FIRST DIVISION
August 7, 2017

No. 1-16-3261
2017 IL App (1st) 163261-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CENTURY-NATIONAL INSURANCE COMPANY, Plaintiff-Appellant, v. LEE SCHOEN and SCHOEN, MANGAN & SMITH, LTD., Defendants-Appellees, (Daniel G. Suber and Daniel G. Suber & Associates, Defendants.)	)	Appeal from the Circuit Court of Cook County. No. 15 L 703 Honorable James N. O'Hara, Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* In a legal malpractice case, the trial court properly granted defendants' motion to dismiss pursuant to section 2-619 of the Code where plaintiff could not establish proximate cause, because defendants' conduct was not a cause in fact of plaintiff's injury.

¶ 2 Plaintiff, Century-National Insurance Company (Century-National), appeals the trial court's order granting the motion to dismiss brought by defendants, Lee Schoen and Schoen, Mangan & Smith, Ltd. (Schoen defendants) pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2012)). In dismissing count II of

Century-National's complaint, the trial court found that the requisite causal connection between the Schoen defendants' alleged negligent act or omission and Century-National's injury was absent, and could not exist based upon the facts pled in the complaint. Century-National argues that the trial court's basis for dismissal erroneously analyzed the causation of its damage, rendering dismissal improper. Century-National further argues that it incurred additional attorney fees due to the Schoen defendants' conduct, a claim which was ignored by the trial court. The Schoen defendants respond that we should affirm the trial court's decision because Century-National cannot establish proximate cause, a requisite element of its cause of action for legal malpractice. We agree with the Schoen defendants, and affirm the trial court's dismissal of Count II of Century-National's complaint.

¶ 3 BACKGROUND

¶ 4 This is a legal malpractice case brought by Century-National against two separate law firms that it had retained to defend two different insureds that had been named as defendants in a personal injury lawsuit brought by William T. Andrews. On February 11, 2007, Andrews was injured when a truck owned by G&G Cement Contractors (G&G), the partnership of Dagoberto Gonzalez and Jose Gonzalez[1], and driven by their employee, Luis Chavez, collided with Andrews's vehicle. Andrews subsequently filed a personal injury lawsuit in the circuit court of Cook County. Century-National previously had issued an automobile liability insurance policy to G&G. As a result, Century-National hired Daniel G. Suber and Daniel G. Suber & Associates (Suber defendants[2]) to represent G&G and its partners in the personal injury action. Century-National denied that Chavez was a permissive user of G&G's truck and it filed a declaratory

[1] Jose Gonzalez is deceased. Thus, Dagoberto Gonzalez is the only remaining member of the partnership known as G&G.

[2] We note that the Suber defendants are not a party to this appeal. Rather than file a motion to dismiss, as the Schoen defendants had, the Suber defendants opted to answer the complaint.

action, seeking a finding of no coverage. Century-National retained the Schoen defendants as independent counsel to represent Chavez.

¶ 5 Andrews allegedly sent separate letters, dated March 13, 2009, to the Suber defendants and the Schoen defendants, demanding that Century-National offer its full policy limits of $300,000 within 30 days. Century-National claims that it never received Andrews's policy demand letters from either Suber or Schoen, thus no offer was made within the 30-day time period. Subsequently, Andrews rejected Century-National's attempt to offer the policy limits.

¶ 6 Nearly four years later, Andrews's personal injury action proceeded to trial and on January 22, 2013, a verdict was entered in favor of Andrews and against G&G and Chavez in the amount of $3,092,000.

¶ 7 On May 31, 2013, Dagoberto Gonzalez, the surviving partner of G&G, assigned to Andrews all of G&G's rights against Century-National.

¶ 8 On July 17, 2013, Andrews filed a complaint for insurance company bad faith arising out of a motor vehicle accident against Century-National and Dagoberto Gonzalez, alleging that the business automobile policy covered the truck driven by Chavez, that the policy required that Century-National provide a defense to G&G and Chavez, and that the failure to pay the policy limits demand of $300,000 was a breach of Century-National's duty to its insureds. In relevant part, the complaint stated, "Exercising its right to control the defense of the negligence case, Century National selected Daniel G. Suber & Associates [] to defend all of the defendants against Andrews'[s] lawsuit." The complaint also stated that, "Andrews'[s] attorney sent a letter to Suber, dated March 13, 2009." The complaint does not reference the letter allegedly sent to Schoen, and in fact, the Schoen defendants are not mentioned in the entirety of the bad faith

complaint. Subsequent to the filing of the complaint, under a reasonable anticipation of litigation, Century-National settled the bad faith lawsuit for $1,250,000.

¶ 9 On January 22, 2015, Century-National brought the instant legal malpractice lawsuit, with count I directed against the Suber defendants, and count II against the Schoen defendants. The allegations of each count were nearly identical, with the exception of Suber's and Schoen's conduct subsequent to receiving Andrews's policy demand letter. Specifically, the complaint alleged Suber requested an extension of the 30-day time period in order to file a motion for summary judgment on behalf of G&G, which was ultimately denied. Also, the complaint stated that Suber does not remember receiving any agreement from Andrews or his counsel to extend the 30-day time period. Conversely, Schoen did not seek an extension of the 30-day time period, and did not seek dismissal of Andrews's lawsuit on behalf of Chavez. Other than these differing allegations, both counts of the complaint alleged that the Schoen defendants and the Suber defendants breached their professional responsibilities to provide legal representation to Century-National in the same manner as a reasonably well-qualified attorney practicing in the same locality. The complaint alleged that each defendant deviated from his duty and failed to adhere to the standard of care through one or more of the following acts or omissions:

> "1) Failed to act diligently in forwarding Plaintiff Andrews[']s settlement demand to Century; or
>
> 2) Failed to secure by motion or agreement an extension of time to file a response to Andrew[s's] demand for settlement; or
>
> 3) Failed to timely consider the likelihood of success[3]; or
>
> 4) Failed to accurately assess the merits of the Andrews lawsuit; or

[3] In count I, directed against Suber, this allegation differed and stated: "Failed to timely consider the likelihood of success on the Motion for Summary Judgment of G&G Concrete Contractors[]."

5) Failed to properly advise Century of the exposure; or

6) Failed to give Century an opportunity to place the interests of its insured over its own; or

7) Failed to timely advise Century of Andrews['s] settlement demand."

The complaint further alleged that but for the negligence of the defendants, Century-National would have settled Andrews's lawsuit for $300,000, but instead its exposure became the amount of the judgment plus interest. Additionally, the complaint alleged that the defendants' actions resulted in additional attorney fees being paid to the Suber defendants and their attorneys in the bad faith case.

¶ 10 On April 24, 2015, the Schoen defendants filed the motion to dismiss that is the subject of this appeal. Their motion was brought pursuant to section 2-619(a)(9) of the Code, and argued that as a matter of law, the Schoen defendants' alleged acts and omissions were not the proximate cause of Century-National's alleged damages. Specifically, the motion asserted that Century-National's claim against the Schoen defendants could not pass the "but for" test requisite in establishing proximate cause because the bad faith claim of G&G and its assignment of that claim to Andrews are not based on, and would have occurred regardless of, any alleged conduct of Schoen's defense of Chavez. In the alternative, the Schoen defendants contended that under the substantial factor test, Century-National could not show that Schoen's alleged negligence was a material element and a substantial factor in bringing about G&G's bad faith claim against Century-National, G&G's assignment of that claim to Andrews, and Century-National's resolution thereof. The Schoen defendants pointed out that the bad faith lawsuit was based on Century-National's and the Suber defendants' defense of G&G, and of which Schoen's alleged conduct in defending Chavez was immaterial and not a factor.

¶ 11 On June 1, 2015, Century-National filed its response, arguing that but for Schoen's failure to timely advise Century-National of Andrews's policy limits demand, it would have paid its policy limits of $300,000, and would not have been subjected to the subsequent bad faith lawsuit. Century-National stated that because the policy at issue was a combined single limits policy, the payment of the policy limits on behalf of Chavez would have terminated Century-National's indemnity obligation and would have precluded the bad faith lawsuit. Additionally, Century-National refutes Schoen's argument regarding the basis of the bad faith lawsuit being G&G's assignment, not Chavez's, by asserting that there would not have been anything assignable if Schoen had conveyed the policy limits demand to Century-National.

¶ 12 On June 15, 2015, the Schoen defendants filed their reply, arguing that when the facts are not in dispute, a court may decide the issue of proximate cause as a matter of law. Additionally, the Schoen defendants asserted that Century-National could not establish either cause in fact or legal cause. At most, they contended, Schoen's actions furnished a condition, but were not a cause.

¶ 13 On October 6, 2015, after briefing on the motion to dismiss was complete, the court asked for supplemental briefing. The parties stipulated to limit the record on appeal, thus we are unaware of the exact language used by the court to frame the issues it sought to have briefed. In its opening brief, Century-National states, "the trial court requested [s]upplemental [b]riefs on whether Schoen had a duty to inform Century-National of the demand and whether Century-National has standing to sue Schoen." In its response brief, the Schoen defendants frame the supplemental issue as, "whether Schoen, as independent counsel for Chavez, had any duty to Century, which was seeking to deny coverage to his client."

¶ 14 The Schoen defendants filed their supplemental brief in support of their motion to dismiss on November 2, 2015. The supplemental brief argued that as independent counsel, the Schoen defendants' only duty was to Chavez. Specifically, they argued that a conflict of interest between Century-National and Chavez existed because Century-National had denied that Chavez was a permissive user of the truck that was involved in the accident. Thus, Schoen's duties as independent counsel were to Chavez, not the conflicted insurance carrier Century-National.

¶ 15 On November 13, 2015, Century-National filed its response to the supplemental brief, and argued that both Suber and Schoen had a duty to communicate Andrews's policy limits demand to Century-National. It also argued that it is well-settled that the attorney retained by the insurer to represent the insured has a fiduciary duty to both the insurer and the insured, and either one can sue the attorney for malpractice. Century-National refuted the Schoen defendants' claim of a conflict of interest by pointing out that no conflict existed regarding reporting that Andrews had made a policy limits demand.

¶ 16 On May 18, 2016, the trial court granted the Schoen defendants' motion to dismiss in a written order. The order stated that the court had found that the Schoen defendants met their burden, specifically finding:

> "The injuries that Plaintiff alleges it sustained are inextricably linked to the results of the bad-faith lawsuit brought against it. The genesis of the bad-faith lawsuit arose from Plaintiff's own named insured's [G&G] assignment of its rights to the underlying plaintiff [Andrews]. It was G&G's bad-faith claim that was actually pursued and led to Plaintiff's injuries. Plaintiff's injuries here were not caused by the pursuit of the other defendant's [Chavez] rights to a bad-faith claim. That is because no such claim was pursued. Therefore, the causal connection between a defendant's negligent action or

> omission and a plaintiff's injuries required to sustain a cause of action is absent here and cannot exist based upon the facts pleaded in Count II."

The court granted the Schoen defendants' motion with prejudice, and struck count II of Century-National's complaint.

¶ 17 Subsequently, the Schoen defendants filed a motion for a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). On December 13, 2016, the court granted the Schoen defendants' motion and entered an order that stated, "[t]here is no just reason to delay enforcement or appeal, or both of this Court's Order of May 18, 2016, dismissing all claims against Schoen with prejudice. This cause remains pending as to all other parties."

¶ 18 Century-National filed its timely notice of appeal on December 16, 2016.

¶ 19 ANALYSIS

¶ 20 On appeal, Century-National seeks our review of whether the trial court erroneously analyzed Century-National's damages as arising from the assignment of the policy rather than from the Schoen defendants' omissions. Specifically, Century-National contends that the Schoen defendants' omissions, namely, failing to inform Century-National of Andrews's policy limits demand letter, was a proximate cause of the settlement of the bad faith lawsuit.

¶ 21 Count II of Century-National's complaint was dismissed pursuant to section 2-619 of the Code (735 ILCS 2-619 (West 2012)). "A motion to dismiss under section 2-619 admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim." (Internal quotation marks omitted.) *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 13. Our review of the circuit court's dismissal of a complaint pursuant to section 2-619 is *de novo*. *Id.*

¶ 22 "A cause of action for legal malpractice must allege facts establishing that (1) the attorney owed the plaintiff a duty of care arising from the attorney-client relationship; (2) the attorney breached that duty; (3) the plaintiff suffered actual damages; and (4) the attorney's breach of duty proximately caused the plaintiff's damages." *Harris v. Vitale*, 2014 IL App (1st) 123514, ¶ 15.

¶ 23 Century-National argues that the Schoen defendants' omission in failing to inform Century-National of Andrews's policy limits demand letter was a proximate cause of the damages it suffered in settling the bad faith lawsuit. Conversely, the Schoen defendants contend that the trial court was correct in determining that it was G&G's bad faith claim that was actually pursued and led to Century-National's injury, because unlike G&G, the Schoen defendants' client, Chavez, never asserted or assigned his rights to a bad faith claim against Century-National.

¶ 24 "The term proximate cause embodies two distinct concepts: cause in fact and legal cause." (Internal quotation marks omitted.) *Turcios v. DeBruler Co.*, 2015 IL 117962, ¶ 23. When addressing the issue of cause in fact, courts typically use either the "but for" test or the "substantial factor" test. *Id.* Under the "but for" test, a defendant's actions or omissions is not the cause of an event if the event would have occurred without the defendant's conduct. See *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343, 354 (1992). Under the "substantial factor" test, a defendant's conduct is deemed a cause of an event if it was both a material element and a substantial factor in bringing about the event's occurrence. *Turcios,* 2015 IL 117962, ¶ 23.

¶ 25 Conversely, the concept of "legal cause involves an assessment of foreseeability." *Id.* ¶ 24. Specifically, "[c]ourts ask whether the injury is the type of injury that a reasonable person

would see as a likely result of his or her conduct, or whether the injury is so highly extraordinary that imposing liability is not justified." (Internal quotation marks omitted.) *Id.*

¶ 26 Even assuming that Century-National could adequately show legal cause, it would still not be able to establish cause in fact under the "but for" test or the "substantial factor" test. Century-National asserts that the trial court's focus on the commencement of the bad faith lawsuit overlooked the definition of proximate cause as being not the only cause, nor the last or nearest cause. See *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 110-11 (1997). We find this argument unconvincing where Century-National's injury, namely the settlement of the bad faith lawsuit, would not have occurred without the bad faith lawsuit having been filed in the first place. Simply put, without the bad faith lawsuit, Century-National would not have incurred the damages at issue here. Or, in other words, but for the filing of the bad faith lawsuit, there would not have been a bad faith lawsuit to settle. Thus, it is clear that the filing of the bad faith lawsuit, which was made possible by the assignment of rights from G&G to Andrews, was a proximate cause of Century-National's damages.

¶ 27 What is not as clear is whether the Schoen defendants' omission in failing to inform Century-National of Andrews's policy limits demand letter was a cause in fact of the injury. We ultimately agree with the trial court and find it was not. Regarding the "but for" test, Century-National contends that but for Schoen's failure to timely advise it of the demand, Andrews's personal injury lawsuit would have been settled for the policy limits and there would have never been a bad faith lawsuit. We find this proposition problematic, because the bad faith lawsuit at issue here did not result from Schoen's representation of Chavez. In fact, the complaint in the bad faith lawsuit does not even mention Schoen or his actions. We recognize that both Suber and Schoen engaged in the same conduct when they failed to give notice of the demand.

However, Suber and Schoen were each hired by Century-National to represent different clients. Suber's client, G&G, ultimately decided to assign its rights to Andrews. Chavez did not. Thus, the bad faith lawsuit was only possible due to G&G's assignment. Had Chavez assigned his rights to Andrews and had the bad faith complaint then contained allegations relating to Schoen, then this would be a different case. We also find unconvincing Century-National's argument that Schoen's omission created a domino effect that led to the ultimate settlement of the bad faith lawsuit. The Schoen defendants argue, and we agree, that following this logic would lead to other events, such as the accident and the issuance of the policy to G&G, as being deemed proximate causes of Century-National's injury. Surely, this would not produce an intended result.

¶ 28 Century-National points to *Lopez v. Clifford Law Offices, P.C.*, 362 Ill. App. 3d 969 (2005), as being instructive. In that case, the plaintiff retained the defendant law firm for the purpose of advising him of his legal rights regarding the death of his daughter who had drowned. *Id.* at 970. Subsequently, the defendant firm decided not to take the case and informed the plaintiff that his claim had a two-year statute of limitations. *Id.* at 971. In fact, the plaintiff's claim actually had a one-year limitations period. *Id.* Prior to the expiration of the one-year limitations period, the plaintiff contacted another attorney who also declined to take the case. *Id.* Approximately one month after the one-year limitations period expired, the plaintiff contacted yet another attorney who informed him that his initial attorney, the defendant firm, might have committed malpractice by informing him of the incorrect statute of limitations. *Id.* In the malpractice case against it, the defendant firm moved to dismiss, arguing that it had terminated its relationship with plaintiff within the one-year limitations time period, thus the plaintiff's action was still viable. *Id.* at 972. The trial court agreed and dismissed the complaint. *Id.* at 973.

¶ 29 On appeal, this court reversed, finding that the defendant's incorrect information regarding the statute of limitations undermined the client's sense of urgency in seeking replacement counsel. *Id.* at 975. The court noted that the case before it, unlike some of the cases relied upon by the defendant, was not one where the defendant's negligence did not proximately cause the plaintiff's loss as a matter of law. *Id.* at 978. Ultimately, when this court reversed, it determined that because no superseding cause operated so as to defeat the defendant's liability, the issue of proximate cause should be decided by a trier of fact. *Id.* at 982.

¶ 30 We do not find the *Lopez* case applicable to the scenario before us. In that case, it was solely the defendant's negligence that led to the plaintiff erroneously believing that his claim had a two-year limitations period. In this case, we are faced with the same conduct by two attorneys, only one of whose clients' rights form the basis of the bad faith lawsuit at issue. Further, neither party on appeal argues that a superseding cause exists or that the facts are in dispute. It is well-settled that "[a]lthough proximate cause is generally a question of fact, the lack of proximate cause may be determined by the court as a matter of law where the facts alleged do not sufficiently demonstrate both cause in fact and legal cause." *Young v. Bryco Arms*, 213 Ill. 2d 433, 447 (2004). Looking to the facts alleged in the bad faith complaint, we find that the facts allege fail to show how Schoen proximately caused Century-National's ultimate injury where his conduct is not alleged to have contributed to the bad faith lawsuit, which is the genesis of the bad faith settlement.

¶ 31 We further find that the Schoen defendants' conduct was not a substantial factor in Century-National's ultimate injury. As mentioned above, the bad faith lawsuit stemmed from G&G's assignment of its rights to Andrews. The Schoen defendants' conduct is not mentioned in that lawsuit. Thus, we are unable to see how Schoen's failure to inform of the demand letter

could be considered a substantial factor in the bringing of a case wherein his conduct is not alleged in the complaint. We recognize that both Suber's and Schoen's omissions were nearly identical. However, it is clear to this court that Suber's omission would be considered a substantial factor in the filing of the bad faith lawsuit where it was his client that assigned its rights to the plaintiff in the bad faith lawsuit, a lawsuit that would not have been possible absent such an assignment. Conversely, the Schoen defendants were retained to represent Chavez, thus as mentioned above, had Chavez assigned his rights and a bad faith case ensued, then it would become more clear how the conduct of his attorney, the Schoen defendants, could be considered a substantial factor in Century-National's ultimate injury. However, based on the undisputed facts before this court, Century-National cannot establish that the Schoen defendants' conduct proximately caused its injury. As a result, Century-National is not able to satisfy all the requisite elements of a claim for legal malpractice, rendering the trial court's dismissal of count II proper.

¶ 32 As we have found that Century-National cannot establish cause in fact, we need not address the issue of legal cause, because in order to satisfy the requirement of proximate cause, both cause in fact and legal cause must be present. See *Turcios*, 2015 IL 117962, ¶ 23.

¶ 33 Finally, we note that Century-National also asserts that the trial court failed to address its claim that it expended attorney fees and incurred costs in the continuation of the defense of Andrews's personal injury lawsuit and the defense of the bad faith lawsuit. We recognize that "[a] legal malpractice plaintiff may recover as actual damages the attorney fees proximately caused by the defendant's malpractice, so long as the plaintiff can demonstrate [it] would not have incurred the fees in the absence of the defendant's negligence." *Huang*, 2014 IL App (1st) 123231, ¶ 25. However, as stated above, we have decided to affirm the trial court's decision to dismiss count II of Century-National's complaint with prejudice, and thus need not address

Century-National's claim that its additional attorney fees stemming from the defense of Andrews's personal injury lawsuit and subsequent bad faith lawsuit are recoverable elements of actual damages.

¶ 34 CONCLUSION

¶ 35 Based on the foregoing, we find that the trial court properly granted the Schoen defendants' motion to dismiss pursuant to section 2-619 of the Code and we affirm its decision.

¶ 36 Affirmed.