

VA Supreme Court: Shevlin Smith v. McLaughlin

2 Mar 2015

The opinion in *Shevlin Smith v. McLaughlin* provides a veritable cornucopia of rulings—15 assignments of error were considered!—that touch on important areas of legal malpractice and civil litigation that all practitioners should review. The case concerns a legal malpractice case by McLaughlin against his former firm of Shevlin Smith, whom he had hired to file a legal malpractice complaint against his former criminal counsel (two different firms). With McLaughlin's approval, Shevlin Smith negotiated a settlement against one firm, but not the other. Four months later, the Court issued its opinion in *Cox v. Geary*, 271 Va. 141 (2006), holding in part that a settlement and release of some co-defendants to a legal malpractice claim released all co-defendants. McLaughlin sued Shevlin Smith for not, among other things, anticipating the *Cox* ruling, which precluded him from obtaining judgment against the other criminal defense firm, and obtained a \$5.75 million verdict.

Justice Millette, for a unanimous Court, vacated the judgment and remanded. Among the rulings: (1) a plea in bar can be sustained even if it only partially bars the plaintiff's recovery; (2) while not adopting the "judgmental immunity rule," an attorney acting with "a reasonable degree of care, skill, and dispatch" in an unsettled area of law does not engage in legal malpractice, which is an issue of law, not fact, when "reasonable minds could not differ" on the issue; (3) a legal malpractice plaintiff need not prove collectability as an element of his actual injury, although it is a relevant factor that the defending attorney can raise as an affirmative defense, as a "growing number" of states have held; (4) non-pecuniary damages are not recoverable in a legal malpractice claim; and (5) a party cannot request more in his opening statement or closing argument than is set forth in his ad damnum. Justice McClanahan filed a partial dissent, arguing that a legal malpractice plaintiff must prove collectability of any judgment on the underlying lost claim, but otherwise joining in the Court's rulings. [A link to this important opinion is here.](#)

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