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August 18, 2020

VIA TRUEFILING

Hon. Tani Cantil-Sakauye, Chief
Justice, and the Associate Justices
CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, California 94102-4797

Re: ***Masellis v. Law Office of Leslie F. Jensen, et al.*,**
No. S263593
Petition for Review filed July 29, 2020

To the Chief Justice and the Associate Justices of the California Supreme Court:

We are counsel to amicus curiae AXA XL. AXA XL now urges the Court to grant the petition for review in this case. We submit this letter pursuant to California Rules of Court, rule 8.500.

1. Interest of Amicus Curiae and Overview.

AXA XL is a provider of global insurance and reinsurance services. It has more than one hundred offices on six continents. AXA writes billions of dollars annually in gross insurance and reinsurance. Money paid for professional liability insurance coverage makes up about twenty percent of all premiums AXA receives from policyholders. AXA's insureds include thousands of law firms and lawyers in California.

Undue exposure of AXA's insureds to liability in "settle-and-sue" cases in the California courts places them at heightened risk. It threatens harm to their ability to negotiate and advise their clients about settlements in the many thousands of civil cases which are settled out of court each year. This boosts burdens on the courts as well as on the parties and their counsel in a time when pressures on judges and their dockets have never been heavier. It also portends increased liability insurance premiums, a cost of practicing law which will surely be passed on to clients in the form of higher fees.

The Court of Appeal's decision exacerbates these risks and burdens. It does this by wrongly lowering the burden of proof necessary for plaintiffs to prove causation and damages in "settle-and-sue" cases or at least muddling how judges and juries should construe that burden. It also creates great uncertainty in the law of professional liability for lawyers, threatens increased malpractice insurance premiums for all private-bar practitioners, and produces no corresponding benefit to the civil justice system. And it improperly expands the role of lawyers who serve as expert witnesses in "settle-and-sue" cases and threatens encroachment on the role of juries. These are matters of great statewide importance.

For these reasons, the Court should grant review.

2. Existing Law in "Settle-and-Sue" Cases.

California law requires the plaintiff in a "settle-and-sue" case to prove causation and damages to a legal certainty, i.e., that, if not for the malpractice, she "would certainly have received more money in settlement or at trial." (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 166; see *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1528 [citing *Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1461-1462].) This means proving both recoverability and collectability of a hypothetical judgment in the underlying case in which the malpractice supposedly occurred. (See *Campbell v. Magana* (1960) 184 Cal.App.2d 751, 754.) The shorthand label for this burden of proof is "case-within-a-case" or "trial-within-a-trial." (See *Mattco Forge, Inc., v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 833.)

The courts have repeatedly recognized the formidable problems of proof this burden poses to plaintiffs. (See *Mattco Forge*, *supra*, 52 Cal.App.4th at pp. 833-834 [quoting Bauman, *Damages for Legal Malpractice: An Appraisal of*

the Crumbling Dike and the Threatening Flood (1988) 61 Temp. L. Rev. 1127, 1128].)

Accordingly, to prevail, the plaintiff in a settle-and-sue case must prove that the settlement was outside "the realm of reasonable conclusions[,]" i.e., a "significant difference, at minimum, between what the settlement was and what [plaintiff] would have gotten at trial." (*Barnard v. Langer*, *supra*, 109 Cal.App.4th 1453, 1461, fn. 12.)

There is a good, practical reason for this rule. In settle-and-sue cases, the fact of damages is "inherently speculative." (*Filbin v. Fitzgerald*, *supra*, 211 Cal.App.4th at p. 166.) Settlement amounts often are the product of educated guesses as to the amount that can be gotten at trial and what the opponent was willing to pay or accept. "Even skillful and experienced negotiators do not know whether they received the maximum settlement or paid out the minimum acceptable. Thus, the goal of a lawyer is to achieve a reasonable settlement, a concept that involves a wide spectrum of considerations and broad discretion." (*Barnard v. Langer*, *supra*, 109 Cal.App.4th at p. 1462, fn. 13 [internal quotation marks omitted].) And, indeed, it may be that non-monetary interests of the client—the impact of litigation, relationships with other parties, or other factors—justify a compromise that is outside potential trial outcomes but is in the same realm.

So, in adjudicating a claim of malpractice in settlement, the court must determine "whether the settlement is within the realm of reasonable conclusions, not whether the client could have received more or paid less. No lawyer has the ability to obtain for each client the best possible compromise but only a reasonable one." (*Barnard v. Langer*, *supra*, 109 Cal.App.4th at p. 1462, fn. 13.) If the plaintiff cannot prove to a legal certainty that the settlement was outside the realm of reasonableness, then her malpractice claim fails as a matter of law. (*Ibid.*; see also *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1528.)

Deeply rooted public policy supports holding plaintiffs to a rigorous burden of proof in settle-and-sue cases as the "hindsight vulnerability of lawyers is particularly acute when the challenge is to the attorney's competence in settling the underlying case." (*Barnard v. Langer*, *supra*, 109 Cal.App.4th at p. 1462, fn. 13.) And, otherwise, the fact finder would not be able to say that the lawyer's conduct caused damages "to a legal certainty."

3. What the Court of Appeal Did.

In re-defining or at least muddling what "legal certainty" means, the Court of Appeal relied heavily on a law review article published in 2018 by Texas lawyer and law professor Vincent R. Johnson. In that article, professor Johnson wrote that "legal certainty" does not exceed the "preponderance of the evidence rule" generally applicable in civil trials.

The court noted the testimony of Masellis's expert witness attorney Jakrun Sodhi at trial. Attorney Sodhi testified that a hypothetical trial which Ms. Masellis avoided by settling her divorce case could have yielded a $1.5 million dollar recovery, a number which Sodhi described as "the low end of what could have been obtained."[1] After deliberating less than a day, the jury awarded Ms. Masellis $300,000 in damages.

The Court of Appeal affirmed the judgment, concluding that "legal certainty" was "ambiguous" and means only "the level of certainty required by law, which is established by" the preponderance of the evidence standard. The court rejected a challenge to Sodhi's testimony as speculative, ruling that a "reasonable approximation or inference" could suffice in lieu of certainty. It cursorily dismissed the public policy of promoting settlements as a basis for reversing the judgment.

4. Need to Correct, or at Least Clarify, Plaintiffs' Burden of Proof and Proper Role of Attorney-Experts in This Setting.

Review is needed to clarify what is at least confusion and at worst a radical lowering of the standard of proof as to causation and damages in settle-and-sue cases.

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[1] Ironically, after the trial, the State Bar Court suspended attorney Sodhi from the practice of law for thirty days. The Bar found attorney Sodhi culpable for, *inter alia*, failure to perform legal services with competence resulting in a poor settlement on behalf of a client on whose case he had admittedly "dropped the ball." (Decision, *In the Matter of Jakrun S. Sodhi* (State Bar Court of California case no. 15-O-13337 (16-O-12705) (October 29, 2018), at pp. 15, 16.)

Virtually every civil settlement can be questioned later as a product of attorney incompetence if only the questioner frames the question academically and confusingly, as the Court of Appeal did. That question is whether it is more likely than not that, in a hypothetical jury trial, the plaintiff would have both received and collected on a judgment that exceeded the settlement to which she consented with the advice of her counsel. Speculation must not supply the answer to this question. But speculation is just what the Court of Appeal's decision has invited.

The reality is no honest lawyer, law firm, or insurance carrier recommends a settlement without wondering afterward whether he, she, or it may have left some money on the table. This wondering is no more than consciousness of the many factors that affect settlements that have nothing to do with the standard of care which governs lawyers.

Is the plaintiff-client elderly, ill, or in financial distress, so as to make exposing her to a trial at which she could hypothetically recover a large damages award a foolish gambit? In a negotiation in which a defendant-client is asked to pay money personally, has nearly all of his insurance coverage been depleted by defense costs, such that exposing him to a trial at which he could possibly suffer pauperization is a poor choice compared to a settlement which leaves his net worth diminished but still intact? Does a chump-change settlement paid by a manufacturer-defendant send a message to other would-be plaintiffs, triggering costly class-action litigation whose cost exceeds the savings achieved by the chump-change settlement? Are the stresses and costs to quality of life imposed on a frail client by a lengthy jury trial worth trading for an amount of cash that is six figures but less than the million dollars which defendant is secretly willing to pay for a dismissal and release? Is the distress and psychological harm suffered by children in protracted divorce litigation preferable to a settlement which, albeit less than one parent hopes for, ends the litigation and lets them start to heal?

In the real world in which lawyers and their clients must live, the Court of Appeal's decision raises these and other troublesome questions. One of the fundamental reasons for settling is to take away uncertainty and control the outcome of the dispute to achieve an acceptable, if imperfect,

conclusion. The potential mischief which the court's new pronouncement may unleash is easy to see. Lawyers fearful of "settle-and-sue" cases will hesitate to recommend settlements they know are achievable and reasonable, for fear of a jury's later disagreement that they got the last dollar theoretically available. Clients uneasy over their counsel's hesitation to recommend a settlement will veto the deal and opt for trial, figuring the lawyer would wholeheartedly recommend the settlement if only she really believed in it. Courts already congested with backlogs of civil cases will see fewer settlements and set more cases for trial.

With fewer settlements, insurance carriers may pay out fewer dollars in the short term. But, with any settlement conceivably subject to challenge as less than the very best deal supposedly achievable, they will wind up paying more in defense costs and judgments. Some of those judgments will be at the urging of attorney-experts like Mr. Sodhi. It was his professional opinion that petitioner could have gotten her client more money had she only recommended the client reject the $1.2 million in cash and $20,000 per month in spousal and child support which were on the table, rolled the dice, and tried to do better at trial. Insurance companies are in business to earn profits for their shareholders. They can and will boost premiums to keep doing so should losses from increased claims escalate. To many of the sole practitioner and small-firm lawyer who will be asked to pay those higher premiums, this will be a significant added burden.

These scenarios are not fanciful. Empirically, there is good reason to fear them. Most plaintiffs who decide to pass up a settlement offer and go to trial end up getting less money than if they had taken the offer. Many, but not most, defendants also make the wrong decision by going to trial. In just fifteen percent of cases do post-trial outcomes justify the decision to reject a pre-trial settlement opportunity. (See J. Glater, *Study Finds Settling is Better Than Going to Trial*, N.Y. Times (August 7, 2008). Ego, uncertainty, and the unpredictability of jurors play their part in these parties' legal fates. It cannot be the case that most of these parties employ incompetent counsel. It is more likely that the decision to settle or go to trial is the product of many factors, only one of which is the competence of attorneys. But what is unarguable from the data is this: most of the time, taking the deal is the better call.

Placing lawyers and insurance carriers at heightened risk for recommending that call is antagonistic to the interests of all involved. In California, as elsewhere, the vast majority of civil cases are settled outside of court. This Court has long stated this State's strong policy favoring that very thing. (*Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 270; *T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280; *McClure v. McClure* (1893) 100 Cal. 339, 343.)

That strong policy warrants the drawing of bright lines in this area. Those bright lines should give clear guidance to attorneys, law firms, and insurance carriers. The law should provide reasonable protection to the private bar against undue exposure to ruinous liability for helping clients achieve settlements which are all too easily second-guessed by persons who are strangers to the negotiations which produced a litigation-ending deal and the hard realities the client was facing in uncertain circumstances.

In addition, the Court should grant review to clarify the proper role of lawyer-experts in "settle-and-sue" cases. An expert witness is "a *witness*, not the judge." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1161 [italics in original] [reversing judgment for admission of improper expert opinion testimony concerning defendants' supposed nondelegable duty, illegal hauling, illegal contracts, requirement to be registered as contract carrier, and liability for negligence].) Thus if the expert testifies about what defendants' legal duties are and whether defendants breached those duties, he "completely overstep[s] [her] legal bounds." (*Summers*, *supra*, 69 Cal.App.4th at p. 1160 [collecting cases].)

Law also bars experts from applying law to fact – something that is the province of court and jurors alone. (*Lombardo v. Huysentry* (2001) 91 Cal.App.4th 656, 666; *Summers*, supra, 69 Cal.App.4th, at p. 1179.) Experts' attempted "expression of [their] general belief as to how the case should be decided" suggests the Court "may shift responsibility for decision to the witnesses[.]" It is "wholly without value to the trier of fact in reaching a decision." (*Summers*, *supra*, 69 Cal.App.4th at pp. 1182-1183.) "The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion." (*Ferreira v. Workmen's Comp. Appeals Board*

(1974) 38 Cal.App.3d 120, 12; see also *Los Angeles Teachers Union v. Los Angeles City Board of Education* (1969) 71 Cal.2d 551, 556.)

The courts have condemned "trial by oath" in which the side producing the greater number of lawyers able to opine in their favor wins:

> [T]he calling of lawyers as "expert witnesses" to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts, and results in no more than a modern day "trial by oath" in which the side producing the greater number of lawyers able to opine in their favor wins.

(*Downer v. Bramer* (1984) 152 Cal.App.3d 837, 842.

Attorney Sodhi's role at the trial was simple. It was to tell the jury attorney Jensen breached her duty of care and caused damage to Ms. Masellis. The Court of Appeal was wrong to endorse this role. Mr. Sodhi's opinion was not true expert opinion. It was advocacy cloaked in the impressive mantle of "expert," akin to a closing argument delivered from the witness stand under oath. (See *Summers*, *supra*, 69 Cal.App.4th at p. 1185.) Mr. Sodhi's testimony usurped the jury's role, which was to determine causation and damages. The Court of Appeal ought to have rejected this testimony as a basis for affirmance of the trial court's judgment.

5. Conclusion.

Depublication provides no lasting remedy in this setting. Both the Court of Appeal's decision and existing law have created uncertainty as to what, exactly, is plaintiffs' burden of proof as to causation and damages in legal malpractice cases and how, exactly, courts should limit what attorney-experts may testify in this area. This Court should grant review and eliminate that uncertainty.

Thank you for your kind attention to this matter.

Respectfully submitted,

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