

**NOTICE**

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

FIFTH DIVISION  
FEBRUARY 28, 2003

No. 1-01-4403

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PAUL WYATT and LINDA WYATT,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiffs-Appellants,	)	COOK COUNTY.
	)	
v.	)	No. 00 L 4515
	)	
JOHN F. GREGORIO and	)	
JOHN F. GREGORIO & ASSOCIATES,	)	HONORABLE
	)	LEE PRESTON,
Defendants-Appellees.	)	JUDGE PRESIDING.

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ORDER

Plaintiffs Paul and Linda Wyatt (the Wyatts) appeal an order of the circuit court of Cook County dismissing their amended complaint against defendants John F. Gregorio and John F. Gregorio & Associates (Gregorio), in a dispute over fees due Gregorio for his legal representation of the Wyatts in a personal injury case.

The plaintiffs' amended complaint, filed on April 20, 2000, alleges the following facts. On December 2, 1992, Paul was traveling on business and staying at a hotel in San Antonio, Texas. Paul was robbed and attacked by two unknown assailants in the hotel parking lot. Paul was totally disabled as a result of injuries suffered in the attack.

The amended complaint alleges that in April 1995, the Wyatts retained Gregorio to represent them and their children in a personal injury action against the owners and operators of the hotel. The amended complaint alleges that on or about April 5, 1995, the Wyatts signed a contingent fee agreement with Gregorio. The contingent fee agreement attached to the amended complaint bears the signatures of Gregorio and the Wyatts and states that the Wyatts agreed to pay Gregorio one-third "of any amount realized from said claims." The document does not refer to the time, place or nature of the allegations forming the basis of the Wyatts' claims against the hotel owners and operators. The document makes the Wyatts responsible for the expenses of the litigation above and beyond attorney fees.

The amended complaint alleges that "[s]ubsequently, in October 1994," the Wyatts filed suit in Bixar County, Texas, against the owners and operators of the hotel for the injuries suffered by the Wyatts and their children (the Texas litigation). October 1994 is in fact not subsequent to April 1995, but neither party has raised an issue as to this discrepancy in this litigation. The amended complaint alleged that the Wyatts advanced Gregorio \$25,252.50 in expenses in connection with the Texas litigation.

Since the time of his injuries, Paul received weekly benefits under an insurance policy issued by the Federal Insurance Company/Chubb Insurance Company (Chubb). The Chubb policy allegedly provided that if Paul made a recovery from third parties, he would be required to reimburse Chubb for benefits paid. The amended complaint alleged that Chubb initiated proceedings to protect its right to reimbursement under the policy. Chubb's attorneys allegedly participated in the Texas litigation and shared expenses. The amended complaint further alleged upon information and belief that in exchange for Chubb's participation in the Texas litigation,

Gregorio agreed that he would make no claim for compensation from Chubb's portion of any settlement or judgment.

On April 19, 1996, the parties in the Texas litigation entered into a Release and Settlement Agreement (Settlement Agreement), a copy of which was attached to the amended complaint as an exhibit. The Settlement Agreement required defendants (while denying liability) to pay a total of \$4 million for pain, suffering and mental anguish. Defendants were required to make three payments of \$150,000 to Linda and a guardian ad litem for the benefit of each of the Wyatts' three children. Defendants were also required to pay \$360,834.47 to Chubb, Chubb's attorney of record, and Gregorio. Defendants were further required to pay \$3,189,165.53 to Paul and Linda Wyatt and Gregorio.

The Settlement Agreement also contains a section entitled "RELEASE AND INDEMNIFICATION," which contains a number of provisions. One of those provisions provides in part as follows:

"This indemnification provision also specifically applies to any claim made by the Intervenor, Federal Insurance Company, for medical expenses, disability benefits, or any other payments made to the Plaintiffs for workers' compensation benefits accruing as a result of the incident in question. This indemnification provision also specifically applies to any claim for legal fees made by Attorney Herbert Stride or any other attorney who has, or claims to have, represented the Plaintiffs in this cause of action \*\*\*."

The Settlement Agreement was signed by the Wyatts, Gregorio, a second attorney for the Wyatts, a representative of Chubb, Chubb's attorney of record, and the guardian ad litem appointed to represent the interests of the minor children. Chubb is described as an intervenor in the Settlement Agreement and in the Agreed Judgment incorporating the Settlement Agreement that was ultimately entered in the Texas litigation.

The amended complaint alleges upon information and belief that on the date of the Settlement Agreement, Gregorio attempted to renegotiate with a Chubb attorney to permit Gregorio and a co-counsel part of the proceeds recovered by Chubb. The amended complaint alleges upon information and belief that the Chubb attorney declined to do so.

The Wyatts further alleged that Gregorio was entitled to a fee of \$1,213,055.18, representing one-third of the sums paid to the Wyatts and their children, but excluding amounts paid to Chubb. Gregorio allegedly retained \$1,333,333, which is one-third of the total settlement. Gregorio also retained \$84,899.28 in expenses.

The Wyatts' amended complaint alleged that Gregorio breached the contingent fee agreement, breached his fiduciary duty to the Wyatts and engaged in misrepresentation and fraud.

On May 24, 2000, Gregorio moved to dismiss the Wyatts' claims as barred by the statute of limitations for legal malpractice actions. On December 21, 2000, the trial court denied that motion to dismiss, holding that the statute of limitations for actions on written contracts was the applicable statute in this case.

On July 10, 2001, Gregorio filed two motions to dismiss the amended complaint. One motion reargued the limitations issue. The second motion sought dismissal on the ground that the

Wyatts' suit was barred by the Agreed Judgment incorporating the Settlement Agreement in the Texas litigation.

In connection with the second motion, Gregorio submitted the transcript of proceedings relating to the approval of the Settlement Agreement in the Texas litigation. In the transcript, Paul testified that he was settling the case for personal reasons, despite advice of counsel to seek more money. Paul testified that he understood the terms of the settlement. The transcript contains the following question and answer given by Paul:

"Q: Okay. You understand that out of the money that you are paid that you have to satisfy the lien that Mr. McHaney [Chubb's attorney] and the Federal Insurance Company, also known as CHUBB, the lien they have in this claim?

A: Yes."

During cross-examination, Paul was asked the following questions and gave the following answers:

"Q: And you also understand that your legal fee is capped and fixed at \$1,333,333.33. You will never owe another dime of legal fees in regard to this claim?

A: Yes.

Q: And that's the figure you've agreed to pay to Mr. Gregorio?

A: Is it 1/3? I mean –

Q: Yes.

A: Yes."

Paul also testified he understood he was responsible for reimbursement of expenses.

The transcript later contains further cross-examination:

"BY MR. MILLER:

Q: Mr. Wyatt, we just met a moment ago when I was appointed to represent you in this matter for the settlement, right?

A: Yes.

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Q: My understanding is that after the worker's compensation lien, which is approximately \$350,000, is paid, and the \$150,000 for each of your children is set aside that you and your wife are going to split this evenly between yourselves, is that right?

A: Yes.

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Q: Have all your questions been asked and answered with regard to the worker's compensation lien?

A: Yes.

Q: The one thing I want to make sure everyone is clear about is with regard to the indemnification clause, you understand that I do not and cannot provide any advice to you with regard to Illinois law, is that right?

A: Yes."

The transcript contains substantially similar testimony on these points from Linda

On November 21, 2001, the trial court entered a written order denying the motion to dismiss on the limitations issue, but granting the motion to dismiss based on the judgment in the Texas litigation. The Wyatts filed a timely Notice of Appeal to this court.

I

The issue on appeal is whether the trial court erred in dismissing plaintiffs' amended complaint, which alleged that Gregorio breached the contingent fee agreement, breached his fiduciary duty to the Wyatts and engaged in misrepresentation and fraud. "[A]n attorney's billing for legal services cannot be separated from the attorney-client relationship." Cripe v. Leiter, 184 Ill. 2d 185, 198, 703 N.E.2d 100, 107 (1998). The relationship between attorney and client is fiduciary in nature. Cripe, 184 Ill. 2d at 198, 703 N.E.2d at 107. Although an attorney's fees in a particular case will generally be governed by the contractual arrangement between the attorney and the client, fraudulent or excessive billing of a client violates the attorney's fiduciary duty to the client. Cripe, 184 Ill. 2d at 198, 703 N.E.2d at 107. "A fiduciary may not withhold material matters from a beneficiary and then assert that the latter, who acted without the knowledge of the facts withheld, is estopped by his acts." Johnson v. Central Standard Life Ins. Co., 102 Ill. App. 2d 15, 32, 243 N.E.2d 376, 385 (1968), citing Freeman Coal Mining Corp v Burton, 388 Ill. 604, 614, 58 N.E.2d 589, 594 (1945).

The amended complaint was dismissed pursuant to section 2-619 of the Illinois Code of Civil Procedure, which provides a means of obtaining summary disposition of issues of law or easily proved issues of fact. Kedzie & 103rd Currency Exchange, Inc. v. Hodge, 156 Ill. 2d 112,

115, 619 N.E.2d 732, 735 (1993). A section 2-619 motion to dismiss admits the legal sufficiency of the plaintiffs' cause of action, much as a section 2-615 motion to dismiss admits a amended complaint's well-pleaded facts. See Kedzie, 156 Ill. 2d at 115, 619 N.E.2d at 735. Generally, "[i]n ruling on a section 2-619 motion, a court must accept as true all well-pleaded facts in plaintiff's amended complaint and all inferences that can reasonably be drawn in plaintiff's favor." Hermitage Corp. v. Contractors Adjustment Co., 166 Ill. 2d 72, 85, 651 N.E.2d 1132, 1139 (1995). An appeal from a section 2-619 dismissal is the same in nature as one following a grant of summary judgment; both are matters given to de novo review. Kedzie, 156 Ill. 2d at 116, 619 N.E.2d at 735. This court must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law. Kedzie, 156 Ill. 2d at 116-17, 619 N.E.2d at 735.

## II

The trial court dismissed the amended complaint in this case pursuant to section 2-619(a)(4), which provides for dismissal on the ground "[t]hat the cause of action is barred by a prior judgment." 735 ILCS 5/2-619(a)(4) (West 2000). Specifically, the trial court based its decision on the issue of collateral estoppel, a doctrine invoked where a party participates in two separate cases involving different causes of action, but a controlling fact or question material to the outcome of both causes has been decided against that party in the prior suit. Housing Authority v. YMCA of Ottawa, 101 Ill. 2d 246, 252, 461 N.E.2d 959, 962 (1984). The doctrine of collateral estoppel requires a defendant to establish: (1) that the issue decided in the prior action was identical to the one presented in the suit in question; (2) that a court of competent jurisdiction rendered a final judgment on the merits in the prior action; (3) that the party against

whom the doctrine is asserted was a party to the prior action or in privity with such a party; and (4) that the factual issue against which the doctrine is interposed has actually and necessarily been litigated and determined in the prior action. Illinois State Chamber of Commerce v. Pollution Control Board, 78 Ill. 2d 1, 7, 398 N.E.2d 9, 12 (1979); Housing Authority, 101 Ill. 2d at 252, 461 N.E.2d at 962. The doctrine of collateral estoppel does not apply to matters which might have been litigated and determined in the other action, but were not litigated and determined. Housing Authority, 101 Ill. 2d at 252, 461 N.E.2d at 962.<sup>1</sup>

Indeed, in order for collateral estoppel to apply, it must conclusively appear that the fact must have been so in issue that it was necessarily decided by the court rendering the prior judgment. Hammond v. North American Asbestos Corp., 207 Ill. App. 3d 556, 562, 565 N.E.2d 1343, 1347 (1991). In determining what has been adjudicated in a prior proceeding, the court examines the judgment actually entered with respect to the issues presented for review, as well as the opinion rendered. Adams v. Pearson, 411 Ill. 431, 437, 104 N.E.2d 267, 270 (1952). Additionally, the court looks to the proceedings in the earlier case to ascertain what the issues were and how they were resolved. Mateyka v. Smith, 47 Ill. App. 2d 1, 4, 197 N.E.2d 157, 159 (1964). The party invoking the defense of collateral estoppel must show with clarity and certainty the precise issues and judgment in the former action. City of Chicago v. Westphalen, 93 Ill. App. 3d 1110, 1120, 418 N.E.2d 63, 72 (1981).

The threshold question is whether the issue decided in the prior action was identical to the one presented in the suit in question. A reading of the Agreed Judgment, and the incorporated

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<sup>1</sup> Defendants suggest in their brief that plaintiffs had a full and fair opportunity to litigate the issue of whether the fee charged was reasonable in the Texas litigation, but the case law makes clear that whether plaintiffs had an "opportunity" to do so is relevant to the issue of res judicata, not collateral estoppel.

Settlement Agreement discloses that the Texas court did not determine any specific amount due Gregorio for attorney fees, let alone that the amount Gregorio seeks to retain is reasonable. Indeed, the Agreed Judgment and the Settlement Agreement both expressly require the defendants to pay \$360,834.47 to Chubb, Chubb's attorney of record, and Gregorio. The Settlement Agreement requires the Wyatts to indemnify the defendants in the Texas litigation against claims by Chubb relating to the payment of workers' compensation benefits, as well as against claims for legal fees, but that provision does not address similar claims that the Wyatts or Gregorio may have had against Chubb. In sum, to the extent that the Agreed Judgment and the Settlement Agreement address the issue of Gregorio's fees, they suggest that the parties and the trial court contemplated that Gregorio would seek the recovery of some portion of his fees from Chubb.<sup>2</sup>

Defendants rely heavily on the Wyatts' testimony in the proceedings leading to the entry of the Agreed Judgment regarding their understanding of what they would owe in legal fees.

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<sup>2</sup> The fact that the Agreed Judgment and Settlement Agreement appear to make Chubb a source of recovery of Gregorio's legal fees is not surprising. The record on appeal refers to the sum due Chubb as a workers' compensation lien. Under Illinois law, section 5(b) of the Workers' Compensation Act grants an employer a lien on the recovery equal to the amount of workers' compensation benefits paid or owed. In re Estate of Dierkes, 191 Ill. 2d 326, 328, 730 N.E.2d 1101, 1102 (2000). We further note that section 5(b) also provides in part as follows:

"Out of any reimbursement received by the employer pursuant to this Section, the employer shall pay his pro rata share of all costs and reasonably necessary expenses in connection with such third-party claim, action or suit and where the services of an attorney at law of the employee or dependents have resulted in or substantially contributed to the procurement by suit, settlement or otherwise of the proceeds out of which the employer is reimbursed, then, in the absence of other agreement, the employer shall pay such attorney 25% of the gross amount of such reimbursement." 820 ILCS 305/5(b) (West 2000).

The statutory language "in the absence of other agreement" refers to an agreement between the employer and the employee or the employee's attorney. Dierkes, 191 Ill. 2d at 335, 730 N.E.2d at 1106.

However, section 2-619(a)(4) provide for dismissal where the claims are barred by a prior judgment, and neither the Agreed Judgment nor the Settlement Agreement incorporated therein determine that a particular sum is a reasonable amount for the Wyatts to pay Gregorio.

Moreover, the Wyatts' testimony addresses the question of whether the clients understood the terms of the contingent fee agreement, which is separate from the question of whether the fee the attorney ultimately sought to retain is reasonable; the latter question is always subject to judicial review under the facts and circumstances of a particular case. See, e.g., Guerrant v. Roth, \_\_\_ Ill. App. 3d \_\_\_, \_\_\_, 777 N.E.2d 499, 504-05 (2002) (and cases cited therein).

In sum, defendants failed to show with certainty and clarity that the reasonableness of the fee was actually and necessarily determined in the Texas litigation. Accordingly, the trial court erred in dismissing the complaint on the ground of collateral estoppel.

For all of the aforementioned reasons the judgment of the circuit court of Cook County is reversed. The case is remanded for further proceedings consistent with this order.

Reversed and remanded.

CAMPBELL, P.J., with QUINN and HARTIGAN, JJ., concurring.