Michigan Gives Wide Berth in Legal Malpractice Cases to Attorneys who Exercise their Judgment in Good Faith

By Steven M. Wolock

In the mid-1990s, the Michigan Supreme Court issued a series of opinions on the law of legal malpractice. The Court treated the topics of causation, the attorney judgment rule, duty, the statute of limitations, collateral estoppel, the right to a jury trial, and venue. In general, these decisions were sympathetic to the vulnerabilities of lawyers practicing in a profession in which second guessing is an occupational hazard.

While subsequent Supreme Court decisions have to some extent diluted protections for attorneys in the areas of venue and the statute of limitations, the Court has not otherwise trimmed these rulings.

One area of particular importance in which the Michigan Supreme Court has not wavered over the years is its embrace of the attorney judgment rule. Indeed, the protections afforded attorneys under Michigan law on this topic are among the strongest in nation.

In 1995, the Michigan Supreme Court in *Simko v Blake* broadly interpreted the attorney judgment rule, stating that “[w]here an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment.” The case arose out of Blake’s representation of Simko in a criminal case. At the trial, Blake, after unsuccessfully seeking a directed verdict upon the close of the prosecution’s proofs, called only Simko to testify in his own defense. Although the jury convicted Simko, the Court of Appeals reversed the denial of the directed verdict. Having spent two years in prison, Simko sued Blake, alleging, *inter alia*, that he had failed to adequately investigate the case, failed to discover essential witnesses, and failed to call important witnesses.

Despite arguable factual issues, the Court upheld the summary dismissal of Simko’s complaint on the grounds that he had failed to state a claim. The Court’s

ruling was anchored in its recognition that litigation is an art, not a science, and that without the protection of the attorney judgment rule, “every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight.” The Court had long before shown its appreciation of these realities. In 1869, the Michigan Supreme Court, in *Babbitt v Bumpus*, noted that lawyers must cope with the “vagaries and imaginations of witnesses and jurors,” the fact that courts “not infrequently” commit error, and the fact that “the best lawyers in the country find themselves mistaken as to what the law is.” Thus, the Court 140 years ago held that when attorneys, “have acted in good faith, and with a fair degree of intelligence . . . the errors which may be made by them must be very gross before the attorney can be held responsible.” In deciding *Simko*, the Court renewed its commitment to the principles recognized in *Babbitt*. As a practical matter, by its decision, the Court encouraged the lower courts to use summary disposition to weed out those cases in which the plaintiff merely seeks to second-guess the good faith and reasoned judgments of the defendant attorney.

In 2007, the Court demonstrated its continued commitment to the policy concerns animating the *Simko* decision in the face of a determined attack on the ruling. In *Grace v Leitman*, the Supreme Court granted leave to appeal a decision upholding summary disposition on attorney judgment grounds, despite the plaintiff’s submission of an expert affidavit opining that the defendant attorney had been grossly negligent. Among other things, the appeal in Grace raised the question whether *Simko* was being applied in a manner that too readily treated allegations of attorney negligence as issues of law to be decided by the court. In an interlocutory order, the Court indicated its intent to thoroughly review *Simko*, and invited *amici* to submit briefs. However, after two rounds of briefing and oral argument, the Court vacated its decision granting leave and let *Simko* stand. The Supreme Court’s decision in Grace to not trim, expand, or clarify *Simko* is a testament to the fact that the *Simko* decision, while perhaps imperfect, served and would continue to serve a salutary purpose.

In the 10 years since *Leitman*, the Michigan Supreme Court has not granted leave in any legal malpractice case in which the attorney judgment rule was at issue.

In the meantime, both before and after *Leitman*, the Michigan Court of Appeals has continued to apply the attorney judgment rule to a wide range of litigation decisions. Thus, the Court of Appeals has upheld summary disposition when the plaintiff challenged decisions regarding whether to sue potential parties or call

particular witnesses; take discovery depositions of standard of care experts, compel pretrial disclosure of expert opinions, object to certain expert testimony at trial, and object to the reading of a deposition in lieu of testimony at trial; plead alternative theories of causation; raise particular issues on appeal; seek reconsideration of an appellate decision; introduce harmful documents rather than object to their admission; recommend settlement; offer particular rebuttal evidence; raise a statute of limitations defense; pursue particular claims; file a motion for summary disposition before the close of discovery; and use a trust to manage settlement proceeds in lieu of a bonded conservatorship.