New Jersey Law Journal
STATEWIDE LEGAL AUTHORITY SINCE 1878
An ALM Publication
VOL. 226 NO. 2 MONDAY, JANUARY 13, 2019 NJLJ.COM

PROFESSIONAL MALPRACTICE

Suit-Within-a-Suit: Can a Jury Hear All Issues if There Was no Jury in the Underlying Case?

By Brian J. Molloy and Pierre Chwang

BRIAN J. MOLLOY

PIERRE CHWANG

You have been retained to defend an attorney who has been sued by a former client for alleged malpractice in the underlying trial. Your adversary proposes to proceed by way of a suit-within-a-suit—that is, by presenting the underlying action in the malpractice suit as if the alleged malpractice had not occurred. *Garcia v. Kozlov, Seaton, Romanini & Brooks,* 179 N.J. 343, 358 (2004). Before you can agree, you remind yourself that there was no right to a jury trial in the underlying case.

Several questions arise: should the suit-within-a-suit be tried as one case before the judge in the malpractice action so that it most closely resembles the original action; should one jury decide both the suit-within-a-suit case and the professional malpractice claim; or should the claims be bifurcated, with the judge deciding the suit-within-a-suit first and then, if necessary, a jury to decide the professional malpractice claim.

The answer to these questions, as it turns out, is not so simple. Some courts have suggested that when the litigant in the underlying action was never entitled to a jury trial, a jury should not decide the subsequent suit-within-a-suit in the malpractice action. Other courts, however, have held that the jury in the malpractice case should also try the suit-within-a-suit, even when there was no right to a jury trial in the underlying action.

This article explores the conceptual divide between these decisions and proposes a middle ground.

Initially, this question is unsettled in New Jersey—only two unpublished cases in New Jersey have even touched upon this issue. In *Bishop v. Nuzzi & Mason*, an unpublished 2011 New Jersey Appellate Division opinion, a malpractice suit was brought after the plaintiff's attorneys failed to bring a timely appeal of an administrative matter, which would have afforded the plaintiff an evidentiary hearing before an administrative

Brian J. Molloy is a shareholder in Wilentz, Goldman & Spitzer, chair of the Professional Liability and Responsibility Litigation group, a member of the Commercial Litigation and Appellate Practice groups, and Managing Partner for the firm. Pierre Chwang is an associate in the Professional Liability and Responsibility Litigation and Commercial Litigation groups.

law judge. The Appellate Division ordered that, upon remand, the suit-within-a-suit in the malpractice action should be conducted as a bench trial because such a format would be consistent with the procedure the plaintiff would have been entitled to had the matter proceeded before the administrative law judge, and because the parties acknowledged at oral argument that the issues should be decided by the trial judge.

Likewise, in 2008's *Rand, Algeier, Tosti & Woodruff v. Braun*, our Appellate Division noted how the trial judge in the malpractice action held "that it would be too complicated to have a jury give its best estimate as to what a chancery court judge would have decided," and bifurcated the legal malpractice claim so that the suit-within-a-suit would proceed as a bench trial. If the plaintiff prevailed, the malpractice case would proceed to a jury trial on the issue of proximate cause and damages, in spite of the plaintiff's demand for a jury trial on all issues. Unfortunately, because the Appellate Division determined that there were actually no disputed facts that needed to be resolved, it never reached the issue as to whether the trial court ruled correctly.

Conversely, in California, the identity of the trier of fact has little to do with whether the plaintiff is entitled to a jury trial in the malpractice suit. *Piscitelli v. Friedenberg,* 105 Cal. Rptr. 2d 88, 99 (Ct. App. 2001). In *Piscitelli*, although the underlying action was to be heard by an arbitration panel, the trial court in the malpractice suit found that while it made sense to find out what would have happened at arbitration, to proceed by way of a bench trial "flies in the face of the constitutional provisions allowing for trial by jury." California's Fourth District Court of Appeal affirmed the lower court's decision to disallow the request for a bench trial, finding that "Piscitelli had a constitutional right to a jury trial in his professional negligence action, including its trial-within-a-trial aspect, because it is a civil action at law."

Confusingly, the *Piscitelli* court then cited to a slew of similar decisions by courts in Washington, Arizona, Wisconsin, and Oregon to show that its decision was consistent with those of other jurisdictions. Though these decisions—*Helmbrecht v. St. Paul Ins. Co.*, 122 Wis. 2d 94 (1985); *Brust v. Newton*, 70 Wash. App. 286 (1993); *Chocktoot v. Smith,* 280 Or. 567 (1977); *Phillips v. Clancy*, 152 Ariz. 415 (App. 1986)—also referenced the constitutional right to a jury trial in civil malpractice actions, they primarily turned on the theory that a suit-within-a-suit should be tried by a jury if the basis of the alleged malpractice is a question of fact, and by a judge when it concerns a question of law, because the purpose of the suit-within-a-suit is not to recreate the underlying action but to discover how a reasonable

PHOTO BY FTWITTY/ISTOCKPHOTO.COM

fact finder should have acted in the absence of the alleged malpractice. Thus, the California model carves out an exception to the constitutional right to a jury trial when lay jurors lack expertise in law, but not when lay jurors lack the expertise, knowledge, or experience possessed by the judges who serve as the sole triers of fact in certain special courts.

Not all states have agreed with the California model. Utah, like New Jersey, refused to adopt the California model in *Harline v. Barker*, 912 P.2d 433 (Utah 1996). There, in the context of an underlying action before a bankruptcy judge, the Supreme Court of Utah rejected the implication that a judge sitting in the malpractice suit is somehow worse off than a lay jury in determining what a reasonable expert judge in the underlying action would have done in the absence of the alleged malpractice. To permit a trial by jury on the suit-within-a-suit would allow the malpractice plaintiff to "bootstrap his way into having a lay jury decide the merits of the underlying 'suit within a suit' when, by statute or other rule of law, only an expert judge could have made the underlying decision." The *Harline* court also

rejected the holdings of *Helmbrecht, Phillips,* and *Chocktoot*, finding the fact versus law distinction drawn by those courts "superficial" and that it was "illogical … to make a change in the law's allocation of responsibility between judge and jury in the underlying action when that action is revisited in legal malpractice actions" and that to do so "ignores and, in some cases, contradicts the public policy goals which prompted the initial assignment of decision-making authority to judges."

More recently, in 2016, a Pennsylvania appellate court independently arrived at a similar conclusion in an unpublished decision, *Kachmar v. William J. Litvin, Esq.* In *Kachmar*, the plaintiff contended that the trial court violated his constitutional right to a jury by bifurcating the case and allowing the suit-within-a-suit to proceed without a jury. The appellate court rejected the plaintiff's arguments, finding that the trial court correctly bifurcated the case and denied a jury trial with respect to the suit-within-a-suit. Then, the court went further and found that the plaintiff cannot be permitted to maneuver the case so that a jury would decide the suit-within-a-suit when the underlying manner would have been adjudicated by a judge had it not been settled.

Ultimately, the outward concerns that appear to have motivated the development of the California model are illusory. First, the malpractice plaintiff's constitutional rights are not being violated if the malpractice action is bifurcated to permit a bench trial of the suit-within-a-suit under the circumstances contemplated by this article. Putting aside the exception to the right to a jury trial created under the California model, malpractice plaintiffs—if successful in the suit-within-a-suit portion of the case—will ultimately present the malpractice claim before a jury.

Second, the notion that the purpose of the suit-within-a-suit is not to recreate the underlying action is facially self-defeating. Under New Jersey law, the suit-within-a-suit is not the only method to approach a malpractice case. If the parties wished to proceed in a manner that did not involve the recreation of the underlying trial, they can proceed in another way, such as by expert testimony. Indeed, our Supreme Court held that "reasonable modifications" to the suit-within-a-suit method were acceptable in *Garcia*, and that "the proper approach in each case will depend upon the facts, legal theories, the impediments to one or more modes of trial, and, where two or more approaches are legitimate, the plaintiff's preference."

It is self-evident, then, that our Supreme Court's directions in *Garcia* stand in stark contrast with the inflexible (and contradictory) rules imposed by the California model, but are fully compatible with *Harline* and *Kachmar.* Indeed, the holding of *Garcia* directs our courts to consider the mode of trial in the underlying action, as was done in *Rand* and *Bishop*. In the context of a malpractice suit arising from a trial where the malpractice plaintiff was not entitled to a jury trial, judges, in their discretion, should take into account the nature, the complexity, and the public policy goals served by precluding a jury in the underlying case before permitting the suit-within-a-suit to go before the jury in the malpractice action. Accordingly, practitioners should not automatically assume that a right to a jury trial attaches to all claims in a legal malpractice case. Rather, practitioners should carefully analyze the nature of the claims, consistent with the purpose of the suit-within-a-suit methodology, to determine when and for which claims a jury trial is required, and whether proceeding by way of a suit-within-a-suit is the best option for their client. ■

Brian J. Molloy | Shareholder
T: 732.855.6083
F: 732.726.6699
bmolloy@wilentz.com

WILENTZ
—ATTORNEYS AT LAW—

Pierre Chwang | Associate
T: 732.855.6127
F: 732.726.4727
pchwang@wilentz.com