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COURT OF APPEALS

STATE OF NEW YORK

GRACE,

Respondent,

-against-

No. 165

LAW, ET AL.,

Appellants.

20 Eagle Street
Albany, New York 12207
September 17, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: 165, Grace v. Law.

2 Counselor, do you want any rebuttal time?

3 MR. HULSLANDER: We'd collectively like two
4 minutes, one minute off of each of our - - -

5 CHIEF JUDGE LIPPMAN: One minute off each,
6 sure.

7 MR. HULSLANDER: And Mr. Hutter will take
8 that - - - take those two minutes.

9 CHIEF JUDGE LIPPMAN: He'll take the two
10 minutes. You have it.

11 MR. HULSLANDER: Yes. Your Honors, this -
12 - - this case really, truly is more than just about
13 these litigants. Truly it's about lawyers' rights,
14 and a right of a lawyer to vindicate himself from any
15 potential malpractice case when an appeal - - - a
16 nonfrivolous appeal is pending, and when a trial is
17 pending, which would allow him to vindicate - - -

18 CHIEF JUDGE LIPPMAN: What's the test?
19 What's the test that we should use?

20 MR. HULSLANDER: Nonfrivolous is the test.

21 CHIEF JUDGE LIPPMAN: No, no. What's the
22 test as to - - - as to what has to be shown
23 ultimately about the - - - what the proximate cause
24 of - - - of the plaintiff's damages?

25 MR. HULSLANDER: In order - - - in order to

1 - - - the test in this case should be not a per se
2 standard, but indeed it should be that if a - - - an
3 appeal which is nonfrivolous exists - - -

4 CHIEF JUDGE LIPPMAN: So it's non - - -
5 that is the ultimate test. If it's nonfrivolous, you
6 have to pursue it, period, even if it's very, very
7 unlikely that you could - - - that you could win?

8 MR. HULSLANDER: Yes, because if - - - if
9 it's anything but that, Judge, meritorious
10 essentially means nonfrivolous in New York State.

11 CHIEF JUDGE LIPPMAN: Where do you get the
12 nonfrivolous, other than the dissent in this case?
13 Where do you get that test from? From a - - - a
14 precedent basis?

15 MR. HULSLANDER: Well - - -

16 CHIEF JUDGE LIPPMAN: What cases do you
17 rely on that that's the test, here or elsewhere?

18 MR. HULSLANDER: Yeah, there's - - -
19 there's cases in other jurisdictions but in this - -
20 - in this - - - in the New York State, we've only
21 seen two cases, the Rupert case and Rodriguez case,
22 and the standard is not - - - is not stated. But in
23 - - - we believe that the standard should be that
24 it's nonfrivolous because - - -

25 CHIEF JUDGE LIPPMAN: What's the majority -

1 - - in places that have dealt with this - - - what's
2 the majority rule?

3 MR. HULSLANDER: Nonfrivolous. In other
4 words, an appeal should - - -

5 CHIEF JUDGE LIPPMAN: That - - - that's the
6 majority rule in those places?

7 MR. HULSLANDER: Ab - - - absolutely. In
8 Georgia - - -

9 JUDGE GRAFFEO: But let me ask you - - -

10 MR. HULSLANDER: - - - Florida, Louisiana,
11 Nevada. If a - - - if a - - - an appeal is pending,
12 which a reasonable attorney would pursue - - -

13 JUDGE SMITH: Is that the same as
14 nonfrivolous? That sounds different.

15 MR. HULSLANDER: Well, it's - - -

16 JUDGE SMITH: And I've - - - I've - - - I
17 thought I was reasonable. I've had a lot of
18 nonfrivolous appeals I didn't pursue or cases I
19 didn't take.

20 MR. HULSLANDER: Well, Judge, we have to -
21 - - you have to equate it somehow. You can't equate
22 it to a likeliness - - - a likelihood-of-success
23 standard, because that's too - - -

24 JUDGE READ: So you're saying it's - - -
25 you're saying it's the same as the reasonably prudent

1 party?

2 MR. HULSLANDER: I would say reasonably
3 prudent party would pursue a nonfrivolous appeal.

4 CHIEF JUDGE LIPPMAN: What's wrong with the
5 likely-to-succeed rule?

6 MR. HULSLANDER: It's too - - - it's
7 completely speculative. I can't say how you're going
8 to rule in this case.

9 CHIEF JUDGE LIPPMAN: Well, it's a trial
10 within a trial. They figure what the like - - -

11 MR. HULSLANDER: Yes, but that's for a jury
12 to decide. This is a - - - a legal appeal. I can't
13 - - - I can't prognosticate - - -

14 JUDGE SMITH: Does it matter - - -

15 MR. HULSLANDER: - - - about what an
16 appellate court might do. I might offer an opinion.

17 JUDGE SMITH: Does it matter if you have a
18 nonfrivolous appeal, that the lawyer himself, the - -
19 - the defendant in the malpractice case has, in
20 substance, told the client, this may be nonfrivolous,
21 but it's not worth pursuing?

22 MR. HULSLANDER: Well, that's subjective,
23 and that would be on a case-by-case basis, Judge, and
24 - - - and we need to - - - I mean, frankly - - -

25 JUDGE SMITH: So you're saying that - - -

1 that you appeal everything. No matter what, you have
2 to exhaust your remedies, just as a matter of course.
3 What I'm saying is that you need to - - -

4 JUDGE RIVERA: Are you - - - are you saying
5 that would - - -

6 MR. HULSLANDER: - - - pursue - - -

7 JUDGE RIVERA: Are you saying that would
8 encompass a frivolous appeal?

9 MR. HULSLANDER: A per se rule does
10 encompass a - - -

11 JUDGE RIVERA: But wouldn't that - - -
12 wouldn't that subject both the client and the
13 attorney to sanctions? I don't think that's - - -
14 that's what you mean.

15 MR. HULSLANDER: Exactly. I don't - - - I
16 don't mean at all that we need - - -

17 CHIEF JUDGE LIPPMAN: You're cutting out
18 fri - - -

19 MR. HULSLANDER: - - - to establish a per
20 se rule.

21 CHIEF JUDGE LIPPMAN: You're saying per se,
22 assuming that it's not totally frivolous.

23 MR. HULSLANDER: Exactly.

24 CHIEF JUDGE LIPPMAN: That's - - - that's
25 the rule you'd have us - - -

1 MR. HULSLANDER: Exactly. That you pursue
2 appeals that are nonfrivolous. And that if you don't
3 pursue the - - -

4 CHIEF JUDGE LIPPMAN: Even if your attorney
5 - - - what in - - - what in this case, what did the
6 attorney suggest to - - - to the plaintiff - - -

7 MR. HULSLANDER: They pursued - - -

8 CHIEF JUDGE LIPPMAN: - - - about pursuing
9 it?

10 MR. HULSLANDER: They pursued the appeal,
11 and there were - - - and there was - - -

12 CHIEF JUDGE LIPPMAN: Did they say there
13 was a likelihood to win or what was the - - -

14 MR. HULSLANDER: There was - - - there's
15 nothing in the record about that.

16 CHIEF JUDGE LIPPMAN: There's no suggestion
17 in the record as to what the - - - the advice was?

18 MR. HULSLANDER: Absolutely not.

19 JUDGE ABDUS-SALAAM: No suggestion in the
20 record that the plaintiff was told by the, I think
21 your clients, the Brenna defendants, that they could
22 - - - that he could pursue the appeal on the one
23 remaining claim in federal court, but that the
24 likelihood of success or whatever he would get
25 wouldn't be worth it. And so he decided not to

1 pursue the appeal.

2 MR. HULSLANDER: No, that's - - - it's two
3 separate - - -

4 JUDGE ABDUS-SALAAM: Isn't that the
5 allegation?

6 MR. HULSLANDER: That's two separate
7 issues. One is to pursue the appeal. The other is
8 to try the case. And there was some discussion about
9 whether to settle or try the case, but there was
10 never any discussion about pursuing the appeal. And
11 that's critical to this case, because if there's a
12 question of fact for jury determination, there's a
13 trial left here.

14 JUDGE ABDUS-SALAAM: So the - - - the
15 choice you would give the client in that situation,
16 the prospective plaintiff in the malpractice action,
17 is pursue what's left of your case, or - - - and/or
18 pursue the appeal, or go sue your lawyers for losing
19 the - - - the major portion of the case?

20 MR. HULSLANDER: In this case, my - - - the
21 suggestion is very simple. They need - - -
22 regardless of the appeal, they need to pursue the
23 trial in order to - - - because the tri - - - there
24 is still a questionable fact - - - a question of fact
25 for jury determination. If successful at trial, they

1 would have recovered in all of their damages.

2 CHIEF JUDGE LIPPMAN: What - - - what would
3 happen if we disagreed with you, and let's say we
4 wanted to put into place a likely-to-succeed rule?
5 What would happen in your case?

6 MR. HULSLANDER: I - - - I believe in our
7 case that there was - - - clearly a likelihood of
8 success on appeal. We've shown undoubtedly that as
9 Justice Whalen agreed that we would have won that
10 appeal, based on the law.

11 CHIEF JUDGE LIPPMAN: Well, Judge Whalen
12 was in the dissent, yeah. Go ahead.

13 MR. HULSLANDER: Yes, and based - - - based
14 on the law. And - - - and they didn't say we didn't
15 - - - the majority didn't say we wouldn't have won
16 the appeal. That's not what they said. The judge -
17 - - Judge Whalen said specifically that we would have
18 won the appeal. So even if you do establish a
19 likelihood of - - -

20 JUDGE GRAFFEO: That - - - that's enough to
21 grant your client summary judgment?

22 MR. HULSLANDER: Absolutely. Absolutely,
23 because you have a du - - - you - - -

24 JUDGE SMITH: You mean, not that Justice
25 Whalen said it, but that we - - - we should, in fact,

1 agree with him that this appeal was a winner.

2 MR. HULSLANDER: That's right. Not only
3 was it a winner, but even if it is - - - even if we
4 don't say, it definitely was a winner, if it's
5 nonfrivolous, it should be pursued, because an
6 attorney should have that right to vindicate himself
7 and vindicate his representation.

8 JUDGE SMITH: This is the attorney who said
9 to - - - in a letter to the client, "unfortunately
10 you would likely have to continue to try what is left
11 in federal court before you take an appeal. It is
12 unlikely" - - - it goes on to say - - - "It's
13 unlikely you're going to win at trial". And then he
14 says "The cost will be expensive". And then he says
15 "A factor you should consider in any event there's no
16 certainty as to the outcome of a trial or an appeal".
17 You don't think the client's allowed to say, you
18 talked me out of it; I'm not doing it?

19 MR. HULSLANDER: Oh, the client - - -
20 that's not - - -

21 JUDGE SMITH: And he has to abandon his
22 claim against the lawyer who wrote the letter in
23 order to follow that advice?

24 MR. HULSLANDER: He has to abandon his
25 claim against the lawyer, in order to settle or - - -

1 or more importantly in this case, to discontinue, not
2 only the appeal, but not pursue the - - - not pursue
3 the trial. Now, it - - - no, there was discussion.
4 There's no doubt there was discussion with my client
5 of - - - about the appropriate course of action. But
6 at the end of the day, the client has a - - - the
7 lawyer has a right to vindicate himself, and if the
8 client chooses to discontinue the case, as this
9 client did, then he, too, must also forfeit the right
10 to sue his lawyer - - -

11 CHIEF JUDGE LIPPMAN: Okay.

12 MR. HULSLANDER: - - - otherwise, he can
13 just go, ah-hah, you made a mistake. We have an
14 adverse ruling. We have an adverse ruling. We're
15 going to grab you because you're an easier defendant.
16 We're going to sue you and not allow - - - and take
17 away the rights of the lawyer.

18 JUDGE ABDUS-SALAAM: What happens - - -
19 what happens to the potential legal malpractice case
20 while your appeal is pending? What if it takes
21 longer than the three-year statute of limitations,
22 then where is the claim for the potential client?

23 MR. HULSLANDER: There's two - - - that's a
24 good question, Judge. And there's two responses to
25 that. One, with continuous representation, that

1 extends the statute, if you continue to represent
2 your client. Two, cases are sued all the time and
3 then stayed, pending the outcome of the underlying
4 case. I've represented a lot of lawyers over the
5 last twenty years, and that's happened, where we've
6 stayed the case, allowed the underlying case to
7 resolve or the outcome to be determined by trial.
8 And then you know, with certainty, what will - - -
9 what will happen going forward.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.

11 Thanks.

12 MR. HULSLANDER: Thank you.

13 CHIEF JUDGE LIPPMAN: Counsel?

14 MR. HUTTER: May it please the court, in
15 response to your question, Chief Judge, the standard
16 that we're talking about is really derived from both
17 Rodriguez and Justice Whalen, as well as the Rupert
18 case, where the court - - - both the Appellate
19 Division talk about a correctable error. And I think
20 a correctable error is obviously one that's not
21 frivolous. And I think that's where judge - - -
22 Justice Whalen - - -

23 JUDGE SMITH: Well, the - - -

24 MR. HUTTER: - - - got his point.

25 JUDGE SMITH: Doesn't that - - - you say

1 correctable error; doesn't that assume that there's
2 an error? You can have a nonfrivolous appeal without
3 the - - - without the decision necessarily being an
4 error?

5 MR. HUTTER: I'm sorry; I missed that last
6 part.

7 JUDGE SMITH: You said correctable error.
8 Doesn't that assume that there was an error?

9 MR. HUTTER: Yes.

10 JUDGE SMITH: Not every nonfrivolous appeal
11 results in a holding that there was error.

12 MR. HUTTER: Well, that may be - - - that
13 may be very true, but the idea is - - - at least the
14 ultimate outcome. And when I - - - when I think when
15 they use the word "correctable error", they mean that
16 obviously it's one that's in error, and then it also
17 would be reversible error, not just a mere harmless
18 error.

19 JUDGE SMITH: But aren't - - - aren't you -
20 - - isn't the rule you're proposing requiring a lot
21 of waste of time and money of a - - - you're
22 requiring a party to take an appeal essentially just
23 to protect his legal malpractice claim, even if they
24 - - - even if by any other calculus, it doesn't make
25 sense to take the appeal?

1 MR. HUTTER: Absolutely - - - absolutely
2 not, Your Honor. In fact, in response to your
3 question, certainly if the attorneys in this case,
4 Mr. Law and Mr. Brenna, said that, you know what, the
5 appeal's not going to be worth anything; discontinue
6 it, they had input. Here, they really did not have
7 that input. The decision was made - - - in fact - -
8 -

9 JUDGE SMITH: Brenna almost said it.

10 MR. HUTTER: Well, he almost but doesn't do
11 it. In fact, what's interesting is that they got the
12 order to - - - Mr. Brenna got the order to
13 discontinue. Mr. Law was out of it by this time.

14 CHIEF JUDGE LIPPMAN: Yeah, but what would
15 - - - what would you do in this situation where - - -
16 where that was the advice that you're given, that,
17 gee, whether this is really worth the time - - -

18 MR. HUTTER: If this - - -

19 CHIEF JUDGE LIPPMAN: - - - you may not
20 succeed - - -

21 MR. HUTTER: If Mr. Brenna and Mr. Law said
22 that, you know what, an appeal is not going to work
23 anything really that I'm going to advise my
24 malpractice carrier. That may - - - obviously, we'd
25 have no complaint here. But the point is, and this

1 is what Mr. Hulslander was getting at - - -

2 CHIEF JUDGE LIPPMAN: Yeah, but I asked you

3 - - -

4 MR. HUTTER: - - - it's the policy.

5 CHIEF JUDGE LIPPMAN: - - - is what would
6 you do with the advice that you were given? You
7 would say, geez, I'm going to appeal this, because if
8 I don't, then I won't be able to bring a malpractice
9 case? Or given the kind of - - - whatever you want
10 to call it - - - at the very least, wishy-washy
11 advice that - - - that the - - - the plaintiff was
12 given, I think most people would - - - I'm not - - -
13 you know, I don't know whether I really want to go
14 forward with this. And now you're going to say that
15 they've abandoned their - - - their - - - their
16 action?

17 MR. HUTTER: Well, you're looking at it at
18 that one perspective, Your Honor, in that regard
19 about the client. But you also have to factor in we
20 also have an attorney here. And now the attorney - -
21 - basically what's happened here, as Justice Whalen
22 points out, we've created a lawsuit against another
23 person. And that person, the attorney, now has no
24 opportunity to be vindicated, except defending
25 himself or herself at the trial. And the policy - -

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JUDGE SMITH: A lot - - - a lot of people -

- -

MR. HUTTER: - - - argument of that is
unfair.

JUDGE SMITH: - - - a lot of people who are
sued have no opportunity to be vindicated except by
defending themselves at trial. That's not unique to
- - - to defendants in legal malpractice cases.

MR. HUTTER: That's true, but why - - - why
create a second lawsuit to do that? Have the
vindication by reason of pursuing an appeal which is
- - - has merit, nonfrivolous, or the cause of
action.

JUDGE SMITH: Why can't - - - why can't the
decision to pursue an appeal or not safely be left to
the self-interest of the client? If the client
really has a good appeal, he'd be crazy to throw it
away in the hope of a malpractice case.

MR. HUTTER: That's what we don't know
here, Your Honor. We - - - again, I - - - as even it
opens up, and I think Mr. Hulslander mentions it in
his brief. And maybe there could be a malpractice
action against plaintiff's now present counsel for
recommending that this appeal be not - - - not

1 pursued. I mean, you're opening up a can of worms on
2 that respect.

3 But more importantly on this, I think here,
4 when you think about the - - - the frivolous standard
5 that we're advocating here, and you look at what the
6 Appellate Division is doing, in talking about the
7 likely - - - what this now is putting in the position
8 of the trial judge, the IAS Judge when it goes back,
9 that Justice Troutman now is going to have to decide
10 how Judge Siragusa would resolve that cause of
11 action.

12 Remember, it's a federal tort claims act,
13 nonjury. How is he going to decide that? Then he
14 also - - - in the appeal, she would have to decide
15 how would the Second Circuit have resolved this.
16 Granted it's likely - - -

17 JUDGE SMITH: Isn't - - - isn't this
18 typical in legal malpractice cases? I mean, suppose
19 your guy had blown the statute of limitations.

20 MR. HUTTER: It - - - it is not, Your - - -
21 I respectfully submit, Your Honor, it's not. In this
22 par - - -

23 JUDGE SMITH: But suppose here - - -
24 suppose - - - suppose your guy had blown a statute of
25 limitations. You - - - to - - - to prevail in legal

1 malpractice, you'd have to try a whole imaginary
2 case. What would have happened in trial; what would
3 have happened at appeal.

4 MR. HUTTER: True, but there, blowing the
5 statute of limitations, obviously, that you can't get
6 around that, so there - - - any appeal from that
7 would be - - - would be frivolous.

8 But getting back, Your Honor, with this
9 point now on this, your - - - we expect a lot of our
10 trial judges. What the Appellate Division now is
11 expecting from the - - - from the trial judge is a
12 level of clairvoyance as to what another court would
13 do or another panel of judges would do. And that
14 really now gets into a level of how do you make that
15 determination?

16 JUDGE ABDUS-SALAAM: Was that really
17 different Mr. - - - Professor Hutter - - - than what
18 the dissent did here? Didn't the dissent go through
19 the whole underlying action, and whether it would
20 have been successful on appeal? And as your co-
21 counsel said, Judge Martoche said it would have been.
22 They would have - - - or was it Whalen? Judge Whalen
23 said they would have won.

24 MR. HUTTER: Again, that's - - - that's his
25 prediction. I - - - I would assu - - - make that

1 assessment I would agree with him. But now, I'm
2 talking about what the trial judge is going to have
3 to be doing when this goes back.

4 And then taking your question one step
5 further, if - - - if Justice Troutman now says, well,
6 it's a question of fact, you now ask the jury. They
7 jury's going to have to decide, well, what would have
8 Jus - - - Judge Siragusa have done. And I think that
9 - - - that's why that standard that they're talking
10 about doesn't work.

11 Now I'm sure you're thinking, we always use
12 this likely-to-succeed standard for preliminary
13 injunctions, where the trial judge has to make a
14 determination is this appeal? But the difference
15 here is with that the trial judge is making the
16 determination based upon her view of the evidence,
17 what is going to go on.

18 This goes another step further. It's now
19 asking, what would another court do? And I - - - I
20 think here, and certainly with respect to an appeal
21 of the Appellate Division, how that result may turn
22 about, you may have - - - it depends upon the panel.
23 I mean, a lot of - - - your court, the First
24 Department, is no - - - is not going to say, not in a
25 bad way, but they're very independent and they go

1 their different ways. A different panel of five
2 judges could go another different way. How do we
3 know that? That's the - - -

4 JUDGE SMITH: And the same is true in the
5 Second Circuit as - - -

6 MR. HUTTER: - - - sort of thing that we're
7 looking at. And our - - -

8 JUDGE SMITH: The Second - - - the Second
9 Circuit panels have been known to - - - to
10 distinguish each other's cases rather aggressively
11 sometimes.

12 MR. HUTTER: The same thing. The same
13 thing, Your Honor. How do we - - - how do we make
14 that prediction? And then the point is, now they
15 say, we have to go and prove that at trial. How do
16 we - - - again, we have to then prove in order to get
17 this case dismissed that he would have prevailed.
18 You're going to have another trial within a trial.

19 JUDGE SMITH: But if - - - if this were the
20 case of the blown statute of limitations, you'd have
21 exactly the same problem and no cure for it.

22 MR. HUTTER: I don't think - - - well,
23 again, it'd be the question then - - - he blew it.
24 They would be how and why.

25 JUDGE SMITH: This case. I'm assuming this

1 case. This exact case, but instead of making the
2 error that he did make, he just - - - he just didn't
3 bring the case timely. It never gets filed. It's
4 never any good. It never exists. Then you have all
5 the problems you're talking about, a completely
6 imaginary case, that has to be tried before another
7 judge or jury.

8 MR. HUTTER: Well, again, I think there the
9 lawyer would say, wait a minute, I have no defense.
10 That blown statute, no way. I'd be sanctioned under
11 Rule 130.

12 JUDGE SMITH: Well, well, wait. His - - -
13 his defense would be, yeah, I blew the statute, but
14 it was a lousy case to begin with, and you never
15 would have recovered a dime.

16 MR. HUTTER: But - - - but that - - -

17 JUDGE SMITH: And that's - - - that's a
18 question for the jury.

19 MR. HUTTER: But trying to argue at that
20 point that the statute really wasn't - - - it'd be -
21 - - it would border on frivolous. And again, that's
22 the standard.

23 And I'd just say - - - my time is just
24 about up.

25 CHIEF JUDGE LIPPMAN: Okay, go ahead.

1 MR. HUTTER: I think the advantage of what
2 we're arguing here, what Justice Whalen is basically
3 saying on this frivolous standard, is that we have a
4 bright line rule.

5 CHIEF JUDGE LIPPMAN: Okay, counsel.
6 You'll have your rebuttal.

7 MR. HUTTER: Okay.

8 MR. BOGNER: Good afternoon, and may it
9 please the court, Brian Bogner, from LoTempio &
10 Brown, on behalf of John Grace.

11 CHIEF JUDGE LIPPMAN: Counsel, what's the
12 rule we should be applying here?

13 MR. BOGNER: Well, for the merit analysis,
14 I think that the only standard has to be the would-
15 have-succeeded standard. I think that's based in
16 case law involving legal malpractice cases. What a
17 plaintiff has to prove in a legal malpractice case,
18 with respect to causation, is that he would have
19 succeeded in the underlying action. The defendant is
20 entitled to summary judgment if he can prove that the
21 plaintiff would not have succeeded. That same
22 standard should be applied here.

23 CHIEF JUDGE LIPPMAN: How difficult is it
24 to - - - to make that proof?

25 MR. BOGNER: I don't think it's very

1 difficult at all. I think if you can - - - if the
2 trial court - - -

3 JUDGE GRAFFEO: Your adversary says it
4 leads to a lot of guessing as to what would happen.
5 It's speculative.

6 MR. BOGNER: I think that's what happens in
7 legal malpractice cases anyway. So, in fact, the - -
8 - the court in Crestwood Cove Apartments v. Turner,
9 address this very issue. And it stated that courts
10 and juries retain the ability to review the
11 underlying matter and determine what should have
12 happened. That's what happens in legal malpractice,
13 whether or not the plaintiff would have succeeded in
14 the underlying action.

15 There's no difference here. The trial
16 court and the jury can determine whether or not Mr.
17 Grace, if he had appealed, would have succeeded on
18 the merits. Now, the merit analysis - - -

19 JUDGE GRAFFEO: How do they determine what
20 an appellate court would do?

21 MR. BOGNER: It's a - - - it's a legal
22 question that obviously most likely would be
23 determined by a judge in the context of a summary
24 judgment motion, but I don't think the trial court is
25 precluded from addressing federal law, which I think

1 counsel's asserting that a trial judge in this case
2 shouldn't address the federal law.

3 JUDGE SMITH: So your - - - your vision of
4 the legal malpractice case here, is an issue that's a
5 motion for summary judgment in which, I guess, you -
6 - - the defendant says the - - - Judge Siragusa - - -
7 would have been affirmed, and that's the end of the
8 case, goodbye. Did I get that right?

9 MR. BOGNER: If - - - there could be
10 factual issues at play here, and I think there - - -
11 there certainly are in - - - namely that's the advice
12 that Mr. Grace was given for - - -

13 JUDGE SMITH: I guess I - - - I guess I'm
14 confused. If Judge Siragusa would have been
15 affirmed, that means that the error - - - the
16 lawyer's error - - - in failing to join the doctor
17 originally becomes a problem. Right?

18 MR. BOGNER: Correct.

19 JUDGE SMITH: So it's the plaintiff who
20 wants to say that Judge Siragusa would have been
21 affirmed.

22 MR. BOGNER: Correct.

23 JUDGE SMITH: Okay. And do you - - - you
24 make that mo - - - and you make a motion for summary
25 motion on that issue, and the - - - and the court

1 pretends it's the Second Circuit, and decides how it
2 would have come out on that appeal?

3 MR. BOGNER: Correct.

4 JUDGE SMITH: And so that - - - that issue
5 never goes to the jury what the Second Circuit would
6 have done?

7 MR. BOGNER: Not necessarily, because if,
8 for example, the defendants move for summary judgment
9 and there's some factual issues. And I think there
10 certainly are factual issues, because I don't think -
11 - -

12 JUDGE SMITH: Well, how can there be a
13 factual issue as to how the Second Circuit would have
14 decided this appeal?

15 MR. BOGNER: Well, I think the factual
16 issue is because we're looking at an analysis on a
17 merits of the appeal, but that shouldn't be the only
18 factor. And we have to consider what Mr. Grace was
19 told or more importantly, what he wasn't told.

20 JUDGE SMITH: But I - - - I understand
21 there would be a lot of jury issues in the case, but
22 this - - - I'm just saying, this isn't one of them,
23 what the Second Circuit would have decided.

24 MR. BOGNER: No, it's a legal issue. And -
25 - - and to that point, I just want to follow up on

1 that point.

2 JUDGE GRAFFEO: And if - - - and if you
3 adversaries have a cross motion for summary judgment,
4 it's the same analysis? The judge is determining
5 their issue as well?

6 MR. BOGNER: Correct. Correct. For the
7 standard, I definitely think it's - - - on the merit
8 analysis, it's the would-have-succeeded standard. I
9 think that's based in law. But other factors that
10 need to be considered are, the cost of the appeal,
11 and what the plaintiff, in this case, Mr. Grace, knew
12 at the time he decided to discontinue his case.

13 CHIEF JUDGE LIPPMAN: What did he know?

14 MR. BOGNER: Well, I think - - - it's not
15 very clear. Certainly, we've alluded to it numerous
16 times here already, that he wasn't given advice on
17 whether he should or should not appeal. He was, I
18 think, dissuaded from appealing. I certainly think
19 if I got that advice I wouldn't necessarily jump to
20 appeal to take on those costs, and it wasn't just the
21 cost of the appeal.

22 He was going to have to try the remaining
23 action, the minor action against the VA hospital, pay
24 for an expert - - - that was going to be costly.
25 That would take two to three years to complete. And

1 then once that was completed, he would then appeal
2 and we all know appealing isn't cheap either. He
3 would have had to pay for all the briefs.

4 And the standard the defendants want to
5 have this court use doesn't consider those costs and
6 the client's ability to pay for that appeal.

7 JUDGE RIVERA: So - - - so is - - - is the
8 cost why you would argue your opponent's approach,
9 where you file the appeal and you file the
10 malpractice action simultaneously, have parallel
11 actions going - - - is it the cost associated with
12 that, or is - - -

13 MR. BOGNER: Yeah, certainly.

14 JUDGE RIVERA: - - - or anything else that
15 you would say makes that approach really unwieldy or
16 inappropriate?

17 MR. BOGNER: There's certainly increase to
18 the cost of litigation both for a client, but there's
19 also a burden on the courts, because now we have an
20 appeal pending with another action that is likely to
21 need motion practice, or at the very least - - -

22 JUDGE SMITH: But he - - - he - - - but
23 he's in principle, he's right, or they're right,
24 aren't they, that the statute of limitations problem
25 is surmountable, either by a stipulation or just by

1 filing a stayed action?

2 MR. BOGNER: It's certainly something that
3 can be resolved, but it - - - it does increase the
4 cost of litigation, because there's filing fees,
5 motion fees, time spent arguing that motion.

6 JUDGE RIVERA: But of course, the way the
7 appeal turns out, you might have another action
8 anyway.

9 MR. BOGNER: Correct.

10 JUDGE RIVERA: Right?

11 MR. BOGNER: Correct.

12 JUDGE SMITH: Why - - - I'm not sure this
13 matters or not, maybe you can tell me if it does
14 after you answer the - - - why did this plaintiff
15 choose to discontinue, rather than take the small
16 settlement that was on the table?

17 CHIEF JUDGE LIPPMAN: And did it matter?

18 MR. BOGNER: I don't have an answer for why
19 he didn't take it. We're not there yet. This is - -
20 - this - - - you have to remember, this summary
21 judgment - - -

22 JUDGE SMITH: Okay, then what's the answer
23 to does it matter? And does it matter to this case
24 whether he abandoned his appeal or settled it?

25 MR. BOGNER: I don't think it matters

1 because if he had settled for that nominal amount,
2 presumably the defendants would argue the same - - -
3 the same arguments they did, that he settled,
4 therefore, he couldn't appeal and, therefore, he's
5 precluded.

6 I think the case law is clear that if you
7 can show that you've settled for less than full
8 value, but that you only did that because of an
9 attorney's malpractice, you still have a viable
10 malpractice claim.

11 JUDGE SMITH: It does - - - if - - -

12 MR. BOGNER: How it's relevant - - -

13 JUDGE SMITH: If - - - if you settle - - -

14 I mean, it looks to me as though, if you win
15 everything else in this case, and get the best
16 results you can, you've got a mitigation of damages
17 problem to the extent of that settlement you never
18 picked up. Would you agree with that?

19 MR. BOGNER: Of course, of course. If they
20 want to argue we had a duty to mitigate damages, and
21 we didn't, there's certainly going to be an offset
22 there.

23 CHIEF JUDGE LIPPMAN: Okay, counselor.
24 Anything else, counselor?

25 MR. BOGNER: No.

1 CHIEF JUDGE LIPPMAN: Okay, thanks.

2 MR. BOGNER: Thank you.

3 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

4 MR. HUTTER: We focused a lot on the - - -
5 Judge Siragusa's decision. You just heard counsel
6 say that the remaining cause of action, just a minor
7 cause of action. The fact is, is that he could have
8 recovered all his - - - compensation for all his
9 injuries under that cause of action, undisputed.

10 JUDGE SMITH: Mr. Brenna wasn't very
11 optimistic, was he?

12 MR. HUTTER: Pardon me?

13 JUDGE SMITH: Mr. Brenna wasn't very
14 optimistic about that possibility?

15 MR. HUTTER: Well, we don't know why. I
16 mean, it - - - it was there. It was clear that they
17 blew the scheduling. In that respect, Judge Siragusa
18 said, you know what? That's a valid cause of action.

19 JUDGE SMITH: Is that - - - is that another
20 count in the malpractice claim against Brenna that he
21 misadvised the client that that claim wasn't worth
22 much?

23 MR. HUTTER: No, it's not in there, Your
24 Honor. It's not a separate claim.

25 JUDGE SMITH: Could it be?

1 MR. HUTTER: It's not a separate claim. So
2 this is - - -

3 JUDGE SMITH: Could it be?

4 MR. HUTTER: This is a valid cause of
5 action.

6 JUDGE SMITH: Did - - - did you just come
7 up with another claim for your adversary here?

8 MR. HUTTER: I'm sorry.

9 JUDGE SMITH: I mean, he - - - Brenna - - -

10 MR. HUTTER: Remember, I don't represent
11 Brenna, Your Honor.

12 JUDGE SMITH: I understand; I understand.
13 But - - - but Brenna tells Grace this - - - this law
14 - - - what's left of this lawsuit at trial isn't - -
15 - is unlikely to prevail. You say you don't know why
16 he thought that and maybe he was wrong. So you think
17 maybe there's a - - - maybe - - - maybe Mr. Grace
18 should add a count to his claim against Mr. Brenna?

19 MR. HUTTER: No, I don't think so. I would
20 - - - what I - - - what I - - - and I don't want it
21 to seem like I'm being a wise guy, but I would - - -
22 might want to think about adding a claim for
23 malpractice against his present attorneys for telling
24 Brenna discontinue, while Brenna was still - - -

25 JUDGE SMITH: In telling - - -

1 MR. HUTTER: - - - representing him.

2 JUDGE SMITH: In telling - - -

3 CHIEF JUDGE LIPPMAN: The client.

4 JUDGE SMITH: - - - oh, for ordering Mr.

5 Brenna to stop.

6 MR. HUTTER: So, I think there, Your Honor,
7 that's a cause of action. It's a - - - it's a good
8 one. And now under the Appellate Division's
9 standard, we have to go back, and we now have to show
10 that we would be likely to prevail - - - that we
11 would - - - that we'd be likely to prevail on that,
12 and again - - -

13 JUDGE GRAFFEO: Even if - - -

14 MR. HUTTER: - - - it gets back to
15 clairvoyance.

16 CHIEF JUDGE LIPPMAN: Why isn't that fair -
17 - - why isn't that fair that that would be your - - -
18 the standard?

19 MR. HUTTER: Pardon me?

20 CHIEF JUDGE LIPPMAN: Putting aside the
21 difficulty, why isn't that a fair standard?

22 MR. HUTTER: Because it's not fair because
23 one, it's a very - - -

24 CHIEF JUDGE LIPPMAN: As opposed to your
25 standard. What's better from a policy perspective?

1 MR. HUTTER: The policy is the standard
2 that Justice Whalen is advocating. Because one, it
3 takes into account the lawyer who now loses the
4 opportunity to vindicate himself. Secondly, it's a
5 bright line rule, which is going now eliminate a lot
6 of the questions that we're having now, well, should
7 you appeal, or should you not appeal - - - it's
8 called standard of frivolous. We all know what
9 frivolous is. And in that - - - so in that sense,
10 it's - - - it's more do - - - user-friendly.

11 JUDGE ABDUS-SALAAM: Whatever standard - -
12 -

13 MR. HUTTER: But more importantly, that
14 likely standard, again it gets back to the judge has
15 got to be clairvoyant about what another court would
16 do. I'm sorry, Your Honor.

17 JUDGE ABDUS-SALAAM: Whatever standard we
18 adopt, does the cost - - - does the ability to pay
19 the cost of an appeal have to be - - - is that one of
20 the considerations we - - - this court should take
21 into account in considering whatever standard we come
22 up with?

23 MR. HUTTER: Sure, costs do - - - obviously
24 come into account. And again, maybe that's what - -
25 - there should have been a sit down with all the

1 parties here, you know - - - and certainly I think a
2 lawyer may say, wait a minute, you're going to
3 discontinue; I think we have a good appeal. I'll - -
4 - I'll take that appeal without any cost. In that
5 sense, we're all talking about the idea of cost of
6 litigation. We're throwing that out left and right.
7 These things are - - - these things are work - - -
8 workable. But this - - - but Mr. Law did not have
9 that opportunity.

10 And this last thing - - - I'm just - - - I
11 don't want to push myself here, Your Honor. The idea
12 here about this - - - the blown statute of
13 limitations argument that Justice - - - Judge Smith
14 has been pointing out, that this is not a blown
15 statute of limitations one. In this respect, when we
16 look at this, we can see that here as Justice Whalen
17 was doing, at least on the merits of the independent
18 contractor, we have a good issue here.

19 CHIEF JUDGE LIPPMAN: Okay, counsel.

20 MR. HUTTER: Thank you.

21 CHIEF JUDGE LIPPMAN: Thanks. Thank you
22 all.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Grace v. Law, No. 165, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: September 25, 2014