



Alerts

Florida Appellate Court Reduces Legal Malpractice Verdict From \$5M to \$250K Because Plaintiff Failed to Prove Underlying Judgment Was Collectible

November 19, 2020

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Morgan & Morgan, P.A. v. Pollack, Court No. 2D19-112020 (11/6/20)

Brief Summary

After a Florida law firm and one of its attorneys (defendants) were hit with a \$5 million jury verdict in a case arising out of an underlying medical malpractice action, they—along with the firm's insurer—appealed. Because the plaintiffs only introduced evidence establishing that a judgment of \$250,000 was collectible at trial, the appellate court reversed and remanded for a remittitur of the damages award to the amount of \$250,000.

Complete Summary

In 2006, while a patient of Gulf Coast Obstetrics & Gynecology, Ltd. (collectively, Gulf Coast), Shawna Pollock gave birth to her son, Rock Pollock, Jr., at Sarasota Memorial Hospital. During labor and delivery, Shawna suffered a uterine rupture, which caused neurological injuries to Rock Jr. Defendants were subsequently retained to pursue medical negligence claims on behalf of plaintiffs—Shawna and Rock Pollock, Sr., and their son, Rock Jr.—against Laura Danner and Gulf Coast and Sarasota Memorial Hospital.

Defendants served the notice of intent to initiate medical negligence litigation upon the medical defendants that is required in Florida in September 2007. The notice, however, stated that it was served only on Rock Jr.'s behalf. Defendants failed to serve a notice of intent on Shawna's behalf. In May 2008, defendants filed a complaint for medical negligence against Gulf Coast and Sarasota Memorial naming Rock Sr., Shawna, and Rock Jr. as plaintiffs. A few months later—and without plaintiffs' consent—defendants stipulated to abate the entire action in order to determine whether Rock Jr.'s claim was subject to the exclusive remedy provided by the Florida Birth-Related Neurological Injury Compensation Plan (NICA). Defendants did not seek to sever or bifurcate Shawna's individual medical negligence claim or Rock Sr.'s derivative claim from Rock Jr.'s NICA claim or to otherwise preserve their claims. While the NICA proceeding was pending, plaintiffs and defendants experienced irreconcilable differences, and defendants withdrew as plaintiffs' counsel. By the time Rock Jr.'s claim was resolved via NICA in 2011, the two-year statute of

Attorneys

Terrence P. McAvoy

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limitations for filing an action on behalf of Shawna and Rock Sr. had expired.

Plaintiffs then filed this legal malpractice action, alleging that defendants (1) failed to perform a proper pre-suit investigation, (2) failed to obtain a proper corroborating opinion, (3) failed to serve a proper notice of intent to initiate medical malpractice litigation, (4) failed to properly draft and file a civil complaint for Shawna's claim, and (5) negligently stipulated to abatement of the civil case. The case went to trial and the jury found the following liability in its verdict: Danner, 30%; Gulf Coast, 60%; and Sarasota Memorial, 10%. The jury awarded \$4 million to Shawna and \$1 million to Rock Sr. In answering the specific interrogatory verdict form, the jury found that \$4.5 million would have been collectible against Gulf Coast. The trial court entered final judgment on the jury's verdict.

On appeal, defendants argued that the jury's finding of \$4.5 million against Gulf Coast had to be remitted to \$250,000, the amount of Gulf Coast's insurance coverage, because plaintiffs failed to present evidence that they could have been able to collect any money from those defendants individually. The Florida appellate court agreed.

Initially, the court noted that: "[T]he client/plaintiff in a legal malpractice action must prove both that a favorable result would have been achieved in the underlying litigation but for the negligence of the attorney/defendant and that any judgment ... would have been collectible." *Fernandes v. Barrs*, 641 So. 2d 1371, 1375 (Fla. 1st DCA 1994), disapproved of on other grounds by *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 185 (Fla. 1995). The court then stated that the collectability burden is satisfied with evidence of the underlying defendant's "financial status, insurance coverage, [or] property ownership." Accordingly, the court reasoned that requiring proof of collectability "prevents a windfall to the client by preventing him from recovering more from the attorney than he could have actually obtained from the tortfeasor in the underlying action." A jury cannot award a greater amount of damages than that which is reasonably supported by the evidence.

Here, the court noted that the only evidence of collectability that plaintiffs presented at trial was the existence of Gulf Coast's insurance policy with a shared \$250,000 limit per claim. There was no other evidence regarding financial status, solvency, interest in property or other assets, income, or profits. Although plaintiffs did offer testimony from their expert that such a medical practice with four doctors and three midwives must be worth more than \$250,000—and that the members of the practice should have the ability to pay any judgment in excess of the insurance policy limit—the appellate court held that such speculation cannot justify a finding of collectability. Plaintiffs did not offer testimony from anyone from Gulf Coast. Nor did they introduce evidence that Gulf Coast was solvent during the time in which plaintiffs would have obtained a judgment against it.

The court concluded that absent admissible evidence of collectability, a jury may not speculate that a medical practice of multiple physicians is financially able to satisfy a judgment in excess of its liability insurance limits. The court also rejected plaintiffs' request that the court adopt decisions from other jurisdictions that shift the burden of collectability to the legal malpractice defendants. Florida courts have weighed the equities in legal malpractice actions and have shifted the burden to the attorney in cases where his or her negligence has made it impossible to prove the collectability. Here, however, plaintiffs did not argue that defendants' alleged negligence made it impossible for them to prove collectability as to Gulf Coast. The court thus reduced the verdict attributable to Gulf Coast to \$250,000.

Significance of the Decision

This decision serves as a reminder that in legal malpractice actions, a plaintiff must not only establish duty, breach, but-for causation, and damages, but also that any judgment that would have been obtained in the underlying litigation would have been collectible. Oftentimes, this last burden is overlooked.