NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0141

FREDERICK WALKER AND IRMA WALKER

VERSUS

JACK PATRICK HARRIS AND DESALVO & HARRIS

Judgment Rendered: September 14, 2011

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Appealed from
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 536,964

Honorable Timothy E. Kelley, Judge

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Alfred B. Shapiro Baton Rouge, LA	Counsel for Plaintiffs/Appellants Frederick and Irma Walker
Gracella Simmons Collin J. LeBlanc Baton Rouge, LA	Counsel for Defendants/Appellees Jack Patrick Harris and DeSalvo & Harris

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Whipple, J. concurs.

GUIDRY, J.

This is an appeal of a judgment dismissing a legal malpractice claim, wherein the trial court found the plaintiffs were equitably estopped from asserting an action for malpractice against their former counsel because they had settled the underlying lawsuit on which the legal malpractice claim was based. We affirm.

FACTS AND PROCEDURAL HISTORY

In September 2003, Frederick Walker was involved in an automobile accident. Mr. Walker and his wife, Irma Walker, later retained Jack Patrick Harris and the Desalvo & Harris law firm to represent them in a legal action for damages they allegedly sustained as a result of the September 2003 accident. A petition for damages was filed in Twenty-First Judicial District Court for Livingston Parish. In the course of litigating the personal injury suit, the defendants named in that suit requested that Mr. Walker be examined by a physician of their choice. A physical examination was scheduled to be performed September 2004; however, Mr. Walker did not appear for the exam. When Mr. Walker failed to appear for the exam, the defendants filed a motion to compel, which was granted. Thereafter, the defendants scheduled a new appointment to have Mr. Walker examined in December 2004.

Mr. Walker attended the rescheduled exam, but a dispute arose as to the scope of the examination, and the doctor refused to perform the examination. The personal injury defendants then filed a motion for rehearing/clarification of the prior judgment in which the court had previously ordered Mr. Walker to appear for the examination. A hearing on the motion for rehearing/clarification was held on March 21, 2005, following which, in a judgment signed April 11, 2005, the court ordered Mr. Walker to submit to a medical examination by the defendants' doctor and to answer specific medical questions posed to him. The court also ruled that if

Mr. Walker again failed to submit to the medical exam, severe sanctions would be imposed.

A motion to reconsider the April 11, 2005 judgment was filed on behalf of the Walkers, wherein then counsel for the Walkers, Mr. Harris, stated that he arrived late for the hearing on March 21, 2005, due to transportation difficulties, and as result, the court ruled on the defendants' motion in his absence. Mr. Harris therefore requested that the court grant a rehearing so that he could be allowed to present argument on the matter. In the alternative, Mr. Harris requested the court to set a return date in which he could seek supervisory review of the April 11, 2005 judgment. He further requested a stay of the April 11, 2005 judgment until a decision was rendered on his writ application. The court denied the request for a rehearing, but signed an incomplete "Alternative Order" submitted by Mr. Harris, which read as follows:

ALTERNATIVE ORDER

> The motion for reconsideration of the ruling pertaining to the physical examination of plaintiff Frederick Walker signed on _____ is hereby DENIED; the return date within which plaintiffs may file supervisory writs for review of the order pertaining to the physical examination of plaintiff Frederick Walker signed _____ is _____ with the First Circuit Court of Appeal; it is further ordered that the order of May 20, 2005 be stayed pending final disposition of plaintiffs' Application for Supervisory Writs or, if not timely filed, the order shall become effective on the return date.

Only the date of "May 20, 2005" and the judge's signature were added to the order, so Mr. Harris filed a "Motion to Correct Record," in which he stated that there was a "clerical error," in that the prior order did not provide a return date. Accordingly, an order was signed by the court on May 3, 2005, providing a return date of June 30, 2005.

In the meantime, a new appointment to have Mr. Walker examined by the defendants' doctor was scheduled for May 5, 2005, but Mr. Walker did not attend.

Consequently, the personal injury defendants filed a motion for contempt and sanctions, which motion was granted. By a judgment rendered August 17, 2005, the court ordered that any claims by Mr. Walker relating to alleged cervical and lumbar injuries be dismissed with prejudice and that the Walkers be precluded from introducing evidence of any "cervical or lumbar injuries including, but not limited to, any alleged injuries to vertebrae, discs, nerves, muscles, tendons, ligaments, or other associated structures relating to the cervical spine and lumbar spine" at the trial of the matter. The Walkers filed a motion to vacate the August 17, 2005 judgment on September 29, 2005. The trial court denied the motion.

Following this ruling, the Walkers terminated the representation of Mr. Harris and the law firm of DeSalvo & Harris and retained new counsel to represent them in the personal injury suit. The Walkers, through new counsel, then sought writs to this court for supervisory review of the trial court's denial of their motion to vacate, but the application was denied. Walker v. Alexander, 06-0052 (La. App. 1st Cir. 2/21/06) (unpublished writ action). They then filed a renewed motion with the trial court to vacate and/or revise the August 17, 2005 judgment. In the renewed motion, the Walkers, for the first time, raised the argument that Mr. Walker was not required to attend the May 5, 2005 medical appointment because the matter had been stayed. The trial court denied the second motion, noting that the new argument had not been raised previously. The Walkers sought supervisory review of the denial of their second motion to vacate, but that writ application was also denied by this court. Walker v. Alexander, 06-0888 (La. App. 1st Cir. 5/19/06) (unpublished writ action).

The Walkers eventually settled their claims in the personal in jury suit on August 17, 2006. In the meantime, however, they filed the instant claim for legal malpractice in the Nineteenth Judicial District Court, East Baton Rouge Parish,

against Mr. Harris and the law firm of DeSalvo & Harris, alleging that the malpractice defendants negligently represented them in the personal injury suit. In their settlement of the underlying personal injury suit, the Walkers expressly reserved their right to pursue their legal malpractice claim. The malpractice defendants denied the Walkers' claim, asserting that there was "no breach of the standard of ... care in failing to produce a client" for a medical evaluation "scheduled during a stay" and further asserting that the August 17, 2005 contempt judgment rendered by the 21st JDC was "null, void, defective, and without authority," as it was premised on the client's failure to attend a medical examination scheduled during an alleged stay ordered by the court.

The malpractice defendants eventually filed a motion for summary judgment, asserting that the Walkers could not establish that they would bear their burden of proving that the defendants had committed malpractice. They also filed a second "Motion for Summary Judgment to Enforce Judicial Estoppel of Legal Malpractice Claim," asserting that the Walkers were equitably estopped from pursuing their malpractice claim based on their settlement of their personal injury claim. Following a hearing on the motions, the trial court denied the first motion for summary judgment, but granted the second motion for summary judgment based on estoppel in favor of the malpractice defendants, which the Walkers now appeal.

ISSUES PRESENTED FOR REVIEW

On appeal, the Walkers allege the trial court erred in granting summary judgment based on the following issues:

I. Whether the doctrine of equitable estoppel applies because of the partial settlement of the underlying suit?
II. Was there an effective "stay order" upon which Jack Harris could have relied in the underlying case?

STANDARD OF REVIEW

A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). On a motion for summary judgment, the burden of proof is on the mover. If the moving party will not bear the burden of proof at trial on the matter, that party's burden on a motion for summary judgment is to point out an absence of factual support for one or more essential elements of the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. C.C.P. art. 966C(2); Robles v. ExxonMobile, 02-0854, p. 4 (La. App. 1st Cir. 3/28/03), 844 So. 2d 339, 341. An appellate court's review of a summary judgment is *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. R.G. Claitor's Realty v. Rigell, 06-1629, p. 4 (La. App. 1st Cir. 5/4/07), 961 So. 2d 469, 471-72, writ denied, 07-1214 (La. 9/21/07), 964 So. 2d 340.

DISCUSSION

Equitable estoppel is defined as the effect of the voluntary conduct of a party by which he is barred from asserting rights or defenses against another party justifiably relying on such conduct and causing him to change his position to his detriment as a result of such reliance. The three elements of estoppel are: (1) a representation by action or word, (2) justifiable reliance on the representation, and (3) a change in position to one's detriment because of the reliance. Murphy v.

Gilsbar, Inc., 02-0205, p. 4 (La. App. 1st Cir. 12/31/02), 834 So. 2d 669, 672, writ denied, 03-0676 (La. 5/30/03), 845 So. 2d 1057.

Although the Walkers characterize their settlement of the personal injury suit as a partial settlement in their first assignment of error, the evidence clearly shows that the settlement was a full and complete settlement of the underlying personal injury suit. The settlement expressly provided, in pertinent part, that the sum paid was "in full settlement, satisfaction, and compromise of any and all claims and alleged causes of action of every nature whatsoever, which [the Walkers] have, or may ever have" against the personal injury defendants. The settlement further provided therein that the Walkers "hereby release, acquit, and forever discharge" the personal injury defendants "of and from any and all past, present, and/or future claims, demands, causes of action and rights of action whatsoever, known and unknown, anticipated and unanticipated," which the Walkers "may or might have against" the personal injury defendants. And finally, the Walkers agreed not to "at any time hereafter, commence, maintain or prosecute any action, at law or otherwise, or assert any claims against [the personal injury defendants], for damages, losses, benefits, or for other equitable relief relating to the accident that occurred on September 24, 2003."

In settling this matter, the Walkers did not seek to reserve their right to appeal the adverse ruling of the trial court in the August 17, 2005 interlocutory judgment, nor did they reserve the right to maintain an action against the personal injury defendants in the event they should prevail in having the August 17, 2005 judgment reversed on appeal. Instead, they chose not to bring an appeal of the ruling and further foreclosed any right to seek additional compensation for the cervical and lumbar injuries claimed by Mr. Walker, which the Walkers allege

were not taken into account in the settlement, even had they elected to seek an appeal of the ruling.

Although this court twice declined to exercise supervisory review of the trial court's August 17, 2005 judgment, this court's prior actions were in no way a decision on the merits of the issue.[1] As noted in the second writ action, supervisory review was declined because the criteria established in Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc., 396 So. 2d 878 (La. 1981) were not met.[2] See Walker v. Alexander, 06-0888 (La. App. 1st Cir. 5/19/06) (unpublished writ action). Furthermore, the denial of a writ application for supervisory review of an interlocutory judgment does not bar reconsideration of, or a different conclusion on, the same question when an appeal is taken from a final judgment. Bozarth v. State, LSU Medical Center/Chabert Medical Center, 09-1393, p. 9 (La. App. 1st Cir. 2/12/10), 35 So. 3d 316, 323. There was even an indication that the Walkers might have succeeded in having the August 17, 2005 judgment reversed on appeal, based on the reasons expressed by the dissenting judge on the writ panel for the second writ application.

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[1] When an unrestricted appeal is taken from a final judgment, an appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him, in addition to the review of the final judgment. However, this general principle is subject to exceptions where the adverse interlocutory judgment has previously been appealed, in accordance with the law, or where the aggrieved party has sought supervisory writs, and the appellate court makes a ruling which constitutes the "law of the case." See Judson v. Davis, 04–1699, pp. 7–8 (La. App. 1st Cir. 6/29/05), 916 So. 2d 1106, 1112–13, writ denied, 05–1998 (La. 2/10/06), 924 So. 2d 167 (citing Landry v. Leonard J. Chabert Medical Center, 02–1559, p. 5 n.4 (La. App. 1st Cir. 5/14/03), 858 So. 2d 454, 461 n.4, writs denied, 03–1748, 03–1752 (La. 10/17/03), 855 So. 2d 761). In the instant case, the prior ruling of this court on the defendants' supervisory applications were not substantive rulings on the merits and, therefore, did not become law of the case so as to have precluded our reconsideration of the issue of whether the August 17, 2005 judgment was proper.

[2] The Herlitz opinion provides in part:

> When the overruling of the exception is arguably incorrect, when a reversal will terminate the litigation, and when there is no dispute of fact to be resolved, judicial efficiency and fundamental fairness to the litigants dictates that the merits of the application for supervisory writs should be decided in an attempt to avoid the waste of time and expense of a possibly useless future trial on the merits.

Herlitz, 396 So. 2d at 878.

In order to establish a claim for legal malpractice, a plaintiff must prove that (1) there was an attorney-client relationship; (2) the attorney was negligent in his representation of the plaintiff; and (3) plaintiff sustained a loss as a result of the attorney's negligence. Moreover, a plaintiff can have no greater rights against attorneys for the negligent handling of a claim than are available in the underlying claim. Costello v. Hardy, 03–1146, pp. 9-10 (La. 1/21/04), 864 So.2d 129, 138.

Our *de novo* review of the record reveals that the Walkers' actions of settling all of their claims against the personal injury defendants, without seeking an appeal of the adverse ruling in the August 17, 2005 judgment, or reserving their right to pursue any claims for Mr. Walker's alleged cervical and lumbar injuries, dismissed pursuant to the August 17, 2005 judgment, precluded them from being able to pursue any claims relative to those injuries. And likewise, the Walkers' action of agreeing to such a complete settlement of their claims in the underlying personal injury suit precluded the malpractice defendants from being able to possibly establish that they did not negligently cause the trial court to render the August 17, 2005 judgment. The malpractice defendants have consistently maintained that the trial court erred in rendering the August 17, 2005 judgment, and as they are barred from proving this defense by the Walkers' settlement, the Walkers must likewise be barred from pursuing their legal malpractice claim premised on the non-reviewable judgment. See Gross v. Pieno, 04-820 (La. App. 5th Cir. 12/28/04), 892 So. 2d 662, writ denied, 05-0218 (La. 4/22/05), 899 So. 2d 582; see also Murphy, 834 So. 2d at 672.

Moreover, in settling their claims against the personal injury defendants, the Walkers agreed to an amount in full satisfaction regarding *all* injuries Mr. Walker sustained in the September 2003 accident. As the only damages asserted by the Walkers in their legal malpractice claim are those based on Mr. Walker's cervical

and lumbar injuries, they are estopped from taking the position that they were not adequately compensated for those injuries when their complete settlement of the personal injury lawsuit indicates otherwise. Compare Wharton v. Bell, 10-0377 (La. App. 1st Cir. 10/25/10) (unpublished opinion). Thus, we find that summary judgment was properly rendered. In so finding, we pretermit discussion of the Walkers' second assignment of error.

CONCLUSION

Based on the foregoing *de novo* review of the summary judgment appealed herein, we find no error in the trial court's legal conclusions and therefore affirm the summary judgment dismissing the Walkers' claims. All costs of this appeal are cast to the appellants, Frederick and Irma Walker.

AFFIRMED.