MANDATORY MALPRACTICE INSURANCE p.24

Washington State Bar Association

NWLawyer

SEP 2017
VOL. 71, NO. 6

12 RULES FOR EFFECTIVE CROSS-EXAMINATION

PERSPECTIVES is a forum for members and others to express their opinions and views.

A NEW LEGAL STANDARD FOR ATTORNEY MALPRACTICE

The Personal Impact of Malpractice

by Dan Bridges

Washington's Supreme Court fundamentally changed the law of attorney malpractice in *Schmidt v. Coogan*, 181 Wn.2d 661(2014), holding (1) collectability of the underlying judgment is an affirmative defense that must be pleaded and proved by the defendant attorney and (2) an injured client may recover emotional distress damages. This article provides a practical application of *Schmidt* and guidance on how the case's unanswered questions should be answered, and illustrates how the unique injury clients suffer is compounded when their attorney has no insurance.

After falling in a grocery store Ms. Teresa Schmidt endured nearly 20 years of litigation. Her attorney sued the wrong party, having waited until the eve of the statute of limitations to file. Ms. Schmidt had repeatedly asked her attorney to file the case. She testified he told her not ask, with profanity-laden rants, saying he was the attorney. She testified that after she learned the wrong party was sued and her case had been dismissed, her attorney told her the case had no value. Her attorney had no malpractice insurance, made no settlement offers, and avoided collection post-judgment.

The attorney's uninsured malpractice set in motion two jury trials, three trips to Division II, and two trips to the Supreme Court, and required this author to execute against the attorney's office furniture and computers to satisfy the judgment. Once his furniture was executed against he immediately produced a check. Prior to that, he simply refused to pay— either Ms. Schmidt or an insurance premium.

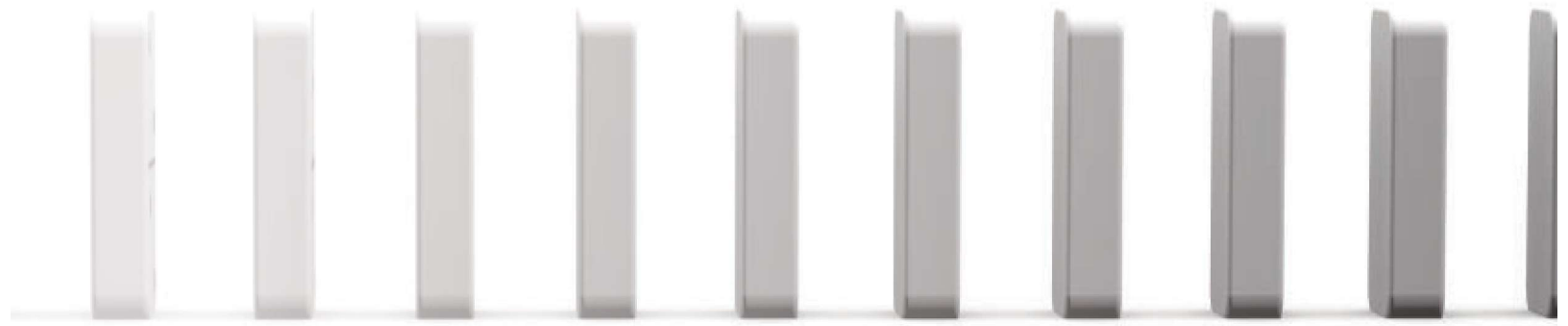
Malpractice Law Post-Schmidt

Schmidt spurred three opinions. Five justices agreed collectability shall be an affirmative defense. That is settled law. Collectability asks whether a judgment in the case that was lost would have been collectible if won. Before *Schmidt* it was the client's burden to prove collectability. Now it is the defendant attorney's burden to "raise uncollectability as an affirmative defense to mitigate or eliminate damages." *Schmidt*, 181 Wn.2d at 669.

Five justices agreed that emotional distress damages should be available but did not agree on the standard to award them. Their availability is now the law but there is no established standard to award them. Justice Wiggins, joined by two justices, authored the lead opinion. Justice Stephens' opinion, joined by Justice Gonzales is, by quirk of syntax, called the dissent but Justice Wiggins' three-Justice opinion does not a majority make. A concurrence of four justices resolved the case on procedural grounds. Those four likely will determine which standard to adopt when the question is next raised.

Before *Schmidt* there was no Washington law on emotional distress damages in attorney malpractice. A slim national majority has not recognized them but the majority trend does, because awarding only what the client should already have recovered does not make the client whole. This was true in *Schmidt*. Ms. Schmidt experienced an almost 20-year delay due to her attorney's malpractice, suffering the distress of unpaid medical bills accruing interest and the inability to afford treatment. Worse, she suffered the damaged relationship and distress over losing her case with no recompense.

Nationally there are two standards to award emotional distress damages; Justice Wiggins applied one and Justice Stephens the other. The standard Justice Wiggins applied allows general damages only "when emotional distress is foreseeable due to the particularly egregious or intentional conduct of an attorney or the sensitive or personal nature of the representation." *Schmidt*, 181 Wn.2d at 674. Justice Wiggins concluded that is "the national trend." *Id.* It is a



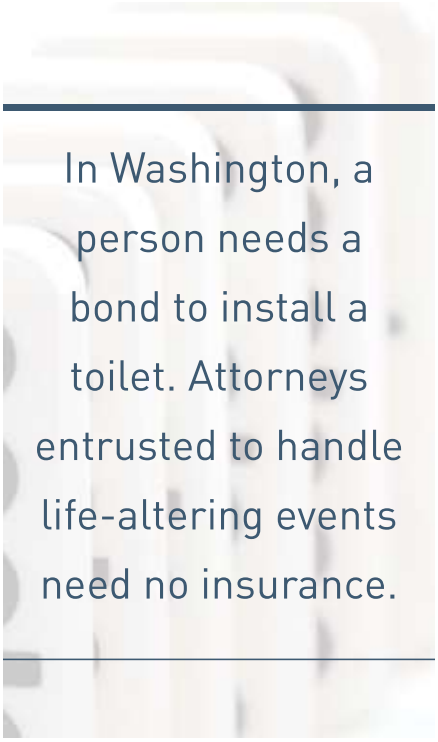
trend but that is an insufficient reason to follow it. Washington does not shy away from providing greater protection than other states. See *York v. Wahkiakum, School Dist,* 163 Wn.2d 297, 303 (2008). A solid number of states reject that standard, among them *Betts v. Allstate Ins. Co*, 154 Cal. App. 688, 697 (1994), and *Gore v. Rains & Block,* 189 Mich. App. 729, 740 (1991).

The standard Justice Stephens applied is consistent with the breach of other "special relationships" because, as not even Justice Wiggins contests, it is well established that the attorney-client relationship is a special relationship. *Schmidt*, 181 Wn.2d at 688. Under this standard the plaintiff must prove general damages but they flow naturally, no differently than in insurance bad faith and medical malpractice, without the additional burdens imposed by Justice Wiggins' standard.

The parties and the court analogized general damages in malpractice to general damages in insurance bad faith. Justice Wiggins' rejected holding attorneys to the same level of accountability as insurance adjusters, saying "an insurer must deal fairly with an insured, giving equal consideration in all matters to the insured's interests." *Id.* at 677. But so must attorneys. See *Arden v. Forsberg & Umlauf*, 193 Wn. App. 731, 743 (2016). He also distinguished bad faith law, saying the source of an insurer's duty is statutory whereas an attorney's is common law. That misses the point: (1) insurers also owe a common law duty, the breach of which gives rise to general damages, and (2) it does not matter how the special relationship arises. Every one has a unique genesis. The issue is having breached the special relationship, what damages are available. Once a relationship is determined to be special, Washington courts uniformly allow general damages for its breach. All except, under Justice Wiggins' opinion, when an attorney commits the breach. Finally, Justice Wiggins rejected comparing general damages in bad faith to malpractice, saying it "places the cart before the horse in that we have never before addressed the availability of emotional distress damages for insurance bad faith..." *Schmidt*, 181 Wn.2d at 676. Two longstanding Court of Appeals cases recognize them and more impliedly do. Their availability is woven into the law. Thomas V. Harris, *Washington Insurance Law*, §7.05 (3d ed. 2012). Unless Justice Wiggins believes the full court would reject general damages in bad faith cases, offering that as a reason to reject them in malpractice is, in the words of Justice Stephens, "unsatisfying."

> The attorney's uninsured malpractice set in motion two jury trials, three trips to Division II, and two trips to the Supreme Court....

Finally, Justice Wiggins rejected general damages despite their availability in insurance bad faith because "importing insurance bad faith standards... will only cause confusion." Neither Ms. Schmidt nor Justice Stephens argued that bad faith law should be "imported." They offered the uncontroversial fact that the attorney-client relationship is no less special than any other special relationship, attorneys are due no special immunity for their breach of it, and it is inconsistent to create a higher standard for general damages in protection of only attorneys. Indeed, the attorney-client relationship is perhaps the most special of all special relationships and to suggest otherwise, as Justice Stephens explained, "erodes the trust that is



In Washington, a person needs a bond to install a toilet. Attorneys entrusted to handle life-altering events need no insurance.

central to (the) relationship by erecting artificial barriers to a client's ability to fully recover damages..." *Schmidt*, 181 Wn.2d at 685. Finally, there is nothing "confusing" about allowing clients to recover emotional distress damages on par with every other special relationship. "Washington cases are unambiguous that legal malpractice damages should fully compensate plaintiffs injured by attorney malpractice." *Shoemaker v. Ferrer*, 143 Wn. App. 819, 829 (2008).

The Path Forward

The stricter standard for general damages will not stand; it is a special immunity for attorneys, inconsistent with Washington law, and bad public policy. Justice Stephens' standard is none of those things and will incentivize attorneys to make reasonable offers and clients to accept them. Washington has long recognized negligence compensates the injury, it does not punish the conduct. Yet, assuming two clients equally damaged by attorney negligence, Justice Wiggins' standard only compensates the one lucky enough to have been injured by "particularly egregious or intentional conduct." Malpractice is based on negligence, not recklessness or intent. To borrow Justice Wiggins' turn of phrase, it is his standard that places the cart before the horse by making an award of damage contingent on intentional conduct when the claim is negligence and it is the injury that is compensated, not the conduct that is punished.

With no majority opinion and no clear guidance from *Schmidt*, trial judges will decide which standard to apply. They should apply Justice Stephens'. It is the national trend, consistent with case law, and the better policy.

In addition to creating needed

law, *Schmidt* illustrates the impact of uninsured malpractice. Attorneys put to pay personally do not make detached decisions. Insurers do not offer nothing for 20 years when liability is clear or require a client to execute against office furniture to satisfy a judgment. Ms. Schmidt may still have had to go to trial but would not have had years of uncertainty as to whether, once she prevailed, she would receive recompense. A more likely outcome is that an insurer would have made an offer to settle. But with no insurance, the judicial system, the public, and Ms. Schmidt endured the burden of nearly 20 years of litigation.

In Washington a person needs a bond to install a toilet. Attorneys entrusted to handle life-altering events need no insurance. Given the complexity of the law even the most diligent attorney may misstep. The WSBA Board of Governors is considering formation of a task force to explore possible models for adoption of a mandatory malpractice insurance system for Washington attorneys. Your input is needed. Please provide it to the governor from your district,[1] or *NWLawyer*, or both. NWL

Dan Bridges was elected to the WSBA Board of Governors, representing District 9, in September 2016. Bridges is a partner with McGaughey Bridges Dunlap, PLLC. He has tried over 50 jury trials in state and U.S. district court and has argued more than 30 appeals in the Washington Supreme Court, all three divisions of the Washington Court of Appeals, and the U.S. Court of Appeals for the Ninth Circuit. He also serves as a superior court arbitrator in four Washington counties. Bridges received his undergraduate degree in political science from the University of Washington and his law degree, cum laude, from the University of Puget Sound (now Seattle University School of Law).

NOTES

1. To find contact information for the governor from your congressional district, go to www.wsba.org/About-WSBA/Governance.