The Liability of Trial Counsel for Strategic and Tactical Judgments Made During Trial

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During trial, strategic and tactical judgments are made by attorneys on behalf of their clients. These judgments during trial are oftentimes based on unexpected rulings or surprise testimony and need to be made quickly. They can often affect the outcome of the case with regard to both liability and damages. This article will discuss the nature of these decisions, scenarios where claims may arise, and defenses available to counsel.

Formulating a Litigation Strategy

In New Jersey, attorneys have a duty to timely formulate a reasonable litigation strategy. However, when trial counsel is unsuccessful in obtaining a favorable expert opinion, it is not the standard of care to shop for a favorable expert once unfavorable opinions are obtained. See, *Soult v. Mattioni*, A-2619-07T2 (Feb. 20, 2009)(plaintiffs argued that the defendant attorneys had a duty to search for medical experts to establish injury and causation. The Appellate Division disagreed, holding it is not the standard of care to shop for a favorable expert once unfavorable opinions are obtained.).

Strategy in Interviewing Witnesses

In *State v. Bentley*, 46 N.J. Super. 193 (App. Div. 1957), the court held that an attorney is not obligated to interview witnesses, even when requested to do so by the client. When a defendant is represented at trial, the attorney has implied authority to make all necessary decisions on matters incidental to managing the case, and the client is bound by this. When claims are made against attorneys for failing to pursue timely discovery, the plaintiff must demonstrate that the failure to pursue discovery in the underlying action caused damages. Plaintiffs must produce an expert opinion as to what discovery was missed and that it would have made a difference in the outcome.

Strategy in Calling Witnesses at Trial

Claims also may arise when an attorney fails to call a witness at trial. In *Carbis Sales v. Eisenberg*, 397 N.J. Super. 64 (App. Div. 2007), the legal malpractice action arose out of an attorney's representation of the defendants in an underlying action alleging that a ladder was defectively altered by Carbis, a ladder distributor.

The clients argued that the defense attorney in the underlying case failed to produce a fellow employee to ascertain whether he could corroborate the plaintiff's account of the ladder's retrieval. The defense attorney also did not call engineering or economic experts and did not produce a defense medical expert to testify about the plaintiff's several subsequent accidents.

The expert for the plaintiffs in the legal malpractice action opined that the defense attorney deviated from the standard of care in failing to meet and prepare witnesses and failing to call an orthopedist and an economic expert. Ultimately, the jury returned a verdict in favor of the plaintiffs in the legal malpractice action and awarded damages. On appeal, the Appellate Division found that the plaintiffs' expert report was not a net opinion and was, therefore, admissible.

Claims may also arise when an attorney fails to produce a testifying expert based on the expert's unexpected unavailability. In *Kranz v. Tiger*, 390 N.J. Super. 135 (App. Div. 2007), after jury selection, Kranz agreed to a $500,000 settlement solely because he understood that Arthur Tiger, M.D., his only orthopedic expert, would not be available to testify.

The plaintiff subsequently filed an action against Dr. Tiger and his former attorneys, contending that their negligence was the cause of Dr. Tiger's unavailability and the plaintiff's acceptance of the settlement. The plaintiff's negligence claim was that his attorneys and the doctor selected by them failed to communicate adequately on the doctor's trial appearance. The plaintiff claimed that as a result of the miscommunication, the attorneys wrongly assumed that the doctor was not available to testify when he, in fact, was available.

On appeal, the Appellate Division held that a reasonable jury also could have found that the attorney unreasonably misunderstood the last message from Dr. Tiger's office, assuming without justification that he would be unavailable, and that the attorney failed to advise his client of the contents of the message from the doctor's office. The Appellate Division held that, had the attorney called the plaintiff with that information, the plaintiff would have had the opportunity to withdraw his previous authorization to settle, which was solely provided on the belief that Dr. Tiger would not be available to testify.

The Appellate Division held that the attorney was obliged to take reasonable steps to arrange for Dr. Tiger's presence at trial, and the jury could have found, without the benefit of expert testimony, that the attorney failed to communicate adequately with him and that his continued assumption that the doctor would be unavailable was unreasonable in light of the second message from the doctor's office, which indicated that the attorney could speak with him the next morning. In other words, Dr. Tiger would be available to testify. Depending on what was said during the conversations among the doctor, his office and the attorneys, the Appellate Division held that there may be additional grounds for finding each of the defendants at fault.

Strategy in Examining Witnesses

Strategic judgments must be made by attorneys when examining witnesses at trial. In *Clayton v. Freehold Township Bd. of Ed.*, 67 N.J. 249 (1975), the plaintiffs raised the question of whether a party was required to cross-examine an adverse witness on a subject before the party was permitted to offer proof of the witness' bias. The court held that under N.J.S.A. § 2A:81-12 and N.J.R.E. 20, bias of a witness could be shown by extrinsic evidence without the necessity for prior cross-examination of the witness. See also, *Kennedy v. Pollock*, 2019 N.J. Super. Unpub. LEXIS 2610 (Dec. 20, 2019) (holding that counsel did not unfairly exploit inconsistencies in witness' testimony even after the questioning had become leading.).

Strategy Regarding Objections During Summation

With regard to comments made by counsel during summation, questions have arisen over whether objections must be made every time an adversary makes a statement about the evidence. In *Maya Jane Stevens v. 48 Branford Place Associates*, A-4858-16T2 (App. Div. Jan. 16, 2019), the Appellate Division presumed that opposing counsel would object to summation comments that unfairly characterize the evidence. The *Stevens* court also noted that in *Hayes v. Delamotte*, 231 N.J. 373, 387-88 (2018), the Supreme Court stated that counsel is allowed broad latitude in summation, but the comments must be confined to the facts or evidence introduced during the course of the trial.

Therefore, in circumstances where claims are brought against attorneys for failure to object to comments by adversary counsel in summation, the New Jersey Supreme Court has given attorneys broad latitude, and attorneys cannot be the subject of legal malpractice actions simply because they did not pose an objection to an adversary's comment in summation.

Misrepresenting the Trial Date to Adverse Counsel

In *Malewich v. Zacharias*, 196 N.J. Super. 372 (1984), the plaintiff was represented by an attorney in a divorce action. When her attorney failed to appear for trial and failed to notify her of the trial date, she filed a legal malpractice action. The defendant filed a third-party action against the plaintiff's husband's attorney. The trial court dismissed the Third Party Complaint, but on appeal, the court reversed the dismissal of the defendant's complaint against the plaintiff's husband's attorney. The defendant claimed that he would have appeared at trial but relied on the plaintiff's husband's attorney's representation that he would call if the case was not adjourned. The court held that the attorney could be responsible if he capitalized on the defendant's negligence by misrepresenting to the trial court what had transpired in violation of the N.J. Disciplinary Rules.

Changes in Expert Testimony

In *McKenney v. Jersey City Med. Ctr.*, 330 N.J. Super. 568, 588 n.1 (App. Div. 2000), rev'd on other grounds, 167 N.J. 359, 371 (2001), the Supreme Court noted that a party has a continuing duty to disclose the opinions of its experts, and the failure to do so may result in exclusion of that expert's opinion evidence.

Engaging in Shenanigans at Trial

In *Baxt v. Liloia*, 155 N.J. 190 (1998), the New Jersey Supreme Court held that shenanigans have no place in a lawsuit. However, one should be careful not to misclassify legitimate legal strategy and tactics as shenanigans. As noted by Judge Dreier in his dissent in the Appellate Division decision in *Baxt v. Liloia*, 284 N.J. Super. 221, 226 (App. Div. 1995), the Rules of Professional Conduct do not bar trial counsel from using trial tactics that lead an adversary away from the real strategy.

Key Takeaway

Legal malpractice actions arising out of strategy decisions during trial are defensible. If the attorney adopts a sound legal strategy in litigation, he or she will be immune from liability in a legal malpractice action. As long as the lawyer demonstrates a reasonable knowledge of the law and applies it to relevant facts, trial counsel will be immune from liability. Although the client may dispute this,

attorneys oftentimes take chances in the conduct of litigation, and if the lawyer errs on a question not conclusively settled by authority, that error is one of judgment for which he or she is not liable. See, Model Jury Charge 5.51A (If the work involves matters to be subjected to the judgment of the attorney, an attorney must be allowed the exercise of that judgment and cannot be held liable if he/she has made a mistake or an error in judgment.). Finally, the client/plaintiff has the obligation to demonstrate that the trial error/strategy caused the damages claimed. See, *2175 Lemoine Ave. Corp. v. Finco*, 272 N.J. Super. 478 (App. Div. 1994), certif. denied, 137 N.J. 311 (1994).

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