

# benchmarks

NAVIGATING THE HAZARDS OF LEGAL MALPRACTICE

8.12.04

## Evidence of Successful Appeal Required in Legal Malpractice Case

By Jeffery S. Matis

In the case of *Tull v. State Appellate Defender Office*, the Michigan Court of Appeals clarified the burden of proof that a plaintiff must establish in order to prevail in a legal malpractice suit involving an appeal of the underlying case.

In *Tull*, Defendant represented Plaintiff in the appeal of Plaintiff's felony murder conviction. Plaintiff's appeal was dismissed by the Michigan Court of Appeals because it was not timely filed by the Defendant. Plaintiff then sued Defendant for legal malpractice and alleged that, but for the negligence of the Defendant, in failing to timely file an appeal, Plaintiff would have succeeded in the appeal of the criminal conviction.

The Michigan Court of Appeals affirmed the trial court dismissal of Plaintiff's case and held that, in order for a Plaintiff to prevail in a legal malpractice case arising out of an appeal, the Plaintiff must establish that the appellate court: (1) would have had jurisdiction to hear the appeal, (2) would have granted review, when review is discretionary, and (3) would have modified the trial court's ruling.

### SECRET WARDLE NOTES:

This case is relevant because it establishes that, in order for a plaintiff to prevail in a legal malpractice case, that arises out of an appeal, the plaintiff must present admissible evidence that establishes that the appellate court would have heard plaintiff's appeal, and plaintiff would have been successful in the appeal.

If you have any legal malpractice cases involving an underlying appeal, discovery should be conducted to determine what admissible evidence plaintiff will rely upon to establish that plaintiff would have been successful in the appeal. Barring the production of any such evidence, counsel should file a motion to dismiss the plaintiff's case.

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Specifically, the *Tull* appeals court held that the Plaintiff's case was rightfully dismissed where the Plaintiff failed to plead any facts or come forward with any admissible and competent evidence to establish that Plaintiff would have prevailed on appeal in the underlying case. The fact that Plaintiff's complaint contained conclusory assertions concerning Plaintiff's success on appeal was insufficient and did not meet Plaintiff's burden of proof.

Finally, the Court of Appeals held that for a Plaintiff to meet his or her burden of proof and create a fact question, concerning whether the Plaintiff would have prevailed on appeal in the underlying case, the Plaintiff must rely on expert witness opinion testimony that the appeal would have been granted and successfully resulted in a favorable decision for the Plaintiff.

## CONTACT US

### **Farmington Hills**

30903 Northwestern Highway, P.O. Box 3040  
Farmington Hills, MI 48333-3040  
Tel: 248-851-9500 Fax: 248-851-2158

### **Mt. Clemens**

94 Macomb Place, Mt. Clemens, MI 48043-5651  
Tel: 586-465-7180 Fax: 586-465-0673

### **Lansing**

6639 Centurion Drive, Ste. 130, Lansing, MI 48917  
Tel: 517-886-1224 Fax: 517-886-9284

### **Grand Rapids**

1550 East Beltline, S.E., Ste. 305, Grand Rapids, MI 49506-4361  
Tel: 616-285-0143 Fax: 616-285-0145

### **Champaign, IL**

2919 Crossing Court, Ste. 11, Champaign, IL 61822-6183  
Tel: 217-378-8002 Fax: 217-378-8003

[www.secrestwardle.com](http://www.secrestwardle.com)

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## CONTRIBUTORS

### **Professional Liability Practice Group Chair**

Mark E. Morley

### **Legal Malpractice Practice Group Chair**

Jeffery S. Matis

### **Editor**

Carina Carlesimo

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