fucile & reising | LLP

WSBA *NWSidebar*
Posted: April 29, 2016

Do You Need an Expert for a Legal Malpractice Case? Yes, No and Maybe So…

By Mark J. Fucile
Fucile & Reising LLP

Division III of the Court of Appeals recently addressed the question of whether a claimant needs expert testimony to avoid summary judgment in a legal malpractice case. In *Slack v. Luke*, 2016 WL 917310, ___ P.3d ___ (Wn. App. Mar. 10, 2016), the plaintiff alleged that her lawyer had not timely filed an employment claim. In the face of a defense motion for summary judgment, the plaintiff offered two expert affidavits to the effect that her lawyer had a duty to file the employment claim before the statute of limitation ran. The expert affidavits, however, did not address whether the plaintiff's underlying employment claim had merit in the first place. The defense, by contrast, submitted a declaration from another expert opining that the underlying employment claim was meritless and argued that, having failed to show through expert testimony that her employment claim had merit, her legal malpractice claim also failed. The trial court agreed and dismissed. The Court of Appeals affirmed, but had a different take on the question of expert testimony.

The Court of Appeals began by outlining Washington's longstanding approach to expert testimony in a legal malpractice case: generally requiring it to establish the standard of care except "'when the negligence charged is within the common knowledge of lay persons.'" *Id*. at *4., *quoting Walker v. Bangs*, 92

Wn.2d 854, 858, 601 P.2d 1279 (1979). The Court of Appeals, however, concluded that the question of whether the underlying claim had merit went to *causation* rather than the standard of care. Causation, the Court of Appeals noted, is ordinarily a question of fact for a jury. But, when challenged on summary judgment, the Court of Appeals reasoned that a plaintiff in a legal malpractice case arising out of asserted errors in handling an underlying claim must "demonstrate that her underlying claim would itself survive summary judgment." *Id*. at *5. In this instance, the Court of Appeals found that the underlying employment claim lacked merit as a matter of law, and, therefore, even expert testimony would not have saved her subsequent legal malpractice claim. Accordingly, it affirmed the dismissal. The Court of Appeals' approach, however, implies that with a closer call, expert testimony on the merit of the underlying claim might create a fact issue on summary judgment and send the subsequent legal malpractice case on to trial.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics.

Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.