

# MICHIGAN LAWYERS WEEKLY

## COA reverses witness immunity ruling *Expert witnesses not absolutely immune*

By: [Thomas Franz](#) in [News Stories](#) January 23, 2019

Arising out of what started as a foreclosure case, a Michigan Court of Appeals panel ruled in a published opinion that licensed professionals acting as expert witnesses owe the same duty to their party as they would to any client, and witness immunity is not a defense against professional malpractice.

In *Voutsaras v. Mogill* (MiLW No. 07-99210, 9 pages), the appeals court panel featuring Amy Ronayne Krause, Brock A. Swartzle and David H. Sawyer reversed an Ingham County Circuit Court ruling they said too broadly applied the doctrine of witness immunity. Ronayne Krause wrote the opinion.

Pat Gallagher represented the plaintiff, the estate of Diana Voutsaras, by personal representative Kathleen Gaydos, and Spiro Voutsaras. Jesse Roth represented defendant Kenneth Mogill of Mogill Posner & Cohen. Kern Slucter of Gannon Group PC was also a defendant.

### **Background**

The litigation resulted from a foreclosure of a commercial mortgage made by Diana and Spiro Voutsaras and held by Gallagher Investments, which is owned by Gallagher. The Voutsarases hired the firm Murphy & Spagnuolo PC to represent them in foreclosure proceedings.

The Voutsarases, on the advice of Murphy & Spagnuolo, the law firm defendants, filed a counterclaim against Gallagher and a third-party claim against some of the principal actors involved with Gallagher for malpractice.

Afterward, the law firm defendants then hired the Mogill defendants for litigation support and to serve as expert witnesses. The court wrote that Kenneth Mogill was a legal ethics expert, and Slucter and Gannon Group were experts in real estate brokerage.

However, the panel wrote that the law firm defendants informed the Voutsarases that their litigation strategy was bound to fail and the trial court granted summary disposition against the Voutsarases. After Diana Voutsaras died in January 2015, her estate filed this lawsuit. The court wrote that the estate argued the law firm defendants failed to advise it of a favorable settlement offer and that the

law firm defendants deliberately concealed the fact that the estate's claims were frivolous in order to drive up their costs prior to trial.

An October 2017 settlement agreement between the estate and law firm defendants concluded that portion of the case.

However, the estate claimed that the Mogill defendants breached their duty to the estate by failing to properly investigate the facts required to formulate their opinions, failing to understand the applicable standards, and failing to provide a competent professional opinion.

When the trial court granted summary judgment to the Mogill defendants based on a broad interpretation of witness immunity standards, the appeal followed.

Gallagher, who wound up becoming a creditor of Diana Voutsaras' estate, became the plaintiff's new attorney for the appeals case.

### **COA analysis**

Much of the argument in the case centered on interpretations of a 1999 Michigan Supreme Court case, *Maiden v. Rozwood*.

Roth, Mogill's attorney in this case and a shareholder at Maddin, Hauser, Roth & Heller PC, said the Court of Appeals misapplied the existing case law.

"The Michigan Supreme Court, in the 1999 *Maiden v. Rozwood* case, said very clearly that witness immunity is absolute, it's to be liberally construed, and that witnesses are immune not only for the testimony they give but for related out-of-court evaluations," Roth said.

The appeals panel wrote that the *Maiden* case was only partially applicable to this matter. The court agreed with the defendants that any witness called by any party enjoys immunity based on the substance of their testimony or evidence.

Where the court differed from the defense is whether witness immunity protects the Mogill defendants from giving professionally incompetent testimony. The court stated that was not a matter considered in the *Maiden* decision.

"Additionally, the witness immunity doctrine at issue in *Maiden* addresses only actual testimony," the court wrote. "Furthermore, plaintiff alleges that the Mogill defendants not only provided incompetent opinions, but failed to undertake reasonable skill and care in forming those opinions."

The court went on to state that since the Mogill defendants owed the plaintiff a duty of professional care, they are not absolutely immunized from professional malpractice claims because part of their retention included the provision of expert testimony.

"The bottom line of the appeal is that in Michigan, if you're an expert witness, you owe the party that hired you the same standard of care that you would owe that party if they were a client or patient of you in your professional capacity," Gallagher said.

Gallagher added that experts shouldn't have anything to fear as a result of this case.

"The important thing here that the COA has made clear in this case is that a party can't just sue their expert for being honest and objective," Gallagher said. "A party can only sue their expert for violating the standard of care or for being incompetent."

Roth disagreed and said the case could have negative policy implications.

"Now there's going to be a perverse incentive for retained expert witnesses to give opinions that are favorable to the party that retains them, as opposed to giving objective opinions," Roth said. Roth said he is going to be petitioning the case to the Michigan Supreme Court.

"At the appellate level, we again relied on *Maiden* which talked about how broad and liberally construed witness immunity is in Michigan," Roth said. "The COA created new law and said there's an exception that's never been recognized before in Michigan and now you're allowed to sue your own expert witness."