New Jersey Law Journal

VOL. CLXXXV– NO.10 – INDEX 867 SEPTEMBER 4, 2006 ESTABLISHED 1878

# SUPREME COURT

## Missing Evidence Prompts Negative Inference

### Just may be instructed loss of evidence harms malpractice defendant's case

**By Bennett J. Wasserman**

This past term, the Supreme Court continued its common sense approach to the problems presented by the "case within a case" requirement for proving legal malpractice. The Court held that where a legal malpractice plaintiff can make a threshold showing that the defendant attorney's malpractice caused the loss or destruction of relevant evidence in the underlying lawsuit, "the jury should be instructed that it may infer that any missing evidence would have been helpful to plaintiff's case and inured to defendant's detriment."

The Court also addressed the rule governing aggregate settlement of claims, finding that when a lawyer represents more than one client, each client has the right to accept or reject the settlement after its terms are known.

Finally, following one decision this term, attorneys accused of minor unethical misconduct may find diversion a much less appealing option.

**Res Ipsa Loquitor**

Traditionally, the proximate cause element of a legal malpractice cause of action arising out of underlying litigation requires a plaintiff to prove that she would have prevailed in the underlying case, had it not been for her lawyer's negligence. This is known as the "case within a case." How to overcome this sometimes onerous burden has been a topic of much discussion in the literature. Since the *Lieberman* decision in 1985 and the *Garcia* decision in 2004, our Supreme Court has stood out as a shining example, approaching the problems presented by the "case within a case" with intelligence and a profound sense of fairness. In *Jerista v. Murray*, 185 N.J.175 (2005), the Court continues its common sense approach, placing the consumer of legal services on a level playing field with her negligent lawyer, a potentially daunting adversary.

Wasserman is of counsel to Stryker Tams & Dill of Newark, and Special Professor of Law at Hofstra University School of Law, where he teaches Lawyer Malpractice. He is grateful to Jennifer L. Campbell, an associate at Stryker, for her able assistance.

What happens when the accused attorney conceals the alleged malpractice for so many years that the evidence necessary to prove the underlying case, and hence the malpractice case, is no longer available? Should the accused attorney who has successfully concealed his failure to properly investigate and prepare the client's thereby reap the benefits of a dismissal of his former client's malpractice claim against him? This is precisely the question addressed by the Supreme Court in *Jerista*.

In *Jerista*, the plaintiff was injured as she entered a supermarket when an automatic door suddenly closed on her, striking and injuring her. The injured plaintiff and her husband retained attorney Thomas M. Murray to bring an action against the supermarket. The supermarket filed a third-party complaint against the company that serviced the automatic door. Three months after the original complaint was filed, counsel for the supermarket served discovery demands to be responded to by the Jeristas. Murray failed to respond to those discovery requests. Nearly one year later, counsel for the supermarket moved to dismiss the Jeristas' complaint for failure to provide discovery. The motion was granted and the plaintiffs' complaint was dismissed.

For nine years, Murray concealed the dismissal from his clients and assured them that "everything [was] under control." Frustrated by the delay, the plaintiffs engaged other counsel to take over. The newly-retained attorney discovered that the case had been dismissed. At that point, some 12 years after the accident occurred, he filed a Motion to Reinstate the complaint. The motion was denied when the supermarket and door service-company successfully argued that relevant evidence and witnesses were no longer available, to their prejudice.

Shortly thereafter, the plaintiffs instituted a legal malpractice action against Murray. They alleged that Murray negligently failed to prosecute the underlying personal injury lawsuit against the supermarket. Murray filed a motion for summary judgment in which he argued that the Jeristas could not prevail in their malpractice action, because it was not possible for them to prove the "case-within-a-case." In that regard, Murray maintained that the Jeristas needed an expert to testify that the cause of the accident was negligent maintenance of the door by the supermarket. Yet, the subject door was arguably no longer available for inspection and testing. Therefore, Murray argued, the Jeristas could not obtain the required expert opinion and the underlying case would fail.

In response, the plaintiffs argued that expert testimony was not required on the basis of *res ipsa loquitor*, and in any event, they should benefit from a spoliation of evidence instruction. To that end, the plaintiffs pointed out that Murray's failure to diligently conduct discovery and his intentional deception made it likely that important service records would be destroyed and other evidence lost, "making it difficult, if not impossible, for them to prosecute the 'suit within a suit' malpractice action." The trial court rejected the plaintiffs' arguments and granted Murray's summary judgment motion on the ground that the plaintiffs had not shown that Murray's alleged misconduct was the proximate cause of their damages. A divided Appellate Division affirmed the grant of summary judgment and the plaintiffs appealed to the Supreme Court.

On appeal, the Supreme Court reversed and held, inter alia, that where a legal malpractice plaintiff can make a threshold showing that the defendant attorney's malpractice caused the loss or destruction of relevant evidence in the underlying lawsuit, "the jury should be instructed that it may infer that any missing evidence would have been helpful to plaintiff's case and inured to defendant's detriment." The Court suggested that application of the spoliation inference would prevent one party from benefiting from actions that recklessly deprive another party of the evidence it needs to present a claim or defense. In applying this reasoning to the facts of *Jerista*, the Court found that the plaintiffs were entitled to the spoliation of evidence inference because, by deliberately deceiving his clients about the status of their case for nine years, Murray had consciously disregarded a substantial risk that key evidence would not be available when they needed it. While the decision emphasizes the evidentiary significance of res ipsa loquitor in proving the proximate cause element of a legal malpractice cause of action, it is also a clear signal to lawyers who fail to comply with their duties of diligence, competence and the communication of material information to clients, that they can expect a firm and appropriate response on the side of the aggrieved client when a malpractice action is brought.

### Aggregate Settlement of Claims

In *The Tax Authority, Inc. v. Jackson Hewitt, Inc.,* 187 N.J. 4 (2006), the Supreme Court considered the proper interpretation of RPC 1.8 (g), which addresses the aggregate settlement of claims in which an attorney represents more than one client. More specifically, the Court examined whether the Rule prohibits an attorney from obtaining advance consent that each of the clients will abide by a majority decision with respect to an aggregate settlement. In the end, the Court determined that RPC 1.8(g), as currently written, forbids such an agreement. However, the Court determined that, in the interests of justice and equity, its holding should only be applied prospectively. In addition, the Court left open the possibility of revising RPC 1.8(g) to accommodate the special circumstances of mass lawsuits.

The 154 plaintiffs in *Tax Authority, Inc.* were franchisees of the defendant, Jackson Hewitt, Inc., a nationwide tax preparation service. The plaintiffs sought to recover damages from the defendant for what they perceived to be a breach of the franchise agreement. However, the franchise agreement specifically prohibited the franchisees from filing a class action lawsuit against the franchisor or its affiliates. Therefore, the plaintiffs' attorney, Eric H. Karp, agreed to represent the individual franchisee-plaintiffs in a mass lawsuit.

Upon retaining his services, each of the plaintiffs entered into an identical attorney-client retainer agreement with Karp. Therein, the plaintiffs agreed that the claims would be pursued on a collective basis, with each plaintiff being responsible for a specified portion of the fee. The plaintiffs further consented to resolution of the matter, or any part thereof, by way of settlement upon a vote of the weighted majority of the co-plaintiffs. The agreement established a four-person steering committee to make decisions regarding "all strategic and similar procedural matters other than the decision to settle the matter."

Approximately one month before the complaint was filed, a member of the steering committee died. No replacement was chosen to join the steering committee and the remaining three members continued to act in accordance with the agreement. Following the filing of the complaint, the three-member steering committee agreed to, and participated in, mediation of the dispute. As a result of the mediation process, a settlement agreement was negotiated and reduced to writing. Although the agreement was signed by representatives of the defendant franchisor and by the three remaining members of the steering committee, it was expressly conditioned upon the approval of the plaintiffs and defendant's board of directors.

Karp provided each of the plaintiffs with access to a spreadsheet, which illustrated the calculation of each plaintiff's estimated net participation in the cash portion of the proposed settlement. Following several conference calls among the plaintiffs and Karp, a weighted majority of the plaintiffs approved the proposed settlement agreement. However, not all of the plaintiffs agreed with the settlement provisions. Twenty-six of the 154 plaintiffs, including a member of the steering committee, refused to sign the settlement agreement, despite their earlier agreement to abide by the vote of a weighted majority. Therefore, Karp filed a motion to be relieved as counsel for the hold-outs and the defendant filed a motion to enforce the settlement agreement against all of the plaintiffs.

At oral argument, the holdouts argued that they could not be bound by the settlement, because Karp had violated RPC 1.8(g) when he obtained advance consent from the plaintiffs to abide by any settlement approved by the majority. The trial court disagreed with the hold-out plaintiffs and granted Karp's motion to withdraw, as well as the defendant's motion to enforce the settlement agreement. The trial court noted that RPC 1.8(g), in contrast to its predecessor (DR) 5-106, does not contain specific language requiring disclosure of the total amount of the settlement prior to each plaintiff's approval. On appeal, the Appellate Division reversed, holding that the agreement was contrary to RPC 1.8(g) and unenforceable.

The Supreme Court granted defendant's petition for certification. Following a review of the arguments, the Court dismissed as insignificant textual differences between (DR) 5-106 and RPC 1.8(g), and held that when a lawyer represents more than one client, each client has the right to accept or reject the settlement after its terms are known. To that end, the Court interpreted *RPC* 1.8(g) to impose two distinct requirements on lawyers representing multiple clients: (1) to disclose the terms of the settlement to each client; and, (2) to obtain agreement to settlement from each client only after the terms of the settlement are known. However, the Court also determined that it would be most equitable to apply the holding prospectively, since the last remaining hold-out had been a member of the steering committee, the defendant's interpretation of RPC 1.8(g) was plausible and the settlement had otherwise been effectuated.

Interestingly, the Court seized the opportunity to acknowledge the recommendation of numerous commentators that the Rule be revised to accommodate the special circumstances of mass lawsuits. In particular, the court noted the argument that settlement is more urgent and more difficult in mass lawsuits due to the large stakes and complex issues, and that the aggregate settlement rule allows a single claimant to block an entire settlement. This would clearly frustrate the state's policy favoring settlement of litigation. In light of these concerns, the Court referred the issue to the Commission on Ethics Reform for review and recommendation. We will watch with interest to see whether RPC 1.8(g) gets the "extreme makeover" that the *Tax Authority* case demonstrates may well be in order. A loosening of the unanimous consent requirement in aggregate settlements will benefit not only litigants, but also the Court dockets.

**Minor Ethical Misconduct**

Rule 1:20-9, provides that all participants in an attorney disciplinary proceeding must maintain its confidentiality when that proceeding does not result in the filing of a formal complaint. For many years, attorneys accused of "minor unethical misconduct" (any action by an attorney which, if proven, would garner a sanction no greater than public admonition) were able to avoid public disclosure of their alleged indiscretions by entering into a diversion agreement with the Office of Attorney Ethics. Entering such an agreement circumvented the issuance of a complaint, thereby bringing the matter within the confidentiality provision of Rule 1:20-9. Following the Supreme Court's recent decision in *R.M. v. Supreme Court of New Jersey*, 185 N.J. 208 (2005), attorneys accused of minor unethical misconduct may find diversion a much less appealing option. On the other hand, many grievants will feel a sense of vindication now that the confidentiality of attorney disciplinary proceedings is a thing of the past.

The plaintiff in *R.M.* challenged the constitutionality of Rule 1:20-9, which mandated that a grievance filed against an attorney remain confidential until such time as a formal complaint is filed. The plaintiff had hired an attorney to represent her in a legal matter, which led her to file a grievance against the attorney with the District XIII Ethics Committee. During the investigation, the respondent attorney admitted specific acts of misconduct in connection with her representation of the plaintiff and accepted a diversion agreement in lieu of discipline.

The plaintiff wanted to publicize the fact that she had filed the grievance, that the respondent attorney had admitted to minor unethical conduct and that the attorney entered into a diversion agreement. However, pursuant to Rule 1:20-9, she was required to keep all communications about the ethics matter confidential until a formal complaint was issued and served. Since the respondent attorney had accepted a diversion agreement, no complaint was issued, and the plaintiff was prohibited from disclosing the information. The plaintiff argued that the Rule constituted an impermissible restraint on free speech in violation of the First Amendment, because it prevented her from making truthful statements about the ethics process.

Ultimately, the Court agreed with the plaintiff and held that Rule 1:20-9, as written and as applied, violated the First Amendment. The Court began its analysis by recognizing that, in order to sustain a law that proscribes the publication of truthful speech, the State must demonstrate that the law furthers a compelling interest and is narrowly tailored to achieve that interest. In attempting to meet its burden, the State advanced three interests that it deemed sufficiently compelling: protecting the reputations of attorneys who are wrongfully accused of ethical misconduct, encouraging attorneys who have committed minor misconduct to agree to diversion and preserving the integrity of the disciplinary system.

While recognizing that "an attorney's reputation is his or her currency," the Court held that the protection of attorneys from unfounded accusations of misconduct does not amount to a compelling interest. The Court reasoned that, once an attorney is cleared of misconduct, his or her interest in suppressing the existence of an accusation is "greatly diminished." And, in fact, "revelation that the grievance was baseless should in most cases reassure clients and the public that the attorney did nothing wrong."

Moreover, the Court found that there is a countervailing interest in permitting grievants to discuss grievances that have been deemed meritless. In that regard, the Court underscored the importance of a grievant's fundamental right to discuss and disagree with the authorities' determination of the merits of his or her matter. In addition, the Court determined that, even if the goal of protecting the reputation of wrongly accused attorneys were sufficiently compelling, Rule 1:20-9 was not narrowly tailored to achieve that goal because it also precluded discussion of meritorious grievances that were resolved by way of diversion.

The state next argued that the restriction on speech occasioned by Rule 1:20-9 was justified, because it advanced the state interest in avoiding in-depth disciplinary proceedings for minor ethical infractions. To that end, the state maintained that the confidentiality afforded to those attorneys accepting diversion agreements encouraged attorneys who had committed minor misconduct to "cooperate with an investigation, remedy past harm and take measures to prevent a future lapse of judgment or competence." Although the court found this to be a "salutary goal," it declined to categorize it as a compelling interest. Rather, the Court specifically stated that the interest in swiftly resolving minor ethics matters cannot "justify infringing a grievant's free-exercise of truthful speech." In coming to that conclusion, the Court observed that the overarching goal of the attorney disciplinary system is to protect the public from unethical attorneys, and that this goal is thwarted by a rule which suppresses truthful speech regarding actual, though minor, ethical violations.

The state's final argument focused on the various respects in which the confidentiality provided by Rule 1:20-9 supports the integrity of pending investigations. In that regard, the State alleged that the rule promotes the cooperation of witnesses, enables a complete review of each ethics matter and encourages the filing of grievances. The Court considered each of these contentions individually.

With respect to witness cooperation, the State argued that the confidentiality requirement of Rule 1:20-9 was analogous to the secrecy of grand jury proceedings. More specifically, it suggested that both provisions promoted "free and untrammeled disclosures" by witnesses. The Court, however, drew a sharp distinction between the two, noting that grand jury proceedings are kept secret for the purpose of preventing the suspect from fleeing and protecting witnesses from undue influence. In contrast, in the case of ethical grievances, the respondent attorney is formally notified of the nature of the charges, as well as the identity of the grievant and potential witnesses. Therefore, the "justifications for grand jury secrecy are simply not present in a disciplinary investigation." The Court concluded that encouraging witnesses to cooperate with disciplinary authorities is not a compelling interest and, in any event, Rule 1:20-9 is not narrowly tailored to achieve that end. In that regard, the Court recognized that witnesses' sworn testimony can be secured through the issuance of subpoenas, without the necessity of restricting a grievant's speech.

The Court made short work of the state's assertion that the Rule's confidentiality requirement is necessary to facilitate the complete review of each ethics matter by disciplinary authorities. While acknowledging that disclosing the existence of an ongoing investigation "has the potential to invite the exertion of outside influence," the Court determined that was merely speculative. And, regardless, the risk of coercion can be minimized through alternative means that do not involve the suppression of free speech, including the use of subpoenas and the imposition of criminal sanctions.

The Court seemed a bit more impressed with the state's argument that encouraging grievants to report attorney misconduct is a compelling interest. However, the Court did not believe that the confidentiality provision of Rule 1:20-9 actually furthered that interest. In that regard, the Court did not see how prohibiting grievants from revealing the identity of the respondent attorney or the nature of the alleged misconduct would encourage persons to file a grievance. In fact, the Court suggested that the confidentiality provision may even dissuade those potential grievants who intend to speak out about an ethical matter from filing a grievance.

Having rejected all of the state's arguments, the Court declared Rule 1:20-9 unconstitutional and held that a grievant may publicly discuss the fact that he or she filed a grievance, the content of that grievance, and the result of the process. In addition, the Court specifically held that the fact that an attorney admits to a violation of the disciplinary rules and accepts a diversion agreement no longer enjoys confidential treatment, although the contents of a diversion agreement itself remain confidential. If, as the Court observed, "an attorney's reputation is his or her currency," it is likely that the number of grievances that are destined to result in full disciplinary hearings will greatly increase, because attorneys will have to fight harder to defend their reputations. The decision is thus a mixed bag: hard for the attorney wrongly accused of ethical infractions, but surely a win for free speech. More than that, however, the decision shows the profound integrity of the Court, illustrating both the Court's ability to acknowledge when one of its own rules impinges on rights of constitutional import, and its willingness to strike down such rules without hesitation. ■