

Circuit Court for Baltimore City
Case # 95079017/C1-194080

IN THE COURT OF APPEALS OF MARYLAND

No. 7

September Term, 1998

DAVID THOMAS

v.

MARSHARINA BETHEA

Bell, C. J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Cathell

JJ.

Concurring and Dissenting Opinion
by Chasanow, J. in which Cathell, J., joins

Filed: October 9, 1998

I concur in the majority's holding that a cause of action exists for legal malpractice by negligently recommending an inadequate settlement. I dissent from the portion of the majority opinion approving what the majority calls the "trial within a trial" procedure employed in the instant case. Lawyers too are entitled to justice when they are parties to litigation and I cannot think of a more unjust and unfair procedure than the "trial within a trial"¹ procedure used to determine the attorney's liability and the amount of the damages in the instant case.

Twelve years after the case against three separate landlords was settled, the plaintiff sues his former attorney for "[r]ecommending to the Plaintiff's mother the acceptance of a settlement which was grossly inadequate to cover the damages in the Plaintiffs case." The plaintiff presented evidence that the settlement was inadequate as to this defendant. Two alternative damage determinations were made by the jury. First, the jury found that the reasonable settlement value was \$25,000, and second, the jury found that, based on the trial within a trial procedure, the verdict would have been \$125,000. The jury either recognized that there were severe problems in proving the plaintiff's underlying case since the settlement value was only 20% of the verdict value (yet the jury found liability in the underlying case) or the verdicts graphically illustrate the injustice of the trial within a trial procedure for

¹I have no doubt that there may be differing procedures employed for a "trial within a trial" and that a trial within a trial may often be unjust to the client as well as the attorney, for example, where the attorney's negligence has resulted in the loss of vital evidence necessary to prove the plaintiff's claim. The "trial within a trial" procedure at issue is the procedure used in the instant case. There may be times when some acceptable form of trial within a trial procedure might be justifiable, but it should not be anything like the "trial within a trial" in the instant case.

determining damages. I would affirm the \$25,000 verdict for reasonable settlement value, but not the \$125,000 award for what the majority calls a “trial within a trial.”

Whether we view the cause of action as negligent recommendation of settlement or loss of a chance to obtain a favorable verdict at trial, the recovery should not be the “trial within a trial” damages. There was never any certainty that the plaintiff would have prevailed at his trial against the landlord; thus, the most the plaintiff lost by settling was not the full trial recovery against the landlord but the less than 100% probability of prevailing multiplied by the likely damages. If the plaintiff lost a 60% chance of recovery of a \$100,000 verdict, the plaintiff lost \$60,000. The plaintiff did not lose a 100% chance of prevailing nor 100% of the damages that might have been awarded against the landlord. The reasonable settlement value as well as the loss of a chance of prevailing at trial should both be computed by the likelihood of success weighed with the probable verdict in the event the jury finds liability. Both the damages for loss of a chance or damages for reasonable settlement value should be similar as both should recognize the chance that the plaintiff might not prevail in the underlying case. In addition, both should also take into account the savings in not having to pay trial expenses such as expert witnesses, discovery costs, etc. These are things that were not factored into the “trial within a trial” damages in the instant case.

Damages for recommending an inadequate settlement ought to be the reasonable settlement amount and the plaintiff ought not to have to prove that the case would have settled for that amount. In the absence of evidence to the contrary, we can assume both

parties would wish to avoid litigation costs and trial uncertainties by settling a case at the reasonable settlement value. Reasonable settlement amounts can be calculated by juries. We assume in all tort cases that a jury can calculate the amount of damages, and similarly, juries should be able to determine the probability of a plaintiff's verdict in the underlying litigation. Settlement value is a product of these two as reduced by the savings in litigation expenses. In addition, there will be some expert testimony as to reasonable settlement value as part of the plaintiff's proof of liability and it is probable the defendant will also have expert testimony on this issue.

In contrast to the determination of reasonable settlement value, the trial within a trial procedure is grossly unfair to the defendant attorney because it permits irrelevant and highly prejudicial evidence to serve as a basis for the jury's findings. In the instant case, the plaintiff had to prove liability by evidence that the settlement was inadequate. To do this the plaintiff must call other attorneys to testify about the likelihood of success in the underlying case, *i.e.*, that a reasonable jury probably would have found for the plaintiff and that the settlement amount was far less than what a reasonable jury would probably award. This testimony will obviously influence the jury in their "trial within a trial" deliberations. In addition, an attorney representing a client will probably reassure the client by estimating the probability of success and the probable verdict with the utmost optimism and will do so in communications with any insurance adjuster and opposing counsel. The attorney when filing suit will unquestionably present the client's case and the client's damages in the best possible light and will base the ad damnum clause on the highest conceivable award. Under the trial

within a trial procedure approved in the instant case, all of those statements by the attorney come into evidence against the attorney as admissions by a party-opponent. It seems absurd to have a trial within a trial where a plaintiff's declaration and ad damnum clause can be used to prove the plaintiff's liability and damages, and this is in addition to allowing expert attorney witnesses to tell the jury their assessment of liability and their opinion as to what a reasonable damage award should be.

In the instant case, the plaintiff acknowledges in his brief that "Christopher Brown, Esquire, after being duly qualified as an expert by the Court, testified that in his opinion the settlement recommended by Mr. Thomas was one which no reasonable attorney under the circumstances would have recommended. He evaluated the underlying lead poisoning case as a 'very strong case, and as a consequence a case which should be off to a trial for however much the jury determines is an appropriate sum.'" The trial within a trial is obviously not a recreation of the underlying tort trial because this testimony that is necessary to prove the attorney's liability for giving unreasonable advice as to settlement would not have been admissible in the underlying tort trial. In addition, since plaintiff's former attorney is now a defendant, the attorney's prior positive statements about the plaintiff's case and even the declaration prepared by the attorney were admissible as admissions by a party-opponent. Plaintiff called the defendant attorney as one of his primary witnesses and brought out the following:

“[Plaintiff's Counsel]: I want to hand you what has been marked as plaintiff's exhibit number 10. At the moment it is for identification. Tell me if you can identify that document?”

[Defendant]: Yes, I can.

[Plaintiff's Counsel]: What is it?

[Defendant]: It is the complaint, with the power of attorney to bring suit as next friend dated August 31, 1981 attached to it on the back.

[Plaintiff's Counsel]: Does it bear your signature?

[Defendant]: Yes, it does.

[Plaintiff's Counsel]: Was that filed by you in the circuit court in Marsharina Bethea's case?

[Defendant]: I caused it to be filed in the court, yes. There would have been a jury trial prayer attached to it as well.

[Plaintiff's Counsel]: I'll offer this into evidence.

[The Court]: That's plaintiff's exhibit what?

[Plaintiff's Counsel]: It is marked ten, your honor.

[The Court]: All right. Plaintiff's exhibit 10 admitted in evidence.

[Plaintiff's Counsel]: Now Mr. Thomas, if you would, could you read that, I think that is called the declaration, is that correct?

[Defendant]: Yes.

[Plaintiff's Counsel]: Would you look at the ad damnum clause? What is the ad damnum clause, that tells how much you are suing for, correct?

[Defendant]: Yes.

[Plaintiff's Counsel]: Can you read that ad damnum clause to the jury?

[Defendant]: One million dollars.

[Plaintiff's Counsel]: I'm sorry?

[Defendant]: One million dollars.

[Plaintiff's Counsel]: Have you seen this?

[Defendant's Counsel]: Yes.

[Plaintiff's Counsel]: And in that declaration Mr. Thomas, is it true that again you had alleged that the child had suffered permanent and irreparable brain damage?

[Defendant]: Yes.

[Plaintiff's Counsel]: And you announced that three separate groups of landlords had inflicted that injury upon Marsharina Bethea by their violations of the Maryland state law. Isn't that correct?

[Defendant]: Three different properties, yes.

[Plaintiff's Counsel]: That's what I'm saying, there was 209 East Lafayette Avenue, you sued correct?

[Defendant]: Yes.

[Plaintiff's Counsel]: 1322 Myrtle Avenue you sued, is that correct?

[Defendant]: Yes.

[Plaintiff's Counsel]: And 1217 East Preston Street you sued, is that correct?

[Defendant]: Yes.

[Plaintiff's Counsel]: And at the time that you filed that complaint — I'm sorry, declaration, it was your belief as an officer of the court that it was well founded in fact and in law,

is that correct?

[Defendant]: Yes.

[Plaintiff's Counsel]: And you so certified as an attorney when you filed a document with the court, isn't that correct?

[Defendant]: That is right.

Under the trial within a trial procedure approved by the court, since the plaintiff's former attorney is now a party defendant, the pleadings filed by the attorney on behalf of the plaintiff and the prior optimistic statements and high damage estimates made by the attorney on behalf of the plaintiff are now admissions by a party-opponent. See Maryland Rule 5-803 (a) (1) admitting "[t]he party's own statement, in either an individual or representative capacity."

Any attorney who has ever settled a plaintiff's case or contemplates settling a plaintiff's case should carefully read the majority's opinion. As a result of this decision, any plaintiff who has accepted an attorney's advice to settle a claim merely has to find another attorney to opine that the settlement was inadequate and should not have been recommended. This should not prove too difficult. The client can then file suit to seek the verdict value of the case without the risks and costs that would have been associated with the underlying trial, and the plaintiff can use the declaration filed by the attorney, the letters written to the insurance adjuster, the initial settlement demands and all the positive things the attorney told the client about the case as admissions to prove liability and damages. In addition, the jury will hear from other "expert" lawyers about the merits of the underlying cause of action and

the probable amount a reasonable jury would award. The jury will probably be less sympathetic to an attorney than it would have been to the real defendant, especially when the attorney is forced to switch hats and now disparage the former client's case that the attorney had previously been extolling. This is not a "trial within a trial," it is a "debacle within a trial." What tort trial would permit the plaintiff's declaration to serve as proof of liability and damages? What tort trial would permit an "expert" attorney to testify as to the defendant's probable liability and what a reasonable damage award would be? This Court would not permit any other class of tort defendants to be judged as unfairly as it permits attorneys to be judged in legal malpractice cases. I would affirm the \$25,000 reasonable settlement value award and not the \$125,000 "trial within a trial" award.

Judge Cathell has authorized me to state that he joins the views expressed in this concurring and dissenting opinion.