Lawyers Beware: The *Masellis* Court Put an End to the "Legal Certainty" Burden in Settle and Sue Legal Malpractice Cases

By Mark B. Wilson

For years, attorneys have been practically immune from legal malpractice actions arising from an underlying case that settled (*e.g.*, a claim by an unhappy client that says the case settled for too little money). That's because plaintiffs (*i.e.*, former clients) in such "settle and sue" legal malpractice cases have been required to prove their case to a "legal certainty," an undefined burden of proof that has no corresponding Judicial Council of California Civil Jury Instruction (CACI). Many legal malpractice attorneys simply won't touch these claims, fearing there is no way to win them.

All this changed when the Court of Appeal, Fifth District published *Masellis v. Law Office of Leslie F. Jensen*, 2020 WL 3406336 on June 19, 2020, which held, "[f]or 'settle and sue' legal malpractice actions, we conclude the applicable burden of proof is a preponderance of the evidence." If the California Supreme Court does not reverse *Masellis*, then lawyers face a potential wave of new claims.

What Do the Applicable CACIs Say?

The *fundamental* CACI for legal malpractice says,

> "To recover damages from [name of defendant], [name of plaintiff] must prove that [he/she/it] would have obtained a better result if [name of defendant] had acted as a reasonably careful attorney. [Name of plaintiff] was not harmed by [name of defendant]'s conduct if the same harm would have occurred anyway without that conduct." CACI 601.

There are two CACIs addressing a plaintiff's burden of proof in civil cases: CACI 200 (the "more likely than not true" instruction); and CACI 201 (the "clear and convincing proof" instruction). *Evidence Code* sections 115 and 502 provide the three potential burdens of proof in California (*i.e.*, the two just men-

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tioned) and the "reasonable doubt" standard. Section 115 says, "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

The "reasonable doubt" burden is reserved for criminal cases. *Penal Code* section 1096. "Generally, facts are subject to a higher burden of proof [*i.e.*, clear and convincing standard] only where particularly important individual interests or rights are at stake." *In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1490. Examples include "termination of parental rights, involuntary commitment, and deportation." *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487.

That leaves only the "more likely than true" burden of proof for legal malpractice cases. And it is well established that "[t]o prevail in a negligence action, the plaintiff must establish every essential element of her case by a preponderance of the evidence." *Leslie G. v. Perry & Assocs.* (1996) 43 Cal.App.4th 472, 482. If this is so well-established CACI 200 is the law, why is *Masellis* so important?

The Unusual "Legal Certainty" Burden Historically Applied to Settle and Sue Cases

Notwithstanding the common complaint by clients that their attorneys did not achieve an acceptable settlement, there are only a handful of California cases addressing "settle and sue" cases. It's likely the lack of published opinions is largely due to the defense bar's Captain America shield: *Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154.

In *Filbin*, former clients sued their attorney, alleging his negligence caused them to settle their case for less money than they would otherwise have received. At trial, plaintiffs prevailed. Defendant appealed, alleging plaintiff did not prove proximate cause. The appellate court reversed and penned the following reasoning that virtually ended all future settle and sue cases:

> '"***Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty***' [citation omitted] . . . '[A] plaintiff who alleges an inadequate settlement in the underlying action must prove that, if not for the malpractice, she would certainly have received more money in settlement or at tri-

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> al.' [Citation omitted.] . . . ***The requirement that a plaintiff need prove damages to 'a legal certainty' is difficult to meet in any case. It is particularly so in 'settle and sue' cases***." (Emphasis added.) *Filbin v. Fitzgerald, supra,* 211 Cal.App.4th 154, 166.

The *Filbin* court even tipped its hat to Pennsylvania, which prohibits "settle and sue" cases. *Filbin v. Fitzgerald, supra,* 211 Cal.App.4th 154, 168 fn. 10. With the "legal certainty" lens, it was not hard for the *Filbin* court to conclude that the "Filbins presented no evidence showing to a legal certainty that [defendant's] acts or omissions proximately caused any injury." *Filbin v. Fitzgerald, supra,* 211 Cal.App.4th 154, 172.

The Impact of *Masellis* on the Legal Community

Like all the other published "settle and sue" cases, the *Masellis* plaintiff alleged her lawyer made mistakes that caused her to receive an inadequate settlement. The jury found the attorney liable for legal malpractice. After the trial, the attorney argued plaintiff failed to meet the *Filbin* "legal certainty" standard of proof as a matter of law, so the trial court should grant a motion for judgment notwithstanding the verdict. The trial court denied the motion, and the attorney appealed.

The *Masellis* court reviewed all "settle and sue" published opinions and concluded,

> "[N]one of the cases (1) recognized the general rule and exception in Evidence Code section 115 and (2) explicitly undertook the analysis usually employed when considering whether to alter the burden of proof from the preponderance of the evidence standard. As a result, none of the cases explicitly state the appropriate burden of proof is the 'legal certainty' standard and explain how that standard fits within the framework of the three common standards of proof listed in Evidence Code sections 115 and 502. These omissions lead us to conclude the cases using the term 'legal certainty' are not authority applying a heightened burden of proof to the elements of causation and damages in a legal malpractice action. [Citation omitted.] ***Consequently, we conclude the ambiguous term 'legal certainty' simply means the level of certainty required by law, which is established by the applicable standard of proof***." (Emphasis added.)

The *Masellis* court concluded that the "preponderance of the evidence standard" applies to "settle and sue" cases for three reasons. First, the "preponderance of the evidence standard" is the default standard in civil cases, and higher standards of proof only apply when something more than money is at issue. Second, in *Viner v. Sweet* (2003) 30 Cal.4th 1232, the California Supreme Court stated, "[i]n a litigation malpractice action, the plaintiff must establish that but for the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment *or settlement* in the action in which the malpractice allegedly occurred." (Emphasis added.) *Viner v. Sweet, supra,* 30 Cal.4th 1232, 1241. "This statement's reference to a more favorable judgment or settlement is broad enough to include the 'settle and sue' malpractice action." *Masellis v. Law Office of Leslie F. Jensen, supra,* 2020 WL 3406336 at 15. Third, the *Masellis* court relied on a law review article that concluded the phrase "legal certainty" is ambiguous.

There are a significant number of plaintiffs who have "settlement regret." *Masellis* just gave those unhappy clients something to celebrate.

♦*Mark Wilson, a trial attorney, has won nearly every case he has tried or arbitrated. He lost only one jury trial and obtained a complete reversal on appeal. Mr. Wilson represents clients in business litigation and legal malpractice cases and was named in the 2017 - 2020 SuperLawyers Top 50 Orange County lists. Mr. Wilson is a California State Bar certified specialist in Legal Malpractice Law and can be reached at (949) 631-3300; wilson@kleinandwilson.com; https://www.kleinandwilson.com.*