

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0526

EVANSTON INSURANCE COMPANY

VERSUS

DAVID KIMMEL, UNGARINO & ECKERT, ATTORNEYS AT LAW, L.L.C.
AND CONTINENTAL CASUALTY COMPANY

Judgment Rendered: DEC 14 2011

APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 556,300, DIVISION "D"

THE HONORABLE JANICE G. CLARK, JUDGE

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

JP Gaidry, J. CONCURS

McDONALD, J.

This is a legal malpractice suit against the defendants, David Kimmel and Ungario & Eckert, LLC, arising from their representation of Keller Oil Company d/b/a Scenic Chevron and its insurer, Evanston Insurance Company. For the following reasons, we affirm the trial court's summary judgment in favor of the defendants, dismissing the suit.

The underlying suit in this matter involved a motorist who was killed at the intersection adjacent to the Scenic Chevron station when her vehicle was hit by a speeding Baton Rouge police officer on his way to work. The officer was not responding to an emergency call and did not have any emergency signals activated. The case against Chevron relied on the assertion that it and the state were responsible for obstructions in the right of way that hindered the line of sight of the officer.

Prior to trial, the plaintiffs settled with the City of Baton Rouge and dismissed the state. After a jury trial, fault was allocated at 80% to Chevron (and Evanston) and 20% to the City of Baton Rouge, and the plaintiffs were awarded \$3.6 million in damages. Evanston provided a general liability policy to Chevron with coverage of \$1 million. During the trial, no one introduced the policy into evidence. After the verdict was rendered, Evanston retained separate counsel to file a motion for new trial for the limited purpose of showing its policy was limited to \$1 million. The motion was denied. This judgment was not appealed. Rather, Evanston settled with the plaintiffs for \$2.425 million. Evanston then filed suit against Kimmel, his law firm, Ungarino & Eckert, LLC, and Continental Casualty Company, the malpractice liability insurer of Kimmel and the law firm.

That suit is now before us as an appeal of the trial court's grant of summary judgment in favor of the defendants. The trial court found that Evanston was

estopped from pursuing the malpractice action after settlement of the underlying claim and there were no genuine issues of material fact.

DISCUSSION

It is well-established that the plaintiff in a legal malpractice action has the burden of proving: (1) the existence of an attorney-client relationship; (2) negligent representation by the attorney; and (3) loss caused by that negligence. *Costello v. Hardy*, 03-1146 (La. 1/21/04), 864 So.2d 129, 138. Defendants argue that there was no malpractice in this matter, and more importantly, that because plaintiff settled the claim, it was denied the right to prove error by the trial court and therefore, plaintiff is estopped from pursuing the claim.

Evanston argues that the law does not per se require a plaintiff in a legal malpractice action to appeal an underlying adverse verdict in order to maintain its claim against the attorney. We agree. We find, after review of the jurisprudence, that each claim must be decided on its own merits. *See MB Industries, LLC v. CNA Insurance Company*, 11-0304 (La. 10/25/11), ___So.3d___ (2011 WL 5865487); *American Reliable Insurance Co. v. Navratil*, 445 F.3d 402 (5th Cir. 2006); *Teague v. St. Paul Fire and Marine Ins. Co.*, 06-1266 (La. App. 1 Cir. 4/7/09), 10 So.3d 806, writ denied, 09-1030 (La. 6/17/09), 10 So.3d 722; *Khan v. Richey*, 40,805 (La. App. 2 Cir. 4/19/06), 927 So.2d 1267, writ denied, 06-1425 (La. 11/3/06), 940 So.2d 662; *Dark v. Marshall*, 41,711 (La. App. 2 Cir. 12/13/06), 945 So.2d 246; *Spellman v. Bizal*, 99-0723 (La. App. 4 Cir. 3/1/00), 755 So.2d 1013; *Walker v. Harris*, 11-0141 (La. App. 1 Cir. 9/14/11) (*unpublished*).

It is further argued that settlement of the underlying claim was required as a mitigation of damages. The Fifth Circuit federal court noted in *American Reliable*, *supra*, 445 F.3d at 406, the following, with which we agree:

Although as a general principle, a client has a duty to mitigate damages caused by its attorney's malpractice, such a duty cannot require the client to undertake measures that are unreasonable, impractical, or disproportionately expensive considering all of the circumstances.

We note particularly that the circumstances of the individual claim will determine what action is required. In this case, defendants argue that the trial court erred in several respects. Initially, it is argued that Louisiana law requires the trial court to reopen the evidence to allow introduction of an insurance policy when it was established at trial that the damages were covered by insurance, but the policy was not introduced. Further, it is argued that the amount of the award was excessive and should not be maintained on appeal, and that the allocation of fault was flawed, in that 80% of the fault was placed on Chevron, Evanston's insured, and only 20% on the City of Baton Rouge for the speeding motorist who was the direct cause of the accident. We do not need to decide these issues to recognize that they are issues that would have a decisive impact on the validity of the underlying judgment that the plaintiff settled. At this point, the defendants are left with a judgment without any opportunity to seek redress for its alleged errors.

While it is not a requirement that a meritless appeal be taken to satisfy a procedural requirement, neither is it required that an appeal right be relinquished in the name of "mitigating damages." It should be remembered that the object of litigation is to achieve justice, and "procedural rules are designed to permit the trial of a case to search for the truth and to have a decision based on substantive law rather than upon the technical rules of procedure." *Unwired Telecom Corp. v. Parish of Calcasieu*, 03-0732 (La. 1/19/05), 903 So.2d 392, 401.

It is established in substantial jurisprudence that the substantive right of the defendant attorney to have his position exonerated is destroyed by settlement of the underlying claim. This court held in a recent decision that when the defendants are barred from proving their defense by the settlement of the claim, the plaintiffs must

likewise be barred from pursuing their legal malpractice claim premised on the non-reviewable judgment. *Walker v. Harris*, supra, 11-0141 at p. 5.

In the matter before us, the appeal was clearly not meritless. The defendant attorneys and their law firm were barred from proving their defense by the settlement of the claim. Therefore, the plaintiff is likewise barred from pursuing its malpractice action. Accordingly, the judgment dismissing the case is affirmed. Costs are assessed to the plaintiff, Evanston Insurance Company.

AFFIRMED.