okla. 1963); Medrano v. Miller, 608 S.W.2d 781, 784 (Tex. Civ. App. 1980).

In other words, application of "judgmental immunity" in legal malpractice cases presents a unique situation where courts are willing to take the question of determination of an attorney's professional conduct from the jury and hold, as a matter of law, that the attorney did not breach his or her duty to the client.

The Kansas Supreme Court's decision in Bergstrom v. Noah, supra, 266 Kan. 847, 974 P.2d 531 illustrates this point. In Bergstrom, the court acknowledged that general rule that "questions of professional negligence should be left to the trier of fact" but nevertheless held that the judgmental immunity rule precluded a findings of malpractice in that case as a matter of law. Id. at 554-57. The court explained that there is a "recognized exception" allowing courts to decide the breach question when a conclusion could be reached as a matter of law that negligence has not been established. Id. at 554.

"[W] conclude that the issue should have been decided as a matter of law because there was legal justification for Crosby's exercise of judgment"). Crosby v. Jones, 705 So.2d 1356, 1357 (Fla., 1998). Davis v. Damrell, 119 Cal. App.3d 883, 887-89, 174 Cal. Rptr. 257, 259-61 (1981) (judgmental immunity defense decided "as a matter of law"); see, Martin

v. Burns, 102 Ariz. 341, 343, 429 P.2d 660, 662 (1967) ("The present fact situation discloses no dispute as to the basic facts involved. We hold that as a matter of law the appellees were not negligent in their conduct of the Martins' appeal"); Hopper v. Gurtman, 17 N.J. Misc. 289, 296, 8 A.2d 376, 380 (1939), aff'd, 126 N.J.L. 263, 18 A.2d 245 (1941) ("affidavits do not present a jury question on this . . . A lawyer, without express agreement, is not an insurer. He is not a guarantor that the instruments he will draft will be held valid by the court of last resort. He is not answerable for an error of judgment in the conduct of a case, or for every mistake which may occur in practice."); Rosner v. Paley, 116 Misc.2d 454, 461, 455 N.Y.S.2d 959, 963 (1982); Quality Inns Intl., Inc. v. Booth, Fish, Simpson, Harrison and Hall, 58 N.C. App. 1, 13-14, 292 S.E.2d 755, 763 (1982); Collins v. Wanner, 382 P.2d 105, 109 (Okla. 1963); Medrano v. Miller, 608 S.W.2d 781, 784 (Tex. Civ. App. 1980).

Clearly, under the weight of national authority, determination of the applicability of the defense of judgmental immunity is a question of law which should be determined by the court and can form the basis for a summary judgment.

Legal malpractice consists of the failure of an attorney to use such skill, prudence and diligence as lawyers of ordinary skill and capacity

commonly possess and exercise in the performance of the task which they undertake.

C. Expert Declarations Presenting Opinions Regarding An Attorney's Conduct Do Not Raise Issues of Fact

Plaintiffs, in their efforts to create a "dispute of fact" on a legal issue that they previously sought summary judgment dismissal, now assert that "factual issues" derived from their paid experts' interpretations of the otherwise undisputed facts, preclude the Respondents underlying cross-motion to dismiss the claims of legal malpractice based on application of judgmental immunity.

Despite their initial submission to the Trial Court arguing that the issue of judgmental immunity was an "issue of law," ultimately, appellants' opposition to the respondents' motion for summary judgment below and on appeal here was/is premised on one idea, that conflicting expert opinions somehow create issues of fact that preclude the Court from determining application of judgmental immunity as a matter of law. Unfortunately, that is an invalid assertion. "[T]estimony by the lawyer-expert witnesses, concerning how they would have resolved the issue cannot create an issue of fact, Ronald E. Mallen, Jeffrey M. Smith, *Legal Malpractice* (2012 ed.) (hereinafter "*Mallen & Smith*"), Vol. 2, §19.7, p.

1171, (citing Halverson v. Fergusson, 46 Wn. App. 708, 717-718, 735 P.2d 675 (1986) (emphasis added).

The statements by experts that they would have conducted litigation in an uncertain and unsettled legal area differently, standing alone, cannot, as a matter of law, constitute the basis for a legal malpractice action. See Rorrer v. Cooke, 313 N.C. 338, 329 S.E.2d 355, 367 (1985) (summary judgment).

D. The Conduct of Respondent Richard Matson Was Protected By The Doctrine of Judgmental Immunity and Reasonable Under the Totality Of The Circumstances

The appellants' complaints respecting the issue of judgmental immunity involve two separate factual situations involving first, the matter of Mr. Matson's actions in relation to the closing argument of plaintiffs' counsel at the underlying trial, and second, Mr. Matson's actions involving his pretrial evaluation of the settlement potential of the underlying case. The two separate sets of circumstances involve different bases for analysis under the doctrine of judgmental immunity. The court's dismissal of plaintiffs claim of professional negligence in each situation as a matter of law, was however, entirely appropriate viewing the "totality of the circumstances."

With respect to the matter of the issue of the underlying trial closing argument objections, there is no factual dispute as to what actually

occurred at the time. Indeed, the trial court requested and reviewed a digital copy of the underlying closing argument. Accordingly, as to that issue the trial court was not required to assess any material factual dispute in reaching its decision that judgmental immunity required that the plaintiffs' claim with respect to the underlying closing argument be dismissed. It is without question that the Court was entitled to apply the uncontested facts and make a determination at law concerning that situation.

The plaintiffs' allegations concerning the defendants' settlement evaluation do not involve questions of fact; rather they involve incompatible opinions of different attorney experts based on the facts. Plaintiffs' complaints as to this issue highlight the rationale for the existence and application of judgmental immunity – reasonable attorneys can hold differing opinions based on the same conduct, and a lawyer should not be subject to liability based on the Monday-morning quarterbacking of new attorneys retained by a disgruntled former client.

1. The Trial Decision Not to Object During the Closing Argument of Plaintiffs' Counsel is A Trial Tactic Protected by Judgmental Immunity

At its core, the doctrine of judgmental immunity was developed to protect trial attorneys from malpractice suits that amount to Monday-morning quarterbacking over trial strategy. The rule reflects that there is

never a single, definitive way to most effectively try a particular case. Fishow v. Simpson, 462 A.2d 540, 543 (MD. App. 1983); Cook v. Connolly, 366 N.W.2d 287, 292 (Minn. 1985); Meagher v. Kavli, 97 N.W.2d 370, 372 (Minn. 1959). Given the same witnesses, evidence, and law, reasonable and competent trial attorneys might differ on the best strategy for persuading the judge or jury. See e.g., James W. McElhaney, *The Play is the Thing*, 92 A.B.A.J. 26, (offering alternatives to some of the most common and traditional approaches to trying cases).

The Trial Court properly applied judgmental immunity by ruling, as a matter of law, that Mr. Matson did not breach his duty to the appellants in not objecting to the underlying plaintiffs' counsel's closing arguments. This "trial tactic" immunity provided to attorneys in litigation was summarized by one Washington court, as follows:

> To assure the [client] of counsel's best efforts then, the law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics. If counsel is to be stultified at trial by a post trial scrutiny of the myriad choices he must make in the course of a trial. . . he will lose the very freedom of action so essential to a skilful representation of the accused.

State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522, 526 (1967).

The Piche Court went on to discuss the importance of allowing trial counsel the freedom to make tactical choices, even where the client might ultimately disagree with them:

> Washington decisions pointedly recognize the principle that 'the decision of when and whether to object is classic example of trial tactics.' State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, 667 (1989); (criminal). What may seem important and favourable to the defendant after the trial may during trial have appeared inconsequential or damaging to his attorney. Counsel may, as the trial progressed, have deemed it wise at the time to avoid issues which then seemed frivolous and insubstantial on a sound tactical theory that to bring them up would create an inference that the whole defense was frivolous and insubstantial and might expose the defendant to a devastating rebuttal. For many reasons, therefore, the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment.

State v. Piche, at 71 Wn.2d 590 (emphasis added).

Respondents' cavalier dismissal in their brief of Washington citations on judgmental immunity which arise from criminal cases merely highlights their fundamental, if not willful misunderstanding of the doctrine. First, if judgmental immunity applies in a criminal case where deprivation of liberty is at stake, it most certainly is applicable to civil matters where all that is at risk is money. Second, Washington law unequivocally holds that **"the decision of when and whether to object" is a classic example of trial tactics.** State v. Piche, Id. It is axiomatic that such a rule applied in the criminal courts is equally applicable in the civil context.

Where a defendant does not object and request a curative instruction at trial, reversal is unwarranted unless the objectionable remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. State v. Reed, 169 Wn. App. 553, 578-579, 278 P.3d 203 (2012).

In reviewing the appellants' request for a New Trial on its appeal of the issues relating to the underlying closing argument, this Court stated "[t]he test for determining such an abuse of discretion is whether 'such a feeling of prejudice [has] been engendered or located in the minds of the jury' as to prevent the litigant from having a fair trial." [CP 587.][11] This Court then ruled "the trial court denied Defendants' post - trial motions, concluding that Boothe's comment, '[t]aken together without objection, is not so prejudicial to warrant the granting of a new trial.'. We agree with the trial court." [CP 589][12]

In analyzing potential prejudice as a result of improper statements in closing arguments, Washington appellate court looks to the context of the total argument, the issues, the evidence, and the instructions. State v. Warren, 165 Wn.2d 17. In determining whether the alleged misconduct warrants reversal, the court considers its prejudicial nature and its

[11]Collins v. Clark County Fire Dis. No. 5, supra, 155 Wn. App. at 93 -94, 231 P.3d at 1235.
[12]Collins v. Clark County Fire Dis. No. 5, supra, 155 Wn. App. at 97, 231 P.3d at 1237.

cumulative effect. State v. Suarez-Bravo, 72 Wn. App. 358, 367, 864 P.2d 426 (1994).

> "The decision of when or whether to object is a classic example of trial tactics." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). "Lawyers do not commonly object during closing argument 'absent egregious misstatements." In re Davis, 152 Wn.2d 647, 717, 101 P.3d 1 (2004) (quoting United States v. Necoechea, 986 F.2d 1273, 1281 (9th Cir. 1993)). *"A decision not to object during summation is within the wide range of permissible professional legal conduct."* In re Davis, 152 Wn.2d at 717. (Emphasis added.)

What may seem important and favorable to the defendant after the trial may during trial have appeared inconsequential or damaging to his attorney. Counsel may, as the trial progressed, have deemed it wise at the time to avoid issues which then seemed frivolous and insubstantial on a sound tactical theory that to bring them up would create an inference that the whole defense was frivolous and insubstantial and might expose the defendant to a devastating rebuttal. For many reasons, therefore, the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment. State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967).

Plaintiffs seem to argue that what they lost by Mr. Matson's decision not to object to the inconsequential remarks of the underlying counsel at closing was a new trial. However, to receive a new trial under

CR 59 or on appeal, the moving party "must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record . . . ." Id. at 539 (quoting 12 James W. Moore, *Moore's Federal Practice* §5913 (2)(c)(l)(A), at 5948, 58-49 (Daniel R. Coquillette et al. eds., 3d ed. 1999)). Yet, the argument before the underlying Court of Appeals by appellant, plaintiffs there, was exactly contrary to their arguments before this Court and, like at the Court of Appeals, are equally unpersuasive.

2. Court of Appeals Decision on the Non-Objections at Closing Argument and Plaintiffs Prior Appellate Arguments Do Not Preclude the Application of Judgmental Immunity

In its appellate brief, which was filed by the same attorney who is plaintiffs' counsel of record in this case, CCFD No. 5 made the following affirmative factual arguments to the Court of Appeals:

> "The insidious effect of the allegedly improper statements by the underlying plaintiffs' counsel in closing argument **'was not readily apparent at the time of his argument.'"** [13] **[CP 555.]**
>
> "It may not have been readily apparent to the trial court or Mr. Matson that the sexual harassment plaintiffs' attorney was commenting about the Fire District's liability insurance during closing argument."[14] [CP 556.]
>
> "It may not have been readily apparent to the trial court or Mr. Matson that the sexual harassment plaintiffs' attorney

[13] Appellants' Brief on Appeal, at p. 25 (emphasis added).
[14] Appellants' Brief on Appeal), at p. 27 (emphasis added).

> was appealing to the jury's sympathy, passion, and prejudice during closing argument."[15] [CP 557]

CCFD No. 5, specifically argued to the Court of Appeals that:

> *Mr. Matson did not need to object* to the sexual harassment plaintiffs' attorney's closing argument to preserve the issue for appeal, because counsel's statements were so flagrant that no instruction would have cured the prejudicial effect.

While the comments of counsel representing the respondents' clients in the appeal of the underlying action are not necessarily legally binding on the appellants here, as a practical matter they absolutely support the argument that the Respondents' conduct in the underlying action was reasonable. As licensed members of the Washington Bar, counsel could not have advanced those arguments before the Court of Appeals unless they at least generally considered them "well grounded in fact" or "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law" *cf.*, Washington CR 11(a), Washington Rule of Professional Conduct (RPC) 3.1.

In their brief on the underlying appeal CCFD No. 5's attorneys Mr. Patterson and Mr. Crowner correctly cited this Court to Riley v. Department of Labor & Industries, (1957), a case in which the Washington Supreme Court upheld the trial court's decision to grant

[15]Appellants' Brief on Appeal), at p. 30 (emphasis added).

plaintiff a new trial because of defendant's improper comments during closing argument and rebuttal, even where plaintiff's counsel tactically elected not to object to defendant's improper comments at the time they were made during closing.

> To have made an objection or requested an instruction would have only called the attention all the more to appellant's argument under the circumstances that existed at the time of this particular trial. Riley, 51 Wn.2d at 443.

Only four pages out of the 56 page opinion issued by this Court in the underlying case was devoted to addressing the issue of Mr. Matson's decision not to object at closing argument for fear of further highlighting the comments made by underlying plaintiffs' counsel. [16]

In the underlying case the trial judge ruled that the closing argument comment about fire services was "one very small portion [of Plaintiffs' closing argument], permissible under the circumstances since "the Fire District encompasses a large taxing area," and these comments were "indirect" because "[it] was not addressed in such a manner as to incite the jury on beyond reasonable awards, nor was it an "attempt to set forth monetary issues other than that which would directly compensate [Plaintiffs] for the damages they suffered. For these reasons, the trial court denied defendants' motion for a new trial. Similarly, the appellate court agreed with Judge Harris stating that the counsel's "arguments were

[16]Also, 39 of the 56-page opinion were devoted to addressing damage claims.

indirect" and not addressed in such a manner as to incite the jury on beyond reasonable awards.

What Judge Harris and this Court of Appeals both separately found was that the alleged "send a message" assertion during closing arguments was that Plaintiffs "not only fail[ed] to show that Boothe's comments about fire services could reasonably have affected the jury's verdict, but they also fail to demonstrate that these comments were "so flagrant that no instruction could have cured the prejudicial effect.

It is worthy of consideration here, that in its ruling on CCFD's appeal of the underlying verdict, this Court specifically based its decision denying the appellants' appeal due, in part, to the fact that Mr. Patterson and Mr. Crowner **"failed to argue how the jury would necessarily have interpreted Boothe's comments as referring to the Fire District's liability insurance;" "... failed to support [their] arguments with any briefing or legal authority beyond their bald proposition[s]..."and because of their failure to provide any "...supporting argument or authority waives an assignment of error."**

Thus, the issue of whether any reference by the underlying plaintiffs' counsel in his closing argument to insurance was prejudicial at trial to the appellants, was in fact thereafter disposed of as an appellate issue in the underlying case by Plaintiffs own present counsel. During

litigation attorneys often face choices that are made difficult not because of the unsettled nature of the law, but rather because there is simply no way to predict with certainty how the judge or jury will react to any particular legal theory or factual presentation of the defense supporting such theories.

"[I]n the context of litigation, an attorney will not be held liable for a mere error in judgment or trial tactics if the attorney acted in good faith and upon an informed judgment." Sun Valley, 981 P.2d at 240 (citing Simko, 532 N.W.2d at 847). A client's mere "dissatisfaction with strategic choices" cannot serve as the proper basis for a legal malpractice claim. Bernstein, 544 N.Y.S.2d at 490). Attorneys are trained and experienced in the often imprecise art of trial advocacy, are better positioned than a lay client to choose the best trial strategy. As the 10th Circuit noted, "[I]t is the duty of the attorney who is a professional to determine trial strategy." Frank v. Bloom, 634 F.2d 1245, 1256-57 (10th Cir. 1980). See also Simko, 532 N.W.2d at 848 (quoting from Frank, favorably). If the client "had the last word on this," the court explained, "the client would be his or her own lawyer." Frank, 634 F.2d at 1257. While plaintiffs assert on the one hand that Mr. Matson trial strategy was flawed, thus subjecting him to malpractice, at the same time, conversely, they seek to claim that Mr. Matson was in the best position to advise the

plaintiffs on liability and damages. If he was in the best position to advise, he was in the best position to determine what the appropriate trial strategy would be.

3. Settlement Evaluations by Counsel – An Attorney is Not a Guarantor Or Insurer of a Particular Jury Verdict Result

Appellant Clark County Fire District seeks in this appeal to resurrect the prosecution of a legal malpractice action against the Respondents, who were assigned by CCFD's insurer AAIC, as defense counsel to represent it. Ironically, the purpose of the legal malpractice claims are to recoup monies that the Fire District was found by a jury to be liable to the underlying plaintiffs on claims for which this same insurance company never offered a single dollar to settle at any time – including during the two years in which it handled the claims even before assignment to Mr. Matson.

In October 2006, seven months prior to the commencement of the underlying trial, appellant AAIC's separate and independent counsel Kathleen Hart Smith specifically communicated to AAIC that she (as well as Mr. Matson) had evaluated the possible value of the case and potential trial verdict. "[I]f the jury believes the plaintiffs then I expect it will be a multi-million dollar verdict." [CP 532.] Yet, the appellants now seek to impose liability on the respondent attorneys based on an alleged negligent

evaluation of the potential pre-trial settlement value of the underlying claims!!

Judgmental immunity protects more than just trial tactics. Courts have applied the rule to insulate attorneys from liability for pre-trial strategy decision. And some courts have applied the rule to strategy decision made outside the litigation context altogether, ie the decision whether to sue or not [see Mitchell v. Dougherty, 644 N.W.2d 391(Mich. App. 2002)]; who to sue [see Bergstrom v. Noah, 974 P.2d 531]; or what legal theories to proceed on. [See Halverson v. Ferguson, 735 P.2d 675 (Wn. App. 1986)].

While plaintiffs cite the leading Washington professional liability case on judgmental immunity, Halverson v. Ferguson, they gloss over its real import and holding in attempting to semantically dance on the head of a pin in arguing that the rule precepts – which is that mere errors in judgment by a lawyer are not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence. This is in accord with other jurisdictions who have addressed this issue. Simko v. Blake, 532 N.W.2d 842 (1995). If an attorney acts in good faith "and in an honest belief that his acts and omissions are well founded in law and are in the best interest of his clients, he is not answerable for mere errors in judgment." Id. In other words, "the law

distinguishes between negligence and mere errors in judgment." Kling v. Landry, 686 N.E.2d 33, 37 (III App.2d 1997), appeal denied, 690 N.E.2d 1381 (III 1998) (citing Spivack, Shulman & Goldman v. Foremost Liquor Store, Inc., 465 N.E.2d 500, 505 (III App.2d 1984)).

In professional malpractice cases the law never imposes an implied guaranty of results. Sinkey v. Surgical Associates, 186 N.W.2d 658, 660 (Iowa 1971); Grosjean v. Spencer, 258 Iowa 685, 691-92, 140 N.W.2d 139, 143 (1966); Wilson v. Corbin, 241 Iowa 593, 599, 41 N.W.2d 702, 705 (1950).

Moreover as the Iowa Supreme Court stated in Martinson Mfg. Co. v. Seery, supra, 351 N.W.2d at 775, "if an attorney acts in good faith and in an honest belief that his acts and advice are well founded and in the best interest of his client, he is not held liable for a mere error of judgment. A *fortiori*, an attorney is not liable for an error in judgment on points of new occurrence or of nice or doubtful construction, or for a mistaken opinion on a point of law that has not been settled by a court of last resort and on which reasonable doubt may well be entertained by informed lawyers. 7 Am.Jur.2d *Attorneys at Law* §201 (1980); accord Woodruff v. Tomlin, 616 F.2d 924, 932 (6th Cir.), cert. denied, 449 U.S. 888, 101 S.Ct. 246, 66 L.Ed.2d 114 (1980); Baker v. Beal, 225 N.W.2d 106, 112 (Iowa 1975); Meagher v. Kavli, 256 Minn. 54, 60-61, 97 N.W.2d 370, 375 (1959);

Hodges v. Carter, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954); Denzer v. Rouse, 48 Wis.2d 528, 534, 180 N.W.2d 521, 525 (1970)."

Simply put, a client's claim that another lawyer might have made different strategy decisions in preparation for trial or at trial or evaluated a case differently cannot sustain a legal-malpractice action, that being "a matter of professional opinion." Simko, 532 N.W.2d at 848.

Courts outside of Washington have recognized this precept and invoked the doctrine of judgmental immunity to preclude legal malpractice actions based on allegedly defective settlement evaluations. The Minnesota Supreme Court did so in Glenna v. Sullivan, 310 Minn. 162, 169, 245 N.W.2d 869, 872-873 (1976). The court noted that an attorney's honest evaluation of a potential settlement was immune from the complaint of a client dissatisfied with a settlement.

> The decision as to whether the [value of the] settlement offer was reasonable under the circumstances of this case called for a professional judgment on the part of defendant. In such a situation it is well established that an attorney * * * is not liable for an error or mistake in judgment as long as he acts in the honest belief that his (advice is) well-founded and in the best interest of the client. . . it is possible that a jury could have awarded plaintiffs a sum greater than $21,110, it is also possible that the jury could have rendered a verdict substantially less than [the attorney's recommended settlement value] . . . To allow a client who becomes dissatisfied with a settlement to recover against an attorney solely on the ground that a jury might have awarded them more than the settlement is unprecedented.

Id., 310 Minn. 162, at 169-170, 245 N.W.2d 869 at 873.

Noted professional liability commentator Ronald Mallen has noted: The settlement process concerns the prospects of success and the value of recovery or exposure. The considerations can be evaluated objectively but also involve subjective factors. These include the forum in which a case will be tried, the attitude of the trial judge, the likely nature of a jury, and a variety of considerations that usually cannot be objectively tested except by hindsight. For that reason an informed judgmental decision should not be second guessed." 4 Mallen & Smith, §33.32, p. 853.

"The hindsight vulnerability of lawyers is particularly acute when the challenge is to the attorney's competence in settling the underlying case. As a leading legal malpractice text observes, the amount of a compromise is often "an educated guess of the amount that can be recovered at trial and what the opponent was willing to pay or accept. Even skillful and experienced negotiators do not know whether they received the maximum settlement or paid out the minimum acceptable. Thus, the goal of a lawyer is to achieve a 'reasonable' settlement, a concept that involves a wide spectrum of considerations and broad discretion." Barnard v. Langer, 109 Cal. App.4th 1453, 1462, 1 Cal.

Rptr.3d 175, 182 (2003) (citing 4 Mallen, *Legal Malpractice* (5th Ed. 2000), §30.41, pp. 582-585).

Despite the fact that the appellants independently chose not to engage in underlying settlement negotiations because of the plaintiffs' exceedingly large settlement demands, they now claim that Mr. Matson was negligent in not analyzing unspecified prior jury verdicts sufficiently to determine their settlement position. Contrary to appellants' self-serving view in hindsight, the law of professional malpractice does not find such conduct unreasonable.

> Jury verdict figures are relevant only insofar as the facts of a particular case are similar to the facts of the case being valued, and even then comparisons are of little predictive value. Cf. Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 869 (Iowa 1994) (stating comparison of verdicts is of little value in determining whether loss-of-consortium award is adequate, due to factual distinctions); Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 168 (Iowa 1984) (same); accord Thurmon v. Sellers, 62 S.W.3d 145, 161 (Tenn.Ct.App.2001) (stating consortium damages are impossible to generalize, so measurement of such damages must be on a case-by-case basis). Therefore, evidence introduced by the plaintiff of the possible range of jury verdicts reported in certain professional publications will not support a finding that Farm Bureau had no reasonable basis for valuing Bellville's claim at a sum less than the reported verdicts.
>
> Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468, 480-481 (Iowa, 2005) (emphasis added).

Plaintiffs' assertion that the defendants did not provide an adequate defense in the underlying litigation are gratuitous, speculative and exactly the type of "hindsight" claims that the doctrine of judgmental immunity is designed to redress.

The end result in the underlying Collins litigation was simply a bad verdict for the defendants. As testified to by Brian McCormick, claims specialist employed by appellant AAIC's parent company Munich Reinsurance who was responsible for overseeing the work of TPA Gladfelter:

> A: I also believe that any case can have a multimillion dollar verdict. It all depends on the jurisdiction.
>
> Q: But any case can come in as a multimillion dollar verdict?
>
> A: Potentially, sure.
>
> Q: The jury can go south on people and end up awarding huge damages for cases that the analysis of the exposure was initially thought to be minimal?
>
> MR. PATTERSON: Objection to the form of the question.
>
> A: In general?
>
> Q: Sure.
>
> A: It's always a possibility.

[CP 1214-1215.]

No one – not Plaintiff AAIC, Plaintiff Clark County Fire District No. 5, AAIC's third-party administrator Gladfelter, the mediator Susan Hammer, Katherine Hart Smith the AAIC national employment attorney who was counsel during the Collins trial, or, Mr. Matson anticipated, expected or valued the case at the amount the jury did.

Plaintiffs go to some effort in their brief to second guess Mr. Matson's decision regarding potential motions, ie dispositive motions, bifurcation, in limine. Again, those decisions are protected as trial tactics which do not give rise to second-guessing malpractice claims. The Southern District of New York reached the same conclusion in Hatfield v. Herz, 109 F. Supp.2d 174 (S.D.N.Y. 2000). There, the client was found liable in the underlying case after a bench trial. He later claimed that his attorney committed malpractice by failing to file dispositive motions before trial. The attorney countered that he properly decided not to file dispositive motions because neither a motion to dismiss nor a motion for summary judgment would have succeeded. Id.

The court held that the attorney "acted ethically and reasonably in deciding not to file [the motions]." Id. The court reasoned that a motion to dismiss would have required the court in the underlying case to assume the truth of all of the plaintiff's allegations, and the attorney "properly concluded" that the plaintiff's allegations in the underlying case, "if

proven true, would state a claim." Id. at 185-86 (italics omitted). A motion for summary judgment would have been equally futile, the court said, because the plaintiff's claims in the underlying case rested on his own testimony – which satisfied the trial judge during the bench trial. Id. at 186. Thus, when offered in affidavit form to oppose a motion, this testimony surely would have satisfied "the lesser burden required to defeat [a] motion for summary judgment." Id. And even if the court had not had the benefit of knowing the outcome in the underlying case, the underlying plaintiff's version of events clearly conflicted with the client's version and would have, at the very least, "raised a triable issue of fact" requiring denial of a motion for summary judgment. 109 F. Supp.2d at 185-86. Given the motions' futility, and because "'[a]ttorneys are entitled to significant discretion in determining which positions to advance on the behalf of their clients, and in determining how best to advance those positions,'" the attorney could "not be held liable for his decision not to make these pretrial motions." Id. at 186 (quoting Chelsea Corp. v. Lebensfeld, No. 95 Civ. 6239 (SS), 1997 WL 576089, at *2 (S.D.N.Y. Sept. 17, 1997)).

This was exactly the thought process of Mr. Matson and was so testified to in his discovery deposition.

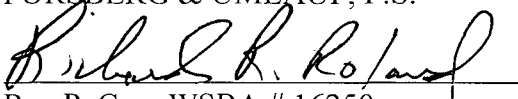
Again, AAIC and their insured, are attempting to hold Mr. Matson to a standard that doesn't exist in the law – guaranteeing a result in a jury trial.

VII. CONCLUSION

Judgmental immunity is an appropriate legal doctrine, reflecting undeniable realities of practicing law. The Trial Court in this case properly reviewed the totality of the circumstances of the in the record, concluded that the resolution of the application of the doctrine of judgmental immunity in this case was a question of law, and on that basis properly dismissed the claims of the appellants which were based on nothing more than their hindsight.

DATED this 19th day of February, 2013.

FORSBERG & UMLAUF, P.S.



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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing OPPOSITION BRIEF OF RESPONDENTS on the following individuals in the manner indicated:

Mr. Michael A. Patterson
Mr. Daniel P. Crowner
Patterson, Buchanan, Fobes, Leitch & Kalzer, Inc., P.S.
2112 Third Ave., Suite 500
Seattle, WA 98121

(X) Via Hand Delivery

SIGNED this 19th day of February, 2013, at Seattle, Washington.

Carol M. Simpson