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Supreme Court Confirms Expert Testimony Required to Establish Causation in Legal Mal Cases

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In the recent case of *Bozelko v. Papastavros*, 323 Conn. 275 (Sept. 27, 2016), the Connecticut Supreme Court ruled that expert testimony is required to establish the element of causation in a legal malpractice case. Thus, even where an attorney's performance was deficient, if the plaintiff cannot present expert testimony that the outcome of her case would have been different but for the attorney's negligence, the attorney will prevail. *Bozelko* thus provides an important procedural safeguard for Connecticut attorneys facing legal malpractice claims.

As legal malpractice is a type of negligence, a plaintiff must prove the traditional elements of negligence: duty, breach, causation, and damages. The first element is typically straightforward: a lawyer owes a duty to his or her client. The

second element—breach of the duty—asks whether the attorney failed to render legal services with the skill and competence of a reasonably prudent lawyer. In other words, the inquiry is whether the lawyer breached the “standard of care” for attorneys. This is often a hotly contested issue, and the Connecticut Supreme Court has previously ruled that, in jury cases, expert testimony is generally required to establish the standard of care against which the jury must evaluate the attorney's conduct. This requirement ensures that the jury is properly educated and helps to weed out frivolous claims of negligence since the plaintiff must, at a minimum, find an expert willing to testify that the defendant breached the standard of care.

There is an exception to this requirement for “gross negligence”—negligence so



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obvious it would be apparent even to lay jurors. See *Grimm v. Fox*, 303 Conn. 322, 330 (2012). This narrow “exception to the need for expert testimony is limited to situations in which the defendant attorney essentially has done nothing whatsoever to represent his or her client's interests... ” *Pagan v. Gonzalez*, 113 Conn. App. 135, 141 (2009). In such limited circumstances, a plaintiff may go forward with a malpractice claim against a lawyer without a standard of care expert. But even in obvious cases of negligence—such as where a lawyer inadvertently fails to file a case within the limitations

period—the lawyer’s conduct may cause no injury. If the client would have lost the case in any event, then the client suffered no harm stemming from the lawyer’s deficient performance. Thus, in order to prevail in a malpractice claim, the plaintiff must prove that the lawyer’s negligence changed the result. The requirement that the plaintiff establish the likely result of the underlying litigation is called the “case-within-a-case” requirement.

In the *Bozelko* case, the Supreme Court considered whether expert testimony is necessary to prove this case-within-a-case requirement or whether other factual evidence can suffice. Chandra Bozelko was convicted of numerous offenses in a 2007 criminal trial, during which she was represented by Attorney Papastavros. After the jury handed down an adverse verdict, Bozelko sued Papastavros for malpractice, claiming that if Papastavros had handled the case differently, she would not have been convicted. The trial court ultimately granted Papastavros’ motion for summary judgment on the ground that expert testimony was required to establish both the relevant standard of care and causation, and Bozelko had none. The Appellate Court affirmed, and the Supreme Court

granted Bozelko’s petition for certification.

Before the Supreme Court, Bozelko argued that she did not need a standard of care expert because Attorney Papastavros was grossly negligent. With respect to causation, Bozelko claimed that expert testimony was not required because former jurors could be called to testify about how Papastavros’s allegedly deficient conduct affected the outcome.

The Supreme Court ruled that even if Papastavros was grossly negligent, and thus no standard of care expert was required (an issue the Court did not reach), the trial court properly granted the motion for summary judgment because an expert was needed to prove causation. The court reasoned: “even if [Papastavros] had done everything that the plaintiff now claims she should have done differently over the course of the plaintiff’s criminal trial, the state’s case might have been strong enough that the defendant still would have been convicted. Without any specialized knowledge of criminal law and procedure, specifically, the statutes proscribing the charged offenses and the rules governing the undertaking of a criminal trial, the jurors would be unable to determine, in light of the case

the state presented, whether the alternative strategies suggested by the plaintiff had a viable chance of succeeding... . Accordingly, expert testimony was necessary for [Bozelko] to show that the actions she alleges [Papastavros] should have taken were likely to have led to [Bozelko]’s acquittal.” *Bozelko*, 323 Conn. at 287.

The court squarely rejected Bozelko’s argument that the appropriate way to prove causation was to call as witnesses the jurors from her criminal trial, and ask them how they would have voted if Papastavros had handled aspects of the case differently. This is because the causation inquiry involves an objective standard asking what the result should have been, rather than a subjective standard asking what the result would have been with a particular jury.

While *Bozelko* marked the first time the Supreme Court addressed this issue, the decision did not alter the existing legal landscape in Connecticut because the Connecticut Appellate Court had ruled in a number of prior cases that expert testimony on causation was required. (e.g., *Law Offices of Robert K. Walsh, LLC v. Natarajan*, 124 Conn. App. 860, 863-64 (2010)). Nevertheless, the outcome in the Supreme Court was not without doubt.

As the *Bozelko* decision noted, the Appellate Court initially imported the requirement from medical malpractice case law with no discussion of the potential distinctions between the two types of claims. See 323 Conn. at 287 n. 13. Specifically, in a medical malpractice case, a jury must determine whether a different (non-negligent) course of treatment would have resulted in a better health outcome for the plaintiff. Lay jurors would be ill-equipped to determine how differing treatments would affect the human body. By contrast, in a legal malpractice case, the jury is asked to determine how a reasonable jury would have reacted had the defendant attorney tried the underlying case differently.

Based on this distinction, some courts in other states have determined that expert testimony is not required to establish causation in legal malpractice cases. For example, in *Whitley v. Chamouris*, 574 S.E.2d 251 (S. Ct. Va. 2003), the Supreme Court of Virginia ruled that expert testimony on the issue of causation is not even admissible. In that court's view, such testimony would either be "a prediction of what some fact

finder would have concluded or an evaluation of the legal merits of Chamouris' claims. No witness can predict the decision of a jury, and, therefore, the former could not be the subject of expert testimony. The latter ... would be improper because it would be legal opinion." *Id.* at 253. While this reasoning is not without some logic, the majority of courts have rejected it, concluding that expert testimony is required to establish causation in legal malpractice cases. As the *Bozelko* court explained, "the wisdom and consequences of ... tactical choices made during litigation are generally matters beyond the ken of most jurors. And when the causal link is beyond the jury's common understanding, expert testimony is necessary." *Bozelko*, 323 Conn. at 288 (alterations in original).

There are two possible exceptions to the rule that expert testimony is required to prove causation. First, the Supreme Court limited its ruling to jury cases, leaving for another day the question of whether a different rule should apply in a bench trial. Second, the Supreme Court noted in passing that "there will be exceptions in obvious cases." The court did not explain what

these "obvious cases" might be, other than citing a New Jersey decision—*Sommers v. McKinney*, 670 A.2d 99 (N.J. App. Div. 1996)—where expert testimony was found to be unnecessary. In that case, the plaintiff alleged that the defendant attorney had taken money out of a settlement check for work that the attorney had not performed. The court concluded that "it is not necessary for an expert to establish the casual connection between a charge for services not performed and lesser proceeds to the plaintiff." As the Connecticut Supreme Court's citation to *Sommers* is the only explanation it gave of what might constitute a situation where the causal nexus is "obvious," attorneys litigating legal malpractice cases should be reluctant to rely on this exception unless their case involves similar facts. ■

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