‘But I Could Have Gotten More!’—Damages Speculation in Legal Malpractice Cases

There is still a very good argument—with very good reasons behind it—that speculation regarding settlement cannot be the basis for damages in a legal malpractice action. It is almost always true that in order to succeed in a legal malpractice action in Pennsylvania, the plaintiff must prove that but for the attorney’s alleged negligence they would have won the underlying action.

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Legal malpractice actions often arise out of a client’s belief that they were not adequately compensated in an underlying matter, and a belief that but for the actions of their attorney the client would have received something more. While many practitioners in Pennsylvania are aware of the Muhammad Doctrine that generally precludes clients from suing after settlement, legal malpractice complaints will often assert that a better settlement could have been achieved, but for the attorney’s conduct. These cases can proceed outside of the Muhammad Doctrine if there was no settlement of the underlying action, or if the matter falls into one of the several exceptions to the Muhammad Doctrine. However, there is still a very good argument- with very good reasons behind it—that speculation regarding settlement cannot be the basis for damages in a legal malpractice action. It is almost always true that in order to succeed in a legal malpractice action in Pennsylvania, the plaintiff must prove that but for the attorney’s alleged negligence they would have won the underlying action.

Pennsylvania has long held that under the “case-within-a-case” analysis for legal malpractice actions, the plaintiff must prove they would have won the underlying action. This is because of our courts’ historic reluctance to speculate on settlements. Pennsylvania courts have justifiably avoided second-guessing settlements in all contexts, not just the legal malpractice context. “Settlement of matters in dispute are favored by the law and must, in the absence of fraud and mistake, be sustained. Otherwise any settlement agreement will serve no useful purpose.” See *Greentree Cinemas v. Hakim*, 432 A.2d 1039, 1041 (Pa. Super. 1981).

It is a well settled doctrine that settlement agreements are a highly favored judicial tool … courts are loathe to second guess or undermine the original intention of the parties to a settlement agreement. If it were the role of courts to re-evaluate settlement agreements, the judicial policies favoring settlements would be useless … If all of the material terms of the bargain are agreed upon, the court will enforce the settlement. See *In re Estate of Misko*, 2002 WL 372943, at *3 (C.C.P. Phila. 2002) (citations and quo-

tations omitted); see also, *Ogle v. Columbia Gas Transmission*, 2014 WL 3895500, at *3 (S.D. Ohio 2014) ("The parties ultimately choose the terms on which they will settle … it is not the court's job to second-guess that decision …"); *Martinez v. Hilton Hotels*, 2013 WL 4427917, at *3 (S.D.N.Y. 2013) ("The court finds the amounts paid to parties and counsel justifiable and the result of arm's length negotiations that the court will not second-guess.").

In the legal malpractice context, even before Muhammad, Pennsylvania courts refused to permit legal malpractice cases that were based on speculation regarding settlement. As far back as 1979, the Pennsylvania Superior Court refused to accept estimations of settlement value as proof of "actual damages" in a legal malpractice action noting it would be "mere speculation." See *Schenkel v. Monheit*, 266 Pa. Super. 396, 400, 405 A.2d 493, 495 (1979); see also, *McCartney v. Dunn & Conner*, 386 Pa. Super. 563, 573, 563 A.2d 525, 530 (1989). ("In any event, this court has not allowed legal malpractice actions based upon speculations regarding settlement negotiations."), citing to *Mariscotti v. Tinari*, 335 Pa. Super. 599, 485 A.2d 56 (1984). In *Mariscotti* the court wrote:

> Her only contention is that she would have been in a better bargaining position if she had known the value of his stock. With this know-ledge, she suggests, she may have been able to achieve a better settlement. Her claim, it seems obvious, is based on pure speculation. Whether she could have obtained a better settlement is anyone's guess. How much better, of course, is even more speculative. These issues cannot properly be left to the surmise of a jury. Because these issues are entirely speculative, they defeat any cause of action for malpractice of the attorney negotiating the settlement.

In 1991, in *Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick*, 526 Pa. 541, 587 A.2d 1346 (Pa. 1991), rehearing denied, 528 Pa. 345, 598 A.2d 27 (Pa. 1991), cert denied U.S., 112 S.Ct. 196, (1991), the Pennsylvania Supreme Court recognized the important public policy of precluding clients from settling a case and then turning around and suing the lawyer who settled the case for legal malpractice. The court held: "We foreclose the ability of dissatisfied litigants to agree to a settlement and then file suit against their attorneys in the hope that they will recover additional moneys." The court continued: "Simply stated, we will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed, unless that plaintiff can show he was fraudulently induced to settle the original action."

The rationale of *Muhammad* was centered on the important public policy in encouraging settlements. *Muhammad* recognized a cause of action for dissatisfaction with a settlement threatened the long standing principle in favor of encouraging settlements since such a cause of action would cause lawyers to be "reluctant to settle a case for fear some enterprising attorney representing a disgruntled client will find a way to sue them for something that 'could have been done, but was not.'" Since *Muhammad*, our courts have recognized three exceptions to the bar to legal malpractice

actions after settlement created by *Muhammad*. To overcome the *Muhammad* bar, a plaintiff must be able to prove the defendants fraudulently induced him into signing the compromise and release agreement; failed to explain the effect of that settlement; or 3) negotiated a settlement that was somehow legally deficient. See *Silvagni v. Shorr*, 2015 PA Super 62, 113 A.3d 810, 816 (Pa. Super. 2015).

However, even in those cases which are not barred by *Muhammad,* either because they do not involve a settlement, or because they fall into one of the exceptions, damages still cannot be based on speculation regarding settlement. In *Spector Gadon & Rosen v. Fishman*, 666 F. App'x 128, 132 (3d Cir. 2016), the court affirmed a trial court ruling that held damages could not be based upon an alleged $1,000,000 offer made during settlement negotiations. The trial court granted a motion to dismiss noting: "The notion that the $1,000,000 figure would not have changed had negotiations continued and a settlement finalized is based on pure speculation."

When prosecuting or defending a legal malpractice action, Pennsylvania attorneys must keep in mind that the ultimate question is whether the plaintiff would have won the underlying action "but for" the conduct of their attorney. The amount of damages is therefore the amount a jury determines they would have won "but for" the conduct of their attorney, not what they may have been able to achieve in settlement.

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