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Recommended Citation
YOUR PLACE OR MINE?: THE BURDEN OF PROVING COLLECTIBILITY OF AN UNDERLYING JUDGMENT IN A LEGAL MALPRACTICE ACTION

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INTRODUCTION

While burdens of proof at trial do not necessarily equate to the awkwardness of a come-on during a date, the question “your place or mine” is still relevant to both, at least in Colorado. This article examines the seemingly unanswered question lingering in Colorado law as to whether a legal malpractice plaintiff bears the burden of proving collectibility of an underlying judgment in order to establish a prima facie case or whether a defendant bears the burden of proving collectability as an affirmative defense. Is it your place to prove it or mine?

Legal malpractice actions are unique in that they require a plaintiff to prove a case within a case. Namely, a plaintiff must first prove that he had a meritorious claim against a third party in the underlying action. Then, a plaintiff must prove that he would have been successful in that underlying action but for the lawyer’s negligence. The illusive concept of “success” has led to some confusion regarding burdens of proof in a malpractice action. Does a plaintiff have the burden simply to prove the likelihood of receiving a favorable judgment, while leaving collectibility as an affirmative defense for the defendant lawyer? Or does a plaintiff also have to prove the judgment was collectible in order to establish the elements of a legal malpractice claim? This question, though addressed by Colorado courts, still seems to be unanswered for purposes of creating a hard-and-fast, precedential ruling. If looking to jurisdictions outside of Colorado for guidance, lawyers will find they are split on the issue of which party bears the burden of proving collectibility.

This article first reviews the current state of Colorado law with regard to which party bears the burden of proving collectibility in a malpractice action. The article then goes beyond Colorado borders to explore how other jurisdictions have decided the issue and the factors those jurisdictions considered in rendering judicial opinions.

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COLLECTIBILITY IN COLORADO

The elements of a legal malpractice claim in the State of Colorado are well established. “To succeed on a legal malpractice claim founded in negligence, the plaintiff must establish that: (1) the attorney owed a duty of care to the plaintiff; (2) the attorney breached that duty; and (3) the attorney’s breach proximately caused damage to the plaintiff.” Establishing proximate cause requires two elements: “First, the plaintiff must establish that but for the attorney’s actions, the injury would not have occurred. Second, the plaintiff must establish the ‘case within a case,’ which requires proof that the claim underlying the malpractice action should have been successful if the attorney acted in accordance with his or her duty.”

The question is unclear in the State of Colorado as to whether the burden to prove that the underlying claim would have been “successful” includes the requirement to prove that any judgment that should have been awarded would have been collectible. The Supreme Court first faced this issue in Lawson v. Sigfrid, when a plaintiff brought a legal malpractice action against her attorney after the court dismissed a collection action for failure to prosecute. At trial, the defendant attorney argued, inter alia, that the defendant in the underlying action was insolvent, and therefore, plaintiff could not have suffered damage. The trial court agreed and directed verdict in favor of the defendant lawyer. On appeal, the plaintiff argued that the burden was on the defendant to show insolvency in the action below. The court did not disagree, but instead found that the plaintiff’s own evidence established insolvency, and therefore, there was no need to decide on which party the burden should be imposed. As a result, the Lawson decision established the relevancy of the question of whether an underlying judgment is collectible in a legal malpractice action, but “did not resolve the question of which party has the burden of proving the lack of assets.”

Since the Lawson decision, no published opinion in the State of Colorado has answered this question, though a couple have come close. For instance, the Colorado Court of Appeals in Morris v. Greer held that, as part of plaintiff’s burden to prove causation and damages, she had to

2. Id., 45 P.3d at 751 (internal citations omitted).
3. Id., 262 P. 1018, 1019 (Colo. 1927).
4. Id.
5. Id.
6. Id.
7. Id.
prove the amount she would have “received.” In *Morris*, the plaintiff asserted claims against the attorney defendant for, *inter alia*, failing to prosecute a motion to set aside a divorce decree due to fraud on the part of the husband. The court stated: “As to her second claim, she was required to prove that because of husband’s fraud her motion to reopen the dissolution decree could have been successfully prosecuted, and that she would have received a higher property distribution as a result.” The court did not specify whether received meant receiving an award of a higher property distribution or actual receipt of the assets. This context is also unique in that providing proof of the husband’s assets would have been part of the legal malpractice plaintiff’s burden of proof for the underlying claim.

Similarly, the Court of Appeals in *Miller v. Byrne* suggested in dicta that the legal malpractice plaintiff must prove as part of her case in chief the amount that would have been “recovered” but for the attorney’s negligence. In *Miller*, the plaintiffs asserted that the attorney defendants negligently defended a claim against them by failing to settle the matter. The court stated: “[The plaintiffs] were required to prove not only that there should have been a settlement of the wrongful death claim, but also that the passenger’s widow should have won the underlying case, and the amount that she should have recovered.” Again, the Court of Appeals does not specify whether the amount recovered referred to the amount of a jury verdict or the amount of that verdict that could be collected, nor was this issue necessary for its holding.

Two recent cases have directly invited the Court of Appeals to rule on this issue. In *Giron v. Koktavy*, the district court awarded summary judgment to the attorney defendant finding that the underlying judgment would have been uncollectible, relying on the decisions of *Lawson* and *Morris*. The district court held:

> While *Lawson* did not resolve the question of which party has the burden of proving the lack of assets. [sic] Under the facts of the instant case, that burden is irrelevant, since Defendants have brought forward sufficient evidence, left unanswered by Plaintiff, that [the

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10. *Id.* (citing *Lawson*, 262 P. 1018); see also Coon v. Ginsberg, 509 P.2d 1293, 1295 (Colo. App. 1973); Rosebud Mining & Milling Co. v. Hughes, 121 P. 674, 674 (Colo. App. 1912). Neither *Coon* nor *Hughes* address the issue of the burden to prove collectibility.
12. *Id.*
14. *Id.*
15. *Id.*
underlying defendant] was unable to satisfy any potential judgment against her.\textsuperscript{17}

On appeal, the Court of Appeals went further, holding: “[W]e conclude that, under controlling Colorado precedent, proving collectibility is part of the plaintiff’s burden to prove actual damages proximately caused by the attorney’s malpractice.”\textsuperscript{18} The controlling precedent to which the Court of Appeals cites includes \textit{Lawson, Morris, Miller, and Coon}, and the opinion provides no analysis beyond that discussed above.\textsuperscript{19} The Court of Appeals did not select this opinion for official publication, prohibiting practitioners from citing this case as precedent.\textsuperscript{20}

Similarly in \textit{C&amp;C Excavating, Inc. v. Whaley}, the legal malpractice plaintiffs specifically argued that collectibility is an affirmative defense that must be pleaded and proven by the attorney defendant.\textsuperscript{21} The Court of Appeals simply held that the legal malpractice plaintiff’s burden included “proof of lost recovery” and declined to review the issue of collectibility.\textsuperscript{22} Again, the Court of Appeals chose not to select the opinion for official publication, and therefore, it does not constitute official precedent in the State of Colorado.\textsuperscript{23}

Accordingly, at this time, the question is officially unanswered as to whether a Colorado legal malpractice plaintiff is required to prove in his case in chief that the underlying judgment he would have been awarded but for the malpractice of the defendant attorney would have been collectible. One commentator suggests otherwise, stating: “In Colorado, after the client demonstrates that he would have prevailed on the underlying claim, he must also show that he could have collected the judgment.”\textsuperscript{24} However, the only authority to which the commentator cites is \textit{Lawson}.\textsuperscript{25} Even so, the commentator questions the current state of the law: “Applicability of this 60-year-old [now 85-year-old] rule is suspect, especially when the defendant attorney is charged with negligence in his handling of a claim against an insolvent party. This defense is an admission that the underlying case should never have been brought by the de-

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} at *3.
\item \textsuperscript{18} \textit{Giron v. Koktavy}, No. 07CA0766, slip. op. at 4 (Colo. App. June 12, 2008).
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} \textit{Id.}; \textit{COLO. APP. R.} 35(f) (“Those opinions designated for official publication shall be followed as precedent by the trial judges of the State of Colorado.”). Citation of unpublished opinions is explicitly prohibited by the Court of Appeals. \textit{Court of Appeals Forms and Policies, COLO. JUDICIAL BRANCH}, \url{www.courts.state.co.us/Courts/Court_Of_Appeals/Forms_Policies.cfm} (last visited Mar. 12, 2014).
\item \textsuperscript{21} \textit{C&amp;C Excavating, Inc. v. Whaley}, No. 11CA0094, slip. op. at 3 (Colo. App. May 3, 2012).
\item \textsuperscript{22} \textit{Id.} at 9–10.
\item \textsuperscript{23} \textit{See supra note 22.}
\item \textsuperscript{24} 7 \textit{JOHN W. GRUND ET AL., COLORADO PRACTICE SERIES: PERSONAL INJURY TORTS AND INSURANCE}, § 22:22 (3d ed. 2013).
\item \textsuperscript{25} \textit{Id.}
\end{itemize}
fendant lawyer. 26 Regardless, the issue appears ripe for a published opinion.

COLLECTIBILITY IN OTHER JURISDICTIONS

While Colorado law on this issue seems to lack precedential value at best or be undecided at worst, a majority of other jurisdictions around the country have more clearly defined burdens. However, a division exists among these other jurisdictions as to whether collectibility of an underlying judgment is part of the legal malpractice plaintiff’s burden of proof or an affirmative defense to be pleaded and proven by the attorney defendant. 27

The majority of jurisdictions place the burden on a malpractice plaintiff to prove collectibility in the underlying action. The opinions of these courts substantially rely on the argument that collectibility is a part of proving proximate cause and damage. 28 “The injury proximately resulting from defendants’ negligence is the loss of a collectible judgment.” 29 As one court put it, “[i]n proving what was lost, the plaintiff must show what would have been gained [but for the lawyer’s negligent act].” 30 If a plaintiff never could have collected a judgment from a third

26. Id.


28. See supra note 29.

29. McKenna, 720 N.Y.S.2d at 658.

party, then a defendant attorney’s negligence logically could not have caused damage to that plaintiff because the negligent act did not put the plaintiff in any better or worse position.\textsuperscript{31} Injury must be measured by what a plaintiff actually would have collected in recompense.\textsuperscript{32} The requirement to prove collectibility in order to establish a prima facie case ensures a plaintiff does not receive a windfall from the lawyer.\textsuperscript{33}

Conversely, a slightly lesser number of jurisdictions consider collectibility to be an affirmative defense to be proven by the defendant lawyer, and those jurisdictions offer a number of reasons for doing so.\textsuperscript{34} Many jury instructions containing the elements of a malpractice action contain no explicit language regarding proof of collectibility, arguably establishing the issue as one of an affirmative defense. Aside from the lack of specific elements addressing collectibility, this minority of jurisdictions focus more on ideas of fairness.\textsuperscript{35} Some courts rely on the rationale that plaintiff was already allegedly wronged twice—first by a third party and next by the attorney. Therefore, a plaintiff should not sustain the added burden of proving collectibility in the malpractice action.\textsuperscript{36} Similar to this second justification, other courts recognize that the issue of collectibility arises only as a result of professional negligence, and the requirement to actually prove collectibility arises only after a plaintiff proves malpractice. Therefore, fairness militates in favor of requiring the malpracticing attorney to bear the inherent risks and uncertainties of proving uncollectibility.\textsuperscript{37}

It is often difficult to prove collectibility, and that difficulty may arise as a result of the negligence of the defendant attorney.\textsuperscript{38} For instance, one court noted that a problem may arise as to the date of the determination of collectibility because a defendant’s solvency may depend entirely on the date the underlying judgment would have been received, which may be difficult to recreate due to the attorney defendant’s

\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Lavigne, 50 P.3d at 310 (stating that “[h]ypothetical damages beyond what the plaintiff would have genuinely collected from the judgment creditor ‘are not a legitimate portion of her ‘actual injury;’ awarding her those damages would result in a windfall’”) (quoting Klump v. Duffus, 71 F.3d 1368, 1374 (7th Cir. 1995).)
\textsuperscript{34} See supra note 29.
\textsuperscript{35} Id.
\textsuperscript{37} Id. (“Because the need to determine collectibility . . . arises only after malpractice has been proved, policy would seem to militate in favor of requiring the malpracticing attorney to bear the inherent risks and uncertainties of proving uncollectibility.”); Hoppe v. Ranzini, 385 A.2d 913, 920 (N.J. Super. Ct. App. Div. 1978) (“We have concluded that fairness requires that the burden of proof with respect to issue of collectibility should be on the attorney defendants . . . .”); Winter v. Brown, 365 A.2d 381, 385 (D.C. Cir. 1976) (finding that the actual loss to the plaintiff was “not subject to fair measurement or calculation,” and that lawyer defendants “must bear the onus of their error and the resultant impossibility of ascertaining the value of what was lost”); see also Clary v. Lite Machs. Corp., 850 N.E.2d 423, 439 (Ind. Ct. App.).
negligence.\textsuperscript{39} Additionally, legal malpractice cases are often brought years after the underlying events due to the attorney defendant’s negligent delay.\textsuperscript{40} Therefore, courts have forced the attorney defendant to bear the difficulties of proof caused by this delay.\textsuperscript{41}

Courts imposing the burden on a defendant to prove collectibility of the underlying judgment have also focused on the concept of the value of that judgment, even if that judgment is not collectible at the time received. For instance, courts have noted that a judgment may have value as an assignable property interest.\textsuperscript{42} Additionally, judgments are valid for a substantial length of time, and therefore, a judgment which is not collectible at the time of its award may become collectible in the future.\textsuperscript{43} Courts have focused on the possibility that the underlying case might have settled.\textsuperscript{44} Finally, one court recognized that the award of a judgment has value, regardless of whether it is collectible, as vindication of the legitimacy of the underlying claim.\textsuperscript{45} Arguably, a judgment or right to a

\textsuperscript{39} Hoppe, 385 A.2d at 919 (“[A] problem arises as to the date as of which [the matter of collectibility] should be determined.”).

\textsuperscript{40} Smith v. Haden, 868 F.Supp. 1, 2 (D.D.C. 1994) (“[P]lacing the burden on a plaintiff to prove collectibility would be unfairly burdensome, particularly when a legal malpractice suit is often brought years after the underlying events and when the delay by the plaintiff in bringing such a suit is because of the defendant-lawyer’s failure to act in a timely manner in the first place.”); Kittuskie v. Corbman, 714 A.2d 1027, 1031 (Pa. 1998) (“To require the plaintiff to also prove collectibility of damages would result in placing an unfair burden on the plaintiff where the plaintiff’s legal malpractice action is often brought years after the initial [negligence] causing his injuries solely because the defendant-lawyer failed to act in a timely and competent manner.”); Jenkins v. St. Paul Fire & Marine Ins. Co., 422 So.2d 1109, n.2 (La. 1982) (“The client’s problem is frequently compounded when the attorney’s negligence and the lapse of time has left a new attorney to search for stale evidence and has prevented or severely hampered thorough and effective preparation of the claim for trial.”); see also Carbone v. Tierney, 864 A.2d 308, 318 (N.H. 2004).

\textsuperscript{41} See supra note 42.

\textsuperscript{42} See Ridenour v. Lewis, 854 P.2d 1005, 1006 (Or. Ct. App. 1993) (“A judgment may have value because it is collectible from the judgment debtor’s assets or prospective assets, or because the judgment debtor’s insurance partly or wholly covers the claim. A judgment may also have market value as an assignable property interest.”).

\textsuperscript{43} Lindenman v. Kreitzer, 775 N.Y.S.2d 4, 9 (N.Y. App. Div.) (“[C]onsideration must be given to the fact that a New York judgment has a 20-year life span and that, even if the judgment is not collectible at the time of its entry, it may become collectible at any time during that life span.”) (internal citations omitted); Power Constructors, 960 P.2d at 31 (“[T]here is no good reason to presume from a record silent on the issue of collectibility that the underlying judgment at issue would not eventually be collected.”); Hoppe, 385 A.2d at 919 (“It is not without significance that had a judgment been obtained against DePoe, it would have been valid for 20 years, and, in an appropriate proceeding, might have been extended for another 20 years.”). Similarly in Colorado, a district court judgment is valid for twenty years and its life may be extended for successive twenty-year periods. COLO. REV. STAT. § 13-52-102 (2013).

\textsuperscript{44} Smith, 868 F. Supp. at 2 (requiring the plaintiff to show the degree of collectibility of a judgment in a legal malpractice case “wholly ignores the possibility of a settlement between the plaintiff and the potential defendant, either before or after judgment, which may be encouraged by active litigation of a claim”); Kittuskie, 714 A.2d at 1032 (imposing the burden to prove collectibility on the legal malpractice plaintiff “ignores the possibility of settlement between the plaintiff and the underlying [defendant] and also overlooks that the passage of time itself can be a mitigating factor either for or against collectibility of the underlying case”); see also Clary v. Lite Machs. Corp., 850 N.E.2d 423, 440 (Ind. Ct. App. 2006).

\textsuperscript{45} Lindenman, 775 N.Y.S.2d at 8 (“[A] fact finder’s judgment in the plaintiff’s favor, i.e., the finding that the plaintiff was wronged by the defendant in the underlying action and wronged by the
judgment in the underlying case may have greater psychological value for some plaintiffs above and beyond the monetary value. These justifications mirror the concept of “success” that has not officially been answered by Colorado courts.

CONCLUSION

While these jurisdictions are divided on the issue of the bearer of the burden to prove collectibility of an underlying judgment, their courts have directly confronted the issue and provided unequivocal guidance to litigants in their respective jurisdictions. On the contrary, the Colorado Supreme Court has not addressed the issue since the Lawson decision in 1927, and the Court of Appeals has declined recent opportunities to provide a published opinion. In spite of the lack of precedential case guidance, Colorado practitioners are best served by assuming their respective clients bear this burden until clear guidance is provided.

attorney who represented him in that action, is itself a vindication of the legitimacy of the plaintiff’s underlying claim and has value regardless of whether it is wholly collectible.”).