'Fair settlement value' expert unnecessary for legal-mal case

By: Eric T. Berkman July 3, 2019

The Appeals Court has found that a client whose attorneys' advice allegedly resulted in his settling an injury claim for an unreasonably low amount should not have been required to provide expert testimony on fair settlement value in a subsequent legal malpractice action.

Critical of trial judge's handling of case

Norris Marston suffered a severe brain injury while working on an offshore light tower. Allegedly on the advice of defendants Joseph M. Orlando and Brian S. McCormick, the Gloucester attorneys handling his injury case, he settled his workers' compensation claim for a nominal amount as there was apparent uncertainty as to whether he was considered a "seaman" and thus ineligible for benefits under the workers' comp statute.

The attorneys then brought suit against Marston's employer under the Jones Act, where the law was apparently unsettled as to whether his prior acceptance of workers' comp benefits precluded him from bringing that federal law action.

On the advice of the defendants, who apparently told him he would lose at trial, Marston agreed to settle the Jones Act case for $200,000. In a subsequent legal malpractice action, his conservator claimed the attorneys wrongly failed to disclose the potential consequences of settling the workers' comp claim and that knowing but not admitting they had erred on that matter, they pressured him to accept an unreasonable settlement of the Jones Act case.

Judge Timothy Q. Feeley, sitting in Essex Superior Court, dismissed the malpractice claim both on liability grounds and on the conservator's failure to provide expert testimony as to what would have constituted a reasonable settlement.

The Appeals Court reversed.

"[The SJC's 1986 decision in *Fishman v. Brooks*] teaches that while expert testimony on reasonable settlement value is admissible in this type of action, it is not required to establish the cause and extent of the client's damages."

— Judge Amy L. Blake

"The absence of an expert opinion on fair settlement value was not fatal to the conservator's legal malpractice case," Judge Amy L. Blake wrote for the panel. "[The Supreme Judicial Court's 1986 decision in *Fishman v. Brooks*] teaches that while expert testimony on reasonable settlement value is admissible in this type of action, it is not required to establish the cause and extent of the client's damages."

The Appeals Court also held that when the law is unsettled on a particular legal issue, the attorney has an obligation to disclose that to the client and explain the impact it might have on the client's claims.

The 19-page decision is *Marston v. Orlando, et al.*, Lawyers Weekly No. 11-077-19. The full text of the ruling can be found here.

'Justice delayed'

Plaintiff's counsel Keith L. Miller of Boston said the trial judge "knew too much" about one of the defendant lawyers, Orlando, "and not enough about legal malpractice" to have proceeded in the case without disclosure of both. Miller was referencing Feeley's refusal to recuse himself from the malpractice case based on comments he had made at the motion stage that allegedly showed bias toward one of the defendants.

Noting Feeley's decision to recuse himself from proceedings on remand, Miller asserted that the delay caused by his alleged errors directly harmed the injured party.

"Justice delayed is justice denied," Miller said. "My client eagerly looks forward to his day in court."

Daniel R. Sonneborn of Boston, who represented the defendants, said he thought the trial judge reached the correct decision when he found that expert testimony regarding whether a better settlement could and should have been reached is required when the former client complains that the settlement amount is too low.

"We believe that is particularly true where the settlement was reached during a mediation conducted by a federal magistrate judge, in which the client participated, and to which he agreed at the time," he added.

Sonneborn said his clients are weighing their options regarding reconsideration and further appellate review.

Boston lawyer John A. Mangones, who handles legal malpractice cases, cautioned that attorneys should not read the decision as suggesting that plaintiffs never need to provide expert testimony on fair settlement value.

Here, he explained, the plaintiff opted to proceed under the "trial-within-a-trial" method, meaning the plaintiff intended to show that if he had not settled the Jones Act claims for $200,000, he would have received a better result at trial.

The Appeals Court held that expert testimony on reasonable settlement value was unnecessary because damages could be measured by a hypothetical jury verdict, Mangones pointed out.

At the same time, Mangones said, plaintiffs can opt to prove an unreasonable settlement claim by asserting that a lawyer's negligence cost them the opportunity to settle their claim for a reasonable amount without a trial.

"Unlike the trial within a trial, this approach requires expert testimony as to the reasonable settlement value of the underlying case," he said.

Alan E. Brown of Boston, who defends malpractice claims, said the case highlights how important it is for plaintiff's counsel in a legal malpractice case to carefully analyze the *Fishman* methodology being used in order to properly present the essential elements of the claim, and for defense counsel to do the same in order to attack those elements.

"Where it is not required, whether an expert's opinion about the reasonable settlement value would be helpful to the plaintiff or defendant must be evaluated on a case-by-case basis," Brown said.

Unreasonable settlement?

In 2008, a ship struck a light tower eight miles off the New Jersey coast.

The U.S. Coast Guard was concerned about its structural integrity and hired a contractor to dismantle it. Hallum Marine Construction, a subcontractor, hired Marston to work on the project.

On Aug. 24, 2008, as Marston was cutting sections of a steel docking station attached to the tower, the docking station came lose, striking him on the head and driving him deep into the water. Submerged for a significant period of time, Marston suffered an anoxic brain injury.

The defendants were retained to handle Marston's action for damages.

They apparently planned to seek more than $1 million in damages against Hallum and other parties under the Jones Act and related federal laws but decided first to pursue workers' comp benefits under Massachusetts law.

After the Department of Industrial Accidents assigned the claim to a hearing judge, Hallum sought dismissal, contending that Marston was a seaman on a vessel engaged in interstate commerce and thus was ineligible for benefits.

Defendant McCormick argued in response that Marston was a land-based construction employee. The administrative judge apparently concluded Marston was indeed a seaman and McCormick settled the claim for $7,500 shortly before the appeal hearing.

Marston allegedly agreed to the settlement solely on his attorneys' recommendation, and they allegedly never advised him that that settlement might preclude his Jones Act claims. The agreement was entered as a DIA administrative order.

On March 15, 2010, the defendants filed suit under the Jones Act and general maritime law. In a supporting memorandum to the court, McCormick characterized Marston as a seaman.

During proceedings, Hallum raised the possibility that the Jones Act claims were precluded by the DIA settlement.

After a one-day mediation in October 2011, Orlando apparently advised Marston to accept a $200,000 settlement offer because he would lose at trial. Marston accepted.

Marston's brother, Jonathon, was soon appointed as his conservator and filed a malpractice action alleging that the defendants' negligence resulted in Marston accepting an unreasonably low settlement and that the attorneys had wrongly failed to disclose the potential consequences of Marston accepting the workers' comp settlement.

Feeley dismissed the action on grounds that Norris Marston had failed to support his claim with an expert on reasonable settlement value and on liability grounds. Jonathan Marston appealed.

Erroneous requirement

The Appeals Court agreed with the conservator that the trial judge should not have required an expert on reasonable settlement value under the circumstances.

The panel pointed out that the plaintiff had proceeded under *Fishman*'s trial-within-a-trial methodology, claiming that Norris Marston probably would have obtained a better result had the Jones Act claim not been settled, as opposed to claiming that a better settlement should have been secured.

That would have required proof that the defendants were negligent in recommending that Norris Marston first accept the workers' comp settlement and then the Jones Act settlement.

"Given the conservator's election to proceed under the first *Fishman* methodology, it was error for the trial judge to impose an extra burden on him — a requirement that he show 'loss/causation' through expert testimony as to reasonable settlement value," Blake stated.

The panel also found that the preclusive effect of the workers' comp settlement on the Jones Act claim was unsettled under federal law.

"Contrary to the trial judge's assertion, the preclusive bar had been raised in the Federal proceedings," Blake wrote. "The attorneys' failure to alert Norris to the uncertainty deprived him of the opportunity to assess the risk and was an actionable basis of negligence."

The panel thus concluded that the case was improperly dismissed.

Marston v. Orlando, et al.

THE ISSUE: Should a client whose attorneys' advice allegedly resulted in his having to settle an injury claim for an unreasonably low amount have been required to provide expert testimony on fair settlement value in a subsequent legal-malpractice action?

DECISION: No (Appeals Court)

LAWYERS: Keith L. Miller of Boston (plaintiff)

Daniel R. Sonneborn of Preti, Flaherty, Beliveau & Pachios, Boston (defense)

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