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Attorney-Judgment Rule from A to Z

By: David M. Saperstein, *Maddin Hauser Roth & Heller, PC*

On those cold, winter days growing up in Los Angeles, nothing was tastier than a warm bowl of Campbell's Alphabet Soup. Lately, the alphabet is back in the news. Alphabet, Inc. (GOOGL) has overtaken Apple, Inc. (AAPL) as the world's most valuable company. So, in honor of this news, this is a summary of Michigan's attorney-judgment rule from A to Z.

Michigan, like most states in this country, protects lawyers from malpractice liability for many of their discretionary decisions. The seminal Michigan decision on the attorney-judgment rule, sometimes known as judgmental immunity, continues to be *Simko v Blake*, 448 Mich 648; 532 NW2d 842 (1995). In *Simko*, the Michigan Supreme Court established the general rule by which the standard of care for attorneys is measured: all attorneys have a duty to act as an attorney of ordinary learning, judgment, or skill would act under the same or similar circumstances. *Id*. at 656. The Court continued that a lawyer is not a guarantor of the most favorable possible outcome for his client. *Id*. at 655-656. Rather, an attorney is not required to exercise extraordinary diligence or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession. *Id.*

To flesh out what this standard means in practice, the *Simko* Court held that where "an attorney acts in good faith and 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." *Id*. The Court understood that any other rule would mean that any losing litigant would then sue his or her attorney with the benefit of hindsight:

> There can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment. This is a sound rule. Otherwise 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. [*Id*.]

The doctrine of judgmental immunity or the "attorney judgment rule" provides attorneys broad protection from *post hoc* examination of most legal decisions that arise in the course of litigation. *Id*. In *Babbitt v Bumpus*, 73 Mich 331; 41 NW 417 (1889), a case cited with approval by the *Simko* Court, the Michigan Supreme Court emphasized the caution to be applied with respect to claims for legal malpractice, stating:

> [G]reat care and consideration should be given to questions involving the proper service to be rendered by attorneys when they have acted in good faith, and with a fair degree of intelligence, in the discharge of their duties when

David M. Saperstein is a partner and trial attorney at Maddin Hauser Roth & Heller, PC, where he focuses his practice on the defense of non-medical professional liability cases. He handles every aspect of litigation in arbitration or in court, from pre-suit claim repair to trial and appeal, on behalf of lawyers, stockbrokers, broker-dealers, insurance agents, accountants, and other professionals. He previously clerked for the Hon. Myron H. Wahls of the Michigan Court of Appeals, and is a proud graduate of the University of California, Berkeley, and the University of Michigan Law School. When not enjoying alphabet soup, he can be reached at dsaperstein@maddinhauser.com.

> employed under the usual implied contract. **Under such circumstances, the errors which may be made by them must be very gross before the attorney can be held responsible.** They should be such as to render wholly improbable a disagreement among good lawyers as to the character of the services required to be performed, as to the manner of their performance under all the circumstances in the given case, before such responsibility attaches. [*Id.* at 337-338 (emphasis added).]

The facts of *Simko* demonstrate the extent of the Michigan Supreme Court's broad interpretation of an attorney's discretion. The plaintiff in *Simko* had been represented by the attorney defendant in a criminal trial and sentenced to life imprisonment. After an appeal by a successor attorney, the plaintiff's sentence was reduced to a two-year term. The plaintiff alleged in his legal-malpractice complaint that his criminal defense trial attorney was not prepared for trial and failed to produce appropriate witnesses. Despite the seemingly substantial factual issues present in the case, the Supreme Court upheld the trial court's grant of summary disposition **on the pleadings**. In so holding, the *Simko* Court ruled that the allegations of the plaintiff, at worst, were nothing more than mere errors in judgment with respect to trial tactics, and therefore not actionable. The Court reasoned further that "[p]erhaps defendant made an error of judgment in deciding not to call particular witnesses, and perhaps another attorney would have made a different decision; however, tactical decisions do not constitute grounds for malpractice actions." *Simko*, 448 Mich at 660.

Given the broad scope of *Simko,* it is no surprise that it has been applied to a wide variety of an attorney's tactical decisions. In fact, Michigan courts have dismissed legal-malpractice claims as a matter of law involving virtually every decision from A to Z:

Evaluation of claim and pleading

- Whether to sue potential parties;[1]
- Failure to plead alternative theories of causation;[2]
- Pursuit of claims without merit;[3]
- Reliance on unqualified experts for evaluation;[4]
- Referral to improper physician for evaluation;[5]
- Improper evaluation of injury;[6]
- Failure to keep client informed[7]
- Failure to consult with client before limiting the scope of representation;[8]
- Improper assessment of expenses;[9]

Discovery

- Failure to contact fact witnesses;[10]
- Failure to investigate;[11]
- Decision of which doctor to depose;[12]
- Failure to take discovery depositions of opposing experts;[13]
- Failure to compel pretrial disclosure of expert opinions;[14]
- Failure to properly prepare experts;[15]

Motion practice

- Whether to enter a default judgment;[16]
- Whether to raise a statute-of-limitations defense;[17]
- Whether to file a dispositive motion before the end of discovery;[18]
- Failure to properly defend against a statute-of-limitations motion;[19]
- Failure to defend against other motions; [20]
- Failure to properly pursue recusal of judge;[21]

Trial

- Whether to recommend settlement;[22]
- Whether to recommend waiver of jury trial;[23]
- Failure to present evidence or exhibits;[24]
- Abandonment of theory of liability during trial;[25]
- Failure to call particular witnesses, including experts; [26]
- Failure to make a variety of objections at trial; [27]
- Failure to obtain additional testimony or cross-examination;[28]
- Whether to offer particular rebuttal evidence;[29]
- Failure to support requested jury instructions with briefs;[30]
- Failure to move for directed verdict;[31]

Post-trial

- Whether to file post-trial motions;[32]
- Whether to raise particular issues on appeal;[33]
- Whether to seek reconsideration of an appellate decision;[34]
- Whether to use a trust to manage settlement proceeds.[35]

Although Michigan's attorney-judgment rule is most frequently applied in the context of underlying litigation, that is not always the case. For example, in *Fifth Third Bank v Couzens Lansky Fealk Ellis Roeder & Lazar, PC*, unpublished opinion per curiam of the Michigan Court of Appeals, issued Jan. 12, 2016 (Docket No. 323654), the attorney-judgment rule was applied to bar a legal-malpractice claim arising out of the attorney's recommendation to offer a full credit bid at a sheriff's sale rather than a deficiency bid.

Michigan's attorney-judgment rule is one of the first defenses that should be examined when analyzing the merits of a legal-malpractice claim. In appropriate circumstances, the rule may be invoked either at the pleadings stage or following

discovery to bar all or part of a plaintiff's legal-malpractice claim.

Endnotes

1 *Estate of Mitchell v Dougherty*, 249 Mich App 668, 676; 644 NW2d 391 (2002); *Gibbons v Thompson, O'Neil & Vanderveen, PC*, unpublished opinion per curiam of the Court of Appeals, issued Mar. 27, 2007 (Docket No. 271628); 2007 WL 914297; *JMS & Associates v Schwartz*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 3, 2000 (Docket No. 214765); 2000 WL 33406802.

2 *Badalamenti v Miller*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 17, 2005 (Docket No. 254790); 2005 WL 3077146; *Fifth Third Bank v Couzens Lansky Fealk Ellis Roeder & Lazar, PC*, unpublished opinion per curiam of the Michigan Court of Appeals, issued Jan. 12, 2016 (Docket No. 323654); 2016 WL 146308 (pursuit of foreclosure by advertisement instead of judicial foreclosure).

3 *Lebedovych v Hadley*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 22, 2005 (Docket No. 255797); 2005 WL 3116083.

4 *Gibbons v Thompson, O'Neil & Vanderveen, PC,* unpublished opinion per curiam of the Court of Appeals, issued Mar. 27, 2007 (Docket No. 271628); 2007 WL 914297.

5 *Woods v Gursten*, unpublished opinion per curiam of the Court of Appeals issued Dec. 15, 1998 (Docket No. 194523); 1998 WL 1988581.

6 *Id*.

7 See *Messenger v Heos*, unpublished per curium of the Court of Appeals, issued Dec. 9, 2008 (Docket No. 279968); 2008 WL 5158901 (theory dismissed by trial court, but not addressed on appeal).

8 *Id*.

9 *Id*.

10 *Schubiner v Sommers Schwartz*, unpublished per curium of the Court of Appeals, issued June 26, 2007 (Docket No. 274775); 2007 WL 1828892.

11 See *Messenger*, *supra*.

12 *Woods*, *supra*.

13 *Beztak Co v Vlasic*, unpublished per curium of the Court of Appeals, issued Aug. 19, 2003 (Docket Nos. 236518, 236519, 236520); 2003 WL 21978749.

14 *Id*.

15 *Id.*

16 *Caudill v Sheldon Miller Law Firm*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 19, 2013 (Docket No. 310714); 2013 WL 6083720.

17 *Wickham v Lepley*, unpublished opinion per curiam of the Court of Appeals, issued Mar. 30, 2006 (Docket No. 258429); 2006 WL 827858.

18 *Berryman Properties v O'Dea*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 23, 2004 (Docket No. 248718); 2004 WL 2125682.

19 See *Messenger*, *supra*.

20 *Id*.

21 *Id*.

22 *Woods*, *supra*; *Heller v Donaldson*, unpublished opinion per curiam of the Court of Appeals, issued Mar. 13, 1998 (Docket No. 194219); 1998 WL 2016612; *Kauer v Clark*, unpublished opinion per curiam of the Court of Appeals, issued July 9, 1996 (Docket No. 175138); 1996 WL 33324098; *Fifth Third Bank v Couzens Lansky Fealk Ellis Roeder & Lazar, PC*, unpublished opinion per curiam of the Michigan Court of Appeals, issued Jan. 12, 2016 (Docket No. 323654); 2016 WL 146308 (recommendation to offer full credit bid rather than deficiency bid at sheriff's sale).

23 *Trakhtenberg v McKelvy*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 27, 2009 (Docket No. 285247); 2009 WL 3465436, vacated on other grounds by *Trakhtenberg v McKelvy*, 493 Mich 946; 828 NW2d 18 (2013).

24 *Id*.; *Schubiner*, *supra*.

25 *Messenger*, *supra*.

26 *Trakhtenberg*, *supra*; *Schubiner*, *supra*; *Grace v Leitman,* unpublished opinion per curiam of the Court of Appeals, issued Mar. 16, 2006 (Docket No. 257896); 2006 WL 664228, lv app gtd, 477 Mich 1064; 728 NW2d 861, lv app vacated, 480 Mich 913; 739 NW2d 634 (2007); *Messenger*, *supra*.

27 *Beztak Co*, *supra*; *Po v Benefiel*, unpublished opinion per curium of the Court of Appeals, issued Sept. 27, 2005 (Docket 255546); 2005 WL 2323823.

28 *Trakhtenberg*, *supra*; *Messenger*, *supra*.

29 *Crutcher v Breck,* unpublished opinion per curiam of the Court of Appeals, issued Mar. 20, 2007 (Docket No. 271599); 2007 WL 840127.

30 See *Messenger*, *supra*.

31 *Trakhtenberg*, *supra*.

32 *Po*, *supra*.

33 *Kandalaft v Peters*, unpublished opinion per curiam of the Court of Appeals, issued Apr. 17, 2007 (Docket No. 267471); 2007 WL 1138395; *Flanigan v Herschfus*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 1, 2002 (Docket No. 226997); 2002 WL 181061.

34 *Kandalaft*, *supra*.

35 *Stanke v Stanke,* unpublished opinion per curiam of the Court of Appeals, issued Mar. 20, 2007 (Docket No. 263446); 2007 WL 838934, rev'd 480 Mich 927; 740 NW2d 300 (2007).