

Virginia Supreme Court Recognizes Judgmental Immunity (or “Error-in-Judgment” Rule), But Collectability Is an Affirmative Defense of Attorney Defendant

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[*Shevlin Smith v. Bruce W. McLaughlin*, 769 S.E.2d 7, 2015 WL 798716 \(Va. 2015\)](#)

Brief Summary

This legal malpractice case arose out of another legal malpractice case that arose out of an underlying criminal case. The Supreme Court of Virginia reversed a \$5.75 million jury verdict against the attorney and held that: (1) the attorney did not, as a matter of law, breach a duty to his client by failing to correctly anticipate a judicial ruling on an unsettled legal issue; (2) collectability was an affirmative defense; and (3) nonpecuniary damages are not recoverable in legal malpractice actions.

Complete Summary

Plaintiff, in the original underlying criminal action, was charged with multiple counts of felony sexual abuse. He hired two attorneys from different law firms to represent him. The jury found plaintiff guilty and convicted him of nine counts of sexual abuse of three of his children, and he was sentenced to serve 13 years in prison.

Plaintiff’s direct appeal was denied. Pursuant to *habeas* proceedings, however, his convictions for the felony charges were vacated, and he was granted a new trial. At the second trial, the jury found plaintiff not guilty on all the felony sexual abuse charges. By then, plaintiff had been incarcerated for more than four years.

Plaintiff then retained new counsel (Shevlin) and filed a legal malpractice claim against his criminal defense attorneys and their respective law firms. Plaintiff alleged that his criminal defense lawyers had negligently failed to obtain the taped interviews of the alleged victims and to compare those tapes with the inaccurate written transcripts used during plaintiff's first criminal trial.

The malpractice insurer for one set of the criminal defense lawyers obtained a judicial finding that there was no coverage for the claim. But the insurer provided those attorneys with \$50,000 to handle the criminal malpractice matter or settle the case. Because plaintiff needed the money, Shevlin negotiated a settlement with these criminal defense lawyers for \$50,000. The settlement agreement expressly did not discharge plaintiff's malpractice claims against the remaining criminal defense attorneys.

Approximately four months after Shevlin executed the settlement agreement, the Supreme Court of Virginia issued an opinion in *Cox v. Geary*, 271 Va. 141, 624 S.E.2d 16 (2006), which held that the release of *some* co-defendants in a legal malpractice case released *all* co-defendants. Based on *Cox*, the remaining criminal defense attorneys filed a plea in bar to plaintiff's malpractice claim. The trial court sustained their plea in bar, and dismissed plaintiff's malpractice claim against them. The dismissal was affirmed on appeal.

Plaintiff then filed a legal malpractice action against Shevlin. Ultimately, the case went to trial and the jury awarded plaintiff \$5.75 million verdict. On appeal, the Supreme Court of Virginia considered: (1) whether an attorney breaches a duty by failing to correctly foresee a judicial ruling on an unsettled legal issue; (2) whether collectability is relevant; and (3) whether nonpecuniary damages are recoverable in legal malpractice claims.

The Court noted that it had previously held that an attorney does not breach his or her duty when the attorney follows "well-established law" that is subsequently reversed. Shevlin relied upon cases in other states that have applied the "judgmental immunity rule," which provides that a lawyer cannot be liable when his or her decisions are based on decisions concerning an unsettled area of law. The Court held that if an attorney exercises a reasonable degree of care, skill and dispatch while acting in an unsettled area of law, which is to be evaluated in the context of the law at the time of the alleged negligence, then he or she does not breach the duty owed to the client.

Here, the Court found that at the time the settlement was executed, Shevlin was acting in an unsettled area of the law in Virginia. At that time, there were two lines of authority that provided Shevlin with the necessary basis to have acted in accordance with "reasonable degree of care, skill, and dispatch." The Court thus found that, as matter of law, Shevlin did not breach his duty to plaintiff by failing to correctly anticipate the Court's holding in *Cox*.

With respect to the collectability issue, Shevlin argued that the \$5.75 million jury verdict should have been reduced because the trial court erred in permitting plaintiff to recover more than he would have been able to collect from his criminal defense attorneys in the criminal legal malpractice case. In recognizing a split among the states on this issue, the Supreme Court ultimately held that collectability was relevant, but it is an affirmative defense and the defendant attorney must prove that any judgment obtained would not have been recovered by the plaintiff.

Finally, the Court held that tort damages — including nonpecuniary damages such as mental anguish, emotional distress and humiliation — are not recoverable as damages in legal malpractice actions. The Court reversed and remanded for further proceedings.

Significance of Opinion

This decision is significant because the Supreme Court of Virginia recognized judgmental immunity (or the “error in judgment” rule) and held that an attorney does not breach his or her duty if the attorney exercises a reasonable degree of care and skill with respect to an unsettled area of law, which is to be evaluated at the time of the alleged negligence. The Court also held that collectability is a relevant consideration in legal malpractice actions because a plaintiff is only entitled to recover “actual damages” caused by the defendant’s malpractice. However, the defendant bears the burden of showing that any judgment obtained by the plaintiff would not have been recovered from the underlying defendant. Finally, the Court held that tort damages — including nonpecuniary damages such as mental anguish, emotional distress and humiliation — are not recoverable in legal malpractice actions.

For more information, please contact [Terrence P. McAvoy](#).

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