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Colorado Supreme Court Holds That Plaintiff Must Bear Burden of Proving Collectibility in Legal Malpractice Actions

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LeHouillier v. Gallegos, 2019 Colo LEXIS 89 (Jan. 28, 2019)

Brief Summary

The Colorado Supreme Court concluded that the plaintiff in a legal malpractice case must bear the burden of proving "collectibility" as part of its obligation to prove causation and damages in its *prima facie* case. In other words, plaintiff must prove that but for the defendant's alleged negligence, plaintiff would have prevailed in the underlying case and been able to collect on any judgment which would have been entered in plaintiff's favor.

Complete Summary

In 2009, the plaintiff retained the defendant to sue her former radiologist, Dr. Steven Hughes, for medical malpractice because he failed to detect a brain tumor on an MRI scan three years earlier. In 2010, however, the defendant decided not to proceed with the representation and failed to prosecute the case, which ultimately led to the statute of limitations on the medical malpractice claim expiring. Thereafter, the plaintiff filed a legal malpractice against the defendant alleging he never informed her that he had withdrawn from the engagement and negligently failed to pursue her medical malpractice claim, which resulted in her underlying claim being time-barred.

At the legal malpractice trial, after the plaintiff rested her case-in-chief, the defendant moved for a directed verdict arguing that the plaintiff bore the burden of proving the collectibility of any judgment she could have obtained against Dr. Hughes, and that she had not satisfied this burden. The trial court agreed that the plaintiff bore the burden, but concluded that she had provided sufficient evidence for the jury to decide whether the judgment was collectible. The jury ultimately found that: (1) the defendant breached his duty of care by not prosecuting the claim against Dr. Hughes; (2) Dr. Hughes had committed medical malpractice in the "case-within-a-case"; and (3)

the plaintiff suffered $1.6 million in damages. The trial court denied the defendant's motion for judgment notwithstanding the verdict based on the plaintiff's failure to prove collectability.

The Colorado Court of Appeals held that the defendant-attorney in a legal malpractice case bears the burden of asserting and proving the issue of collectability as an affirmative defense. Accordingly, the appellate court reversed and remanded the case to the trial court for a new trial, requiring that the defendant bear the burden of proving that the hypothetical judgment against Dr. Hughes was not collectible.

The Colorado Supreme Court reversed the judgment of the appellate court and held that "[b]ecause the collectibility of the underlying judgment is essential to the causation and damages elements of a client's professional negligence claim against her attorney . . . the client-plaintiff bears the burden to prove that the underlying judgment was collectible." *LeHouillier*, 2019 Colo LEXIS 89 at *11. In doing so, the court observed that to prevail on a legal malpractice claim, a plaintiff must prove that underlying claim would have been successful but for the attorney's negligence and that she suffered "actual damages." *Id.* **17-18. With these principles in mind, the court held that if the underlying judgment was not collectible: (1) the lost value of the judgment was not the proximate cause of an attorney's negligence, and (2) the plaintiff has not incurred any legally cognizable damages.

The court concluded that placing the burden of proving collectibility on the plaintiff is not unfair or onerous, as the best evidence of collectibility would be proof of insurance coverage, which would likely be in the defendant-attorney's files and subject to discovery in the legal malpractice action. The court also noted that evidence of insurance would not improperly influence the jury's determination of liability because the insurance at issue does not relate to the attorney's coverage, but rather the defendant in the underlying action. Finally, the court suggested a plaintiff could prove collectibility by deposing the underlying defendant(s) to explore his or her net worth or by showing sufficient unencumbered assets through publicly available records.

The court also noted that treating collectibility as an affirmative defense would not be logically sound because by definition, an affirmative defense nullifies facts, which would otherwise result in liability (*e.g.*, statute of limitations), but does not purport to negate an essential element of a plaintiff's case (*i.e.*, causation and damages). The court concluded that placing the burden on the defendant to prove a negative (uncollectibility) would permit the plaintiff to potentially reap a windfall by allowing her to collect more than her actual injury.

Significance of Decision

This decision by the Colorado Supreme Court squarely places the burden of proving collectibility on plaintiffs in legal malpractice actions as part of the "but for" causation and actual damage elements necessary to prevail.

For more information please contact Terrence P. McAvoy or Robert M. Buchholz

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Related People

Robert M. Buchholz

Partner

617-213-7000

Terrence P. McAvoy

Of Counsel

312-704-3281