

# MALPRACTICE? PROVE IT!

Ohio courts continue trend of applying case-within-a-case doctrine to reject legal malpractice cases


By David J. Oberly

Litigating a legal malpractice case generally encompasses a wide variety of unique complexities not seen in other types of lawsuits. One of the most daunting challenges of a legal malpractice lawsuit concerns the “case-within-a-case” requirement that is sometimes—but not always—triggered in connection with proximate causation. When applicable, the rule requires the plaintiff to prove that it would have prevailed in the underlying lawsuit. Oftentimes, the case-within-a-case requirement by itself is sufficient to derail an otherwise meritorious legal malpractice claim. Importantly, two recent Ohio appellate decisions exemplify the current trend of Ohio courts in routinely applying the case-within-a-case requirement where a plaintiff places the merits of the underlying litigation directly at issue to preclude legal malpractice actions in their entirety. As a result of the increasing prevalence of the doctrine in legal malpractice litigation, both plaintiff’s attorneys and defense practitioners are well advised to take note of the potential advantages and pitfalls of this game-changing rule.

## **Overview of the case-within-a-case requirement**

To establish a cause of action for legal malpractice, a claimant must demonstrate the existence of an attorney-client relationship giving rise to a duty, a breach of that duty and damages proximately caused by that breach. If a plaintiff fails to establish a genuine issue of material fact as to any of the elements, the attorney is entitled to summary judgment.



A 3D maze with light blue walls and a grey path. A person in a dark suit is standing on the path, looking into the maze. The maze is complex with many dead ends and paths.

As a general rule, the requirement of causation often dictates that the merits of the malpractice action depend on the merits of an underlying case. As such, a plaintiff in a legal malpractice action may be required to demonstrate the merits of the underlying claim. Nonetheless, the Ohio Supreme Court has rejected universal application of the case-within-a-case doctrine, concluding that the element of causation cannot be replaced or supplemented with a rule of thumb requiring that a plaintiff, to establish damage or loss, prove in every instance that he or she would have been successful in the underlying matter(s) giving rise to the complaint.

In holding that not every legal malpractice case will require the plaintiff to establish that he or she would have succeeded in the underlying matter, the Ohio Supreme Court necessarily implied that there are some cases in which the plaintiff must so establish. This type of legal malpractice action involves the case-within-a-case doctrine, which means the plaintiff must establish that he or she would have been successful in the underlying matter. Here it is insufficient for the plaintiff to present simply "some evidence" of the merits of the underlying claim.

The less-stringent "some evidence" standard applies in cases in which a plaintiff's damage or loss has been suffered regardless of the fact that the plaintiff may be unable to prove that he or she would have been successful in the underlying matter(s) in question. In such a case, the plaintiff need provide only some evidence of the merits of the underlying claim. The case-within-a-case doctrine, however, applies if the theory

of the malpractice case places the merits of the underlying litigation directly at issue. To prove causation in these cases, the plaintiff must prove that but for the attorney's negligence, the plaintiff would have obtained a better outcome in the underlying case. In this way, all the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff's former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action.

### Recent applications of the case-within-a-case doctrine by Ohio courts

#### *Passerell v. Cordell*

In *Passerell v. Cordell*, 2015 Ohio 1767 (11th Dist.), the court ruled that the case-within-a-case doctrine estopped a plaintiff from asserting a legal malpractice claim in the absence of expert testimony establishing that the claimant would have fared better in the underlying litigation but for the defendant attorneys' malpractice. The legal malpractice claim in that case arose out of Stuart Cordell's representation of David and Michael Passerell—both part owners of AllPass Corporation—in a business dispute over the family-run company. Shortly after the company's recently terminated president and co-owner filed a complaint for declaratory and injunctive relief for damages against the two owners and AllPass, the Passerell brothers sought out Cordell to enter an appearance on their behalf and represent their interests in the litigation. At that time, Cordell informed David and Michael of the potential conflict of interest that existed as a result of Cordell's prior representation of the company's former president. Less than a month after undertaking the representation, it became apparent to Cordell that there was, in fact, a conflict of interest. Accordingly, he sought to withdraw as counsel for David and Michael, which was later granted by the court. However, before he withdrew, the court held an ex parte temporary

restraining order hearing on the president's motion for a temporary restraining order, which was not attended by Cordell. A temporary restraining order was granted that day. Approximately a month later, the three individuals settled the litigation, and the lawsuit was dismissed.

David and Michael Passerell subsequently filed a complaint for legal malpractice against attorney Cordell. Importantly, while Cordell engaged the services of an expert who opined that he had not breached any duty of care toward his former clients, David and Michael believed otherwise but did not engage an expert because they thought that the breach was so obvious and the harm so evident that an expert was unnecessary to prove legal malpractice. The court found that the case-within-a-case doctrine applied to bar the brothers' legal malpractice claim because the plaintiffs could not succeed on the element of proximate cause in the absence of expert testimony.

In reaching that conclusion, the court noted that the plaintiffs were arguing that but for the alleged malpractice of Cordell, they would have prevailed in the underlying litigation. Accordingly, their case relied entirely on success on the merits of the underlying case, thus triggering the case-within-a-case doctrine. To do so, the court found, required them to establish that the entire result of the case would have been different by demonstrating how they would have prevailed in the underlying litigation—that if Cordell had attended the hearing, the judge would not have granted the restraining order, and if the judge had not granted the restraining order, they would have had a better outcome in the case and would not have incurred the claimed damage or loss. To prevail, then, the brothers were required to establish a proximate causal connection requiring them to address complex business litigation, various procedural issues and corporate law, which would require them to prove the case-within-a-case. Given these complex issues and the particular circumstances of the case,

the court continued, the jury could not properly evaluate the evidence on the element of proximate cause without the benefit of expert testimony on the question of whether the outcome of the underlying case would have been different, but for the negligence of their former attorney; however, David and Michael had failed to disclose an expert on this issue, which barred them from presenting any expert testimony on the issue of proximate causation. Without expert testimony on causation, David and Michael could not satisfy the case-within-a-case causation requirement. As a result, the plaintiffs were precluded from establishing the essential elements of their legal malpractice claim, thus mandating judgment in favor of the defendant attorney as matter of law.

#### *Skoda Minotti Co. v. Novak, Pavlik & Deliberato, L.L.P.*

A very similar result was also seen recently in *Skoda Minotti Co. v. Novak, Pavlik & Deliberato, L.L.P.*, 2015 Ohio 2043 (8th Dist.), where the court invoked the case-within-a-case doctrine to bar a legal malpractice claim that arose out of a taxpayer mandamus action filed against the city of Akron. In that case, Robert Smith retained Novak, Pavlik & Deliberato, L.L.P. and Scott Perlmutter for the purpose of compelling the production of travel records, receipts and credit card statements from the mayor of Akron and other city personnel whom he believed improperly destroyed these records, which established that they "traveled the world, stayed in four-star hotels, and wined and dined" on the taxpayer's dime. Smith also sought damages for the estimated 1,000 documents that were destroyed. Eventually, Smith's case was voluntarily dismissed without prejudice. Thereafter, Smith terminated the attorney-client relationship with Perlmutter and Novak. After the case was dismissed, Smith did not refile his claims against the city of Akron.

Smith subsequently asserted a claim for legal malpractice against Perlmutter, alleging that his former attorney was



negligent for failing to present evidence at an evidentiary hearing, hiring an expert against Smith's wishes and then later claiming an expert was not needed, and dismissing a case that was worth approximately \$985,000. The court found that the case-within-a-case doctrine applied to bar the claim because Smith's failure to refile the action after it was voluntarily dismissed without prejudice and litigate the merits of the city case was fatal to his claim that any alleged negligence caused him to incur damages. Because he alleged that he would have obtained a better outcome in the case—the recovery of \$985,000—but for the negligence of his former attorney, Smith was alleging a legal malpractice action that involved the case-within-a-case doctrine, which required him to establish that he would have been successful in the underlying matter. Smith failed to do so when he had the opportunity to litigate the merits of his claims by refile his complaint after the first dismissal, and chose not to. As a result, Smith failed to establish proximate cause when he did not refile and litigate the merits of the city case. Thus, Smith was unable to put forth a set of facts which, if true, would establish Novak's and Perlmutter's liability. Accordingly, his legal malpractice claim failed as a matter of law.

Causation is an essential element in any legal malpractice lawsuit. Without question, the case-within-a-case requirement favors the defense in legal malpractice litigation. It is a stringent,

unique requirement not seen in other types of litigation that essentially requires the plaintiff to try two cases—the underlying case and the malpractice case—in one action. The defendant only needs to defeat one of the two cases to avoid liability altogether. Obviously, then, defense practitioners must carefully analyze the issue of causation at the outset of any legal malpractice lawsuit to determine both whether the case-within-a-case rule applies and, if so, whether the requirement can be wielded to completely shield the defendant from liability. On the flip side, plaintiff's counsel must also make a tough judgment call on the same issues at the initial client intake stage.

Where the potential pitfalls to causation can be avoided, the case-within-a-case doctrine may present several advantages for a plaintiff, as the rule can pose thorny issues for the defendant lawyer with regards to his or her task of establishing that his or her former client would not have succeeded in the underlying litigation. For example, the defendant lawyer may have made statements advocating for the plaintiff's position in the underlying matter. If so, and such evidence were deemed relevant and otherwise admissible in the legal malpractice action, the lawyer will be at a disadvantage in the legal malpractice action, and may come across as disingenuous in the eyes of a jury in attempting to argue the opposite position from what was taken in the original lawsuit. In addition, if the

legal malpractice plaintiff can testify credibly and put forth reliable evidence concerning the underlying events that establish a prima facie basis for the defendant's liability in the underlying litigation, then the plaintiff has an advantage over his former lawyer, who must seek and obtain testimony and other evidence from both the defendant and frequently other individuals and entities who were not involved in that prior litigation. Where the doctrine does apply, counsel on both sides of the table are well advised to devote a considerable amount of time and effort toward mapping out an effective strategy to prove or defeat the case-within-a-case requirement at trial, including determining the optimal course of action in structuring the trial-within-a-trial and analyzing the need for expert testimony, which is frequently, but not always, required on the issue of causation in legal malpractice lawsuits. 📌



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