

## **Collectibility in Legal Malpractice Suits - A Required Element in Proving Damages: *Schmidt v. Coogan***

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In *Schmidt v. Coogan*, No. 41279-9-II, 2012 WL 5331567 (October 30, 2012), the Washington Court of Appeals held that (1) collectibility is a required component in determining legal malpractice damages and (2) the failure to prove collectibility is fatal to a plaintiff trying to establish damages in a legal malpractice action.

### **The Underlying Facts**

In *Schmidt*, plaintiff Teresa Schmidt retained attorney Timothy Coogan to represent her in a slip and fall action against a Tacoma grocery store. Coogan failed to file Schmidt's lawsuit before the statute of limitations expired and Schmidt sued Coogan for legal malpractice. Following a jury trial, the jury returned a verdict against Coogan for \$32,000 in past economic damages and \$180,500 in non-economic damages. Coogan moved for a new trial on the issue of damages and the trial court granted the new trial.

### **The Damages Only Trial**

Following the close of Schmidt's case at the damages trial, Coogan moved for a judgment as a matter of law asserting, among other things, that Schmidt failed to present any evidence that, had Coogan originally filed this case within the statute of limitations and won a jury verdict, the verdict would have been collectible. In response, Schmidt argued the issue of collectibility should have been raised in the first trial and could not be raised in the second trial.

The trial court denied Coogan's motion, finding that Coogan should have raised the issue of collectibility at the first trial, not at the damages-only trial. The jury awarded Schmidt \$3,733.16 in past economic damages and \$80,000 in non-economic damages. Coogan filed a motion for judgment as a matter of law and/or a new trial on the basis that Schmidt failed to establish collectibility. The trial court denied the motion and Coogan appealed.

### **Collectibility: An Essential Element of Damages**

On review, the Court of Appeals reversed the trial court's denial of Coogan's motion because there was insufficient evidence to support the jury's verdict. Schmidt never proved collectibility, an essential component of damages in a legal malpractice claim. At best, Schmidt asserted that two pieces of evidence established collectibility. First, she pointed to her own testimony, showing she previously "testified the grocery store was a large, busy going concern." Second, she asserted that five photographs, showing the shampoo aisle inside the grocery store, demonstrated the grocery store's solvency and the collectibility of a judgment. The Court of Appeals disagreed.<sup>1</sup>

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<sup>1</sup> The court looked to *Matson v. Weidenkopf*, 101 Wn. App. 472, 3 P.3d 805 (2000), as an example of the requisite showing of collectibility, which included testimony from the third party confirming actual financial earnings, financial savings and a willingness to pay legal obligations.

Given the lack of any substantial evidence proving collectibility of a judgment against the grocery store – an essential component in determining damages in Schmidt’s legal malpractice action against Coogan, the Court of Appeals reversed the trial court’s decision and remanded for dismissal of Schmidt’s claim.

### **Conclusion**

In Washington, the measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney’s conduct. As the decision in *Schmidt* makes clear, collectibility of the underlying judgment is a required component of damages in a legal malpractice action and should be analyzed and asserted when defending a legal malpractice

action. By enforcing this requirement, Washington courts will not permit a plaintiff to recover from a lawyer what he or she would not otherwise have been able to recover from the original defendant had the malpractice not occurred.

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