Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **19th day of November, 2020** are as follows:

BY Johnson, C.J.:

2020-C-00339 ELAINE EWING VS. WESTPORT INSURANCE CORPORATION, ET AL. (Parish of St. Landry)

We granted this writ application to determine whether "collectibility" is a relevant consideration in a legal malpractice action. Specifically, we must decide whether plaintiff's damages in this legal malpractice action are limited to the amount she could have actually collected on a judgment against the tortfeasor in the underlying lawsuit. For the following reasons, we answer these questions in the negative, holding proof of collectibility of an underlying judgment is not an element necessary for a plaintiff to establish a claim for legal malpractice, nor can collectibility be asserted by an attorney as an affirmative defense in a legal malpractice action.

AFFIRMED.

Retired Judge James H. Boddie, Jr., heard this case as Justice pro tempore, sitting in the vacant seat for District 4 of the Supreme Court. He is now appearing as an ad hoc for Justice Jay B. McCallum.

Weimer, J., concurs in the result and assigns reasons.
Genovese, J., dissents for the reasons assigned by Justice Crain.
Crain, J., dissents and assigns reasons.

11/19/20

SUPREME COURT OF LOUISIANA

No. 2020-C-00339

ELAINE EWING

VS.

WESTPORT INSURANCE CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD CIRCUIT, PARISH OF ST. LANDRY

JOHNSON, CHIEF JUSTICE[1]

We granted this writ application to determine whether "collectibility" is a relevant consideration in a legal malpractice action. Specifically, we must decide whether plaintiff's damages in this legal malpractice action are limited to the amount she could have actually collected on a judgment against the tortfeasor in the underlying lawsuit. For the following reasons, we answer these questions in the negative, holding proof of collectibility of an underlying judgment is not an element necessary for a plaintiff to establish a claim for legal malpractice, nor can collectibility be asserted by an attorney as an affirmative defense in a legal malpractice action.

FACTS AND PROCEDURAL HISTORY

Elaine Ewing was injured in an automobile accident on April 9, 2015, when her vehicle was hit by a vehicle driven by Marc Melancon. Ms. Ewing retained attorney Chuck Granger to represent her relative to damages she sustained in the accident. On April 4, 2016, Mr. Granger fax-filed a petition for damages with the 18th Judicial District Court. However, Mr. Granger failed to forward the original

[1] Retired Judge James H. Boddie, Jr., heard this case as Justice pro tempore, sitting in the vacant seat for District 4 of the Supreme Court. He is now appearing as an ad hoc for Justice Jay B. McCallum.

petition for damages within seven days as required by La. R.S. 13:850.[2] The original petition was filed on April 22, 2016, after the one-year prescriptive period had passed. Ms. Ewing's suit was dismissed on an exception of prescription.

Ms. Ewing subsequently filed a legal malpractice action against Mr. Granger and Westport Insurance Corporation, Mr. Granger's malpractice insurer. Defendants filed a motion for partial summary judgment asserting the court should apply the "collectibility rule." Defendants alleged Ms. Ewing's recovery could be no greater than her potential recovery in the underlying personal injury lawsuit, and recovery in this case should be capped at Mr. Melancon's insurance policy limits.

The district court initially denied the motion for summary judgment because there was no evidence indicating Mr. Melancon would be unable to pay a judgment in excess of the policy limits. However, defendants reurged the motion immediately prior to trial, introducing the deposition of Mr. Melancon in support of the motion. The parties stipulated insurance coverage totaled $30,000. It was also stipulated that there was an attorney/client relationship between Mr. Granger and Ms. Ewing, and Mr. Granger breached the standard of care. In granting the partial motion for summary judgment and capping Ms. Ewing's damages at $30,000, the district court stated:

> The Court after considering the deposition of the defendant driver, Marc Melancon, it's very clear that Mr. Melancon's testimony is that he would have filed bankruptcy for any judgment in excess of, and that his ability to pay would not support his paying any judgment above the underlying $30,000 of coverage. In addition, the deposition from a factual standpoint seems to leave no genuine issue of material fact as to whether or not he had an ability to pay anything.... I find that, in this

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[2] La. R.S. 13:850 provides in relevant part: "B. Within seven days, exclusive of legal holidays, after the clerk of court receives the facsimile filing, all of the following shall be delivered to the clerk of court:

> (1) The original document identical to the facsimile filing in number of pages and in content of each page including any attachments, exhibits, and orders. A document not identical to the facsimile filing or which includes pages not included in the facsimile filing shall not be considered the original document.

C. If the filing party fails to comply with any of the requirements of Subsection B of this Section, the facsimile filing shall have no force or effect. *** "

> case, the plaintiff cannot pursue damages in excess of the $30,000 of insurance, and my rationale is this, in every case where insurance is involved and limited insurance is involved, say in personal injury actions, where you have a $15,000 auto policy or you have, in this case a $30,000 of underlying auto coverage, a plaintiff would—for me to rule otherwise, would mean that a plaintiff, where there is limited insurance coverage, would be better off if their attorney committed malpractice, because the attorney would have more coverage than that underlying coverage.

After trial, the court awarded Ms. Ewing $30,000 concluding the evidence proved she incurred damages of at least that amount. However, the court did not make a determination of the amount of actual damages, finding that issue moot due to the grant of summary judgment in favor of the defendants on the issue of collectibility.

The court of appeal reversed, citing to this court's decisions in *Rodriguez v. Traylor*, 468 So. 2d 1186, 1188 (La.1985) (holding "the wealth or poverty of a party to a lawsuit is not a proper consideration in the determination of compensatory damages.") and *Costello v. Hardy*, 03-1146 (La. 1/21/04), 864 So. 2d 129, 138 (stating "[a] plaintiff can have no greater rights against attorneys for the negligent handling of a claim than are available in the underlying claim."). *Ewing v. Westport Ins. Corp*., 19-551 (La. App. 3 Cir. 2/5/20), 290 So. 3d 707. The court of appeal explained:

> We find that the Defendants cannot rely on a hypothetical situation of bankruptcy to limit Ms. Ewing's recovery. It is just as possible that Mr. Melancon may not file bankruptcy and the judgment may become collectible in the future should Mr. Melancon receive some money from other sources. It is admitted that Ms. Ewing would have been successful in her claim against Mr. Melancon. Ms. Ewing had a right to a judgment for the recovery of the full amount of her damages against Mr. Melancon, without the consideration of his ability to pay the judgment. An inability to pay Ms. Ewing does not relieve Mr. Melancon of the obligation to pay her. Because of Mr. Granger's negligence, we will never know what Ms. Ewing would have collected from Mr. Melancon. Mr. Granger can have no greater rights in his defense of legal malpractice than Mr. Melancon would have had in the underlying suit. Ms. Ewing is entitled to the same rights against the Defendants as she had against Mr. Melancon, due to the negligence of Mr. Granger in depriving of her the ability to sue Mr. Melancon. Collectibility could not be raised in the underlying lawsuit and should not be considered in Ms. Ewing's malpractice claim against the Defendants either.

Id. at 711. The court of appeal remanded the case to the district court for consideration of the amount of damages suffered by Ms. Ewing as a result of the accident. *Id*.

Defendants filed a writ application in this court, which we granted. *Ewing v. Westport Ins. Corp*., 20-0339 (La. 6/22/20), 297 So. 3d 759.

DISCUSSION

The general issue presented is whether the collectibility of damages is a relevant consideration in a legal malpractice action. In particular, we must determine whether the loss caused by Mr. Granger's admitted negligence is limited to the amount Ms. Ewing could have actually collected on a judgment against the underlying tortfeasor, Mr. Melancon. The concept of "collectibility" concerns the measure of damages. Application of the "collectibility rule" limits the measure of a legal malpractice plaintiff's damages to what the plaintiff could have actually collected from the tortfeasor in the underlying litigation absent the attorney's negligence, regardless of the face value of the lost claim. The justification for applying the collectibility rule is that the attorney's negligence did not cause the client any damage if the client would have been unable to collect upon a judgment, even it if had been obtained in the underlying action. The primary rationale is the perceived inequity if the plaintiff is able to obtain a judgment against the attorney that is greater than the judgment the plaintiff could have collected from the underlying tortfeasor. *See* Ronald E. Mallen, *The plaintiff's attorney—The cause of action—Collectibility and offsets*, 4 Legal Malpractice § 33:32 (2020 ed.); 3 Modern Tort Law: *Liability and Litigation, Damages: In general--Collectibilty* §25:42 (June 2020).

A majority of courts that have considered this issue view collectiblity as an essential element of the plaintiff's legal malpractice case demonstrating the attorney's negligence proximately caused the resulting damages, thus placing the

burden of proof on the malpractice plaintiff. *See* Daniel D. Tostrud, "*Payability as the Logical Corollary to Collectibility" in Legal Malpractice*, 4 St. Mary's J. Legal Malpractice & Ethics 408 (2014). As recently explained by the Colorado Supreme Court:

> Where, as here, a legal malpractice claim is founded on professional negligence, the plaintiff must prove duty, breach, causation, and damages (as in every negligence case).…[T]he collectibility of the underlying judgment implicates both the causation and damages elements of a negligence claim. In order to prove that the attorney's negligence caused the client harm, the client-plaintiff must show that the claim underlying the malpractice action would have been successful "but for" the attorney's negligence. But if the underlying judgment was uncollectible, for example, due to insufficient assets or bankruptcy, the lost value of the judgment is not the proximate result of an attorney's negligence. Proving collectibility, therefore, necessarily follows from the rule that plaintiffs must prove causation.

LeHouillier v. Gallegos, 434 P.3d 156, 162, *reh'g denied* (Colo. 2019). "Collectibility is logically and inextricably linked to the legal-malpractice plaintiff's damages, for which the plaintiff bears the burden of proof. In proving what was lost, the plaintiff must show what would have been gained." *Paterek v. Petersen & Ibold*, 890 N.E.2d 316, 321 (Ohio 2008). *See also*, *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp*., 299 S.W.3d 106, 112 (Tex. 2009) (when the claim is that the lawyer improperly represented the plaintiff in another case, the plaintiff must prove and obtain findings as to the amount of damages that would have been recoverable and collectible if the other case had been properly prosecuted); *Paterek*, *supra* (in attorney malpractice case, proof of collectibility of judgment lost due to malpractice is an element of plaintiff's claim against negligent attorney); *Hartford Cas. Ins. Co. v. Farrish-LeDuc*, 882 A.2d 44 (Conn. 2005) (when the underlying action was never tried, client must establish that the underlying claim was recoverable and collectible); *Huber v. Watson*, 568 N.W.2d 787 (Iowa 1997) (in a legal malpractice case involving alleged negligent handling of litigation, plaintiffs must prove that any recovery against defendant in the underlying action

could have been collected); *Poly v. Moylan*, 667 N.E.2d 250 (Mass. 1996) (plaintiff in a legal malpractice action bears the burden of showing that the client would have been able to collect on a judgment obtained in the underlying case; client may only collect from the lawyer what the client could have collected from defendant in underlying action); *Klump v. Duffus*, 71 F.3d 1368 (7th Cir. 1995) (applying Illinois state law, held the burden is on the plaintiff to prove the amount she would have actually collected from the original tortfeasor as an element of her malpractice claim); *Haberer v. Rice*, 511 N.W.2d 279 (S.D. 1994) (showing of proximate cause requires proof that the client would not only have prevailed in underlying claim but that judgment in the client's favor would have been collectible); *DiPalma v. Seldman*, 27 Cal. App. 4th 1499, 33 Cal. Rptr. 2d 219, 223 (Cal. 1994) (where the alleged malpractice consists of mishandling a client's claim, the plaintiff must show proper prosecution of the matter would have resulted in a favorable judgment and collection thereof); *Eno v. Watkins*, 429 N.W.2d 371, 372 (Neb. 1988) (plaintiff has the burden of proving that she would have been successful in obtaining and collecting a judgment against the attorney); *Rorrer v. Cooke*, 329 S.E.2d 355, 369 (N.C. 1985) (plaintiff bringing suit for legal malpractice must prove that the original claim was valid; it would have resulted in a judgment in his favor; and the judgment would have been collectible); *McDow v. Dixon*, 226 S.E.2d 145, 147 (Ga. Ct. App. 1976) (a client suing his attorney for malpractice not only must prove that his claim was valid and would have resulted in a judgment in his favor, but also that the judgment would have been collectible in some amount).

However, there is a significant growing trend of courts that have allocated the burden differently, making the issue of collectibility an affirmative defense to be pled and proven by the legal malpractice defendant. *See* Tostrud, *supra* at 417-18. These courts have generally reasoned that requiring the legal malpractice plaintiff to also prove collectibility of damages places an unfair burden on the plaintiff, thus

finding it more logical and fair to treat collectibility as a matter constituting an avoidance or mitigation of the consequences of the attorney's negligent act. *See*, *e.g*, *Smith v. McLaughlin*, 769 S.E.2d 7, 18 (Va. 2015) (the burden of pleading and disproving collectibility is on the negligent attorney as an affirmative defense); *Clary v. Lite Machines Corp*., 850 N.E.2d 423, 440 (Ind. Ct. App. 2006) (it makes more sense to place the burden of proof upon the malpractice defendant to show the judgment would not have been collectible from the defendant in the underlying case); *Lindenman v. Kreitzer*, 7 A.D.3d 30, 35 (N.Y. App. Div. 2004) (the issue of noncollectibility should be treated as a matter constituting an avoidance or mitigation of the consequences of the attorney's malpractice and the erring attorney should bear the inherent risks and uncertainties of proving it); *Carbone v. Tierney*, 864 A.2d 308, 319 (N.H. 2004) (in a legal malpractice action, noncollectibility of the underlying judgment is an affirmative defense that must be proved by the defendant); *Kituskie v. Corbman*, 714 A.2d 1027, 1032 (Pa. 1998) (a defendant/lawyer in a legal malpractice action should plead and prove the affirmative defense that the underlying case was not collectible); *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 31-32 (Alaska 1998) (policy militates in favor of requiring the malpracticing attorney to bear the inherent risks and uncertainties of proving uncollectibility); *Smith v. Haden*, 868 F.Supp. 1, 3 (D.D.C. 1994) (it is more rational and fair to put the burden on defendant to prove non-collectibility than on the plaintiff to prove collectibility in her case in chief); *Teodorescu v. Bushnell, Gage, Reizen & Byington*, 506 N.W.2d 275 (Mich. Ct. App. 1993) (we choose to follow the minority view and hold that collectibility is an affirmative defense to an action for legal malpractice that must be pleaded and proved by the defendant); *Jourdain v. Dineen*, 527 A.2d 1304 (Me. 1987) (because uncollectibility of a judgment should be treated as a matter constituting an avoidance or mitigation of the consequences of one's negligent act, it must be pleaded and

proved by the defendant); *Hoppe v. Ranzini*, 385 A.2d 913, 920 (N.J. Super. Ct. App. Div. 1978) (fairness requires that the burden of proof with respect to the issue of collectibility should be upon the attorney defendant, notwithstanding the rule elsewhere that places that burden on plaintiff).

Whether collectibility is a relevant consideration in legal malpractice cases is *res nova* in Louisiana. After review of the law and consideration of the parties' arguments, we decline to follow the jurisprudence outlined above. Rather, based on Louisiana jurisprudence and public policy, and considering the lack of relevant statutory authority, we hold the collectibility rule is not applicable in legal malpractice cases.

To establish a claim for legal malpractice, a plaintiff must prove: 1) the existence of an attorney-client relationship; 2) negligent representation by the attorney; and 3) loss caused by that negligence. *Costello*, 864 So. 2d at 138. Notably, the "case within a case" requirement in legal malpractice cases has been eliminated. In *Jenkins v. St. Paul Fire & Marine Ins. Co*., 422 So. 2d 1109, 1110 (La. 1982), this court expressed concern over the "case within a case" approach which had been used by courts ruling on legal malpractice cases. Under that approach, a plaintiff was required to prove not only that the attorney was negligent in handling the client's claim or litigation, but also that the claim or litigation would have been successful but for the attorney's negligence. *Id*. at 1109-10. A plurality of this court rejected the "case within a case" approach, explaining:

> Causation, of course, is an essential element of any tort claim. However, once the client has proved that his former attorney accepted employment and failed to assert the claim timely, then the client has established a prima facie case that the attorney's negligence caused him some loss, since it is unlikely the attorney would have agreed to handle a claim completely devoid of merit. In such a situation, a rule which requires the client to prove the amount of damages by trying the "case within a case" simply imposes too great a standard of certainty of proof. Rather, the more logical approach is to impose on the negligent attorney, at this point in the trial, the burden of going forward with evidence to overcome the client's prima facie case by proving that the

> client could not have succeeded on the original claim, and the causation and damage questions are then up to the jury to decide. Otherwise, there is an undue burden on an aggrieved client, who can prove negligence and causation of some damages, when he has been relegated to seeking relief by the only remedy available after his attorney's negligence precluded relief by means of the original claim.

Id. In *MB Indus., LLC v. CNA Ins. Co*., 11-0303 (La. 10/25/11), 74 So. 3d 1173, 1187, we confirmed the holding in *Jenkins*, explaining it is not sufficient for the plaintiff to simply show the attorney acted negligently, and making clear the plaintiff continues to bear the initial burden of establishing some causal connection between the negligence and the alleged loss:

> Although this Court disavowed the "case within a case" doctrine in *Jenkins v. St. Paul Fire & Marine Ins. Co*., 422 So. 2d 1109, 1110 (La.1982), we reiterated that causation "is an essential element of any tort claim." At the very least, [plaintiff] must establish some causal connection between the alleged negligence and the eventual unfavorable outcome of the litigation.

Id. Thus, under our jurisprudence, Ms. Ewing was only required to prove she had an attorney-client relationship with Mr. Granger; that Mr. Granger's representation was negligent; and that Mr. Granger's negligence caused her some loss. The parties stipulated the first two elements were satisfied. Furthermore, Ms. Ewing satisfied her burden regarding the third element. Where the plaintiff proves that the negligence on the part of her former attorney caused the loss of the opportunity to assert a claim, she has established the inference of causation of damages resulting from the lost opportunity for recovery. *Jenkins*, 422 So. 2d at 1110. Because the "case within a case" requirement no longer exists, there is no basis to burden a legal malpractice plaintiff with also proving she would have successfully been able to execute on the judgment in the underlying case or that the judgment was collectible. Collectibility is not an element of the plaintiff's legal malpractice claim in Louisiana.

Although defendants do not assert Ms. Ewing was required to prove collectibility as part of her claim, they do argue collectibility is a valid defense in a legal malpractice lawsuit. We disagree. A legal malpractice claim in Louisiana is a

negligence claim, albeit a professional negligence claim, and thus derives from La. C.C. arts. 2315[3] and 2316.[4] *See* Frank L. Maraist, 21 La. Civ. L. Treatise, *Louisiana Lawyering* § 18.1 (2020). These articles do not limit the damages available in legal malpractice actions based on the collectibility of the judgment against a particular tortfeasor. Defendants argue "it is maxim in Louisiana legal malpractice cases that a plaintiff shall have no greater rights against her attorney than she had against the tortfeasor-defendant in the underlying case," and allowing Ms. Ewing to recover more from Mr. Granger than she could have collected against Mr. Melancon would violate this rule. Defendants' argument is drawn from a sentence in this court's opinion in *Costello*, *supra* ("A plaintiff can have no greater rights against attorneys for the negligent handling of a claim than are available in the underlying claim." 864 So. 2d at 138). However, *Costello* did not involve the issue of collectibility. Rather, *Costello* concerned the lack of any factual support for the third prong of plaintiff's malpractice claim (proof of loss or damages) primarily because the plaintiff had settled her lawsuit in the underlying claim providing her with the relief she originally sought. This principle stated in *Costello* was adopted from *Couture v. Guillory*, 97-2796 (La. App. 4 Cir. 4/15/98), 713 So. 2d 528, 532, *writ denied*, 98-1323 (La. 6/26/98), 719 So. 2d 1287 and *Spellman v. Bizal*, 99-0723 (La. App. 4 Cir. 3/1/00), 755 So. 2d 1013, 1019, wherein the court of appeal stated that to the extent a plaintiff asserts claims for damages against her former attorneys which were clearly discharged in the underlying lawsuit against the underlying negligent party,

[3] La. C.C. art. 2315: "A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. B. Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person. Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease. Damages shall include any sales taxes paid by the owner on the repair or replacement of the property damaged."

[4] La. C.C. art 2316: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

defendants are entitled to judgment as a matter of law dismissing the malpractice claims. The same principle would apply in a case where the defendant attorney successfully demonstrates the plaintiff could not have prevailed on the merits regarding liability in the underlying tort claim. *See*, *e.g.*, *Fortenberry v. Continental Cas. Co*., 15-418 (La. App. 3 Cir. 11/4/15), 179 So. 3d 729. Thus, nothing in *Costello* requires this court to adopt the collectibility rule.

Moreover, applying the collectibility rule assumes that the underlying tortfeasor will remain insolvent or unable to pay for the life of the judgment. But impecunity is a snapshot in time. Under Louisiana law, a money judgment is valid for ten years and may be revived for successive ten-year periods if appropriate steps are taken. La. C.C. art. 3501.[5] It would be inherently unfair to deprive the malpractice plaintiff of recovery against the negligent attorney if the underlying judgment would be collectible at a later point in time, within the statutory prescriptive period for satisfaction of a judgment.

A money judgment rendered against a tortfeasor has intrinsic value, regardless of collectibility of that judgment. We hold collectibility is not relevant to the correct measure of a legal malpractice plaintiff's damages. This is consistent with the policy set forth by this court in *Rodriguez v. Traylor*, 468 So. 2d 1186, 1188 (La. 1985) that the financial condition of the defendant is not a proper consideration in the determination of compensatory damages. We will not allow a malpractice defendant to assert a defense based on the wealth or poverty of the underlying tortfeasor when a defendant in any other type of tort action could not assert a similarly based defense.

CONCLUSION

[5] La. C.C. art. 3501 provides in relevant part: "A money judgment rendered by a trial court of this state is prescribed by the lapse of ten years from its signing if no appeal has been taken, or, if an appeal has been taken, it is prescribed by the lapse of ten years from the time the judgment becomes final. *** Any party having an interest in a money judgment may have it revived before it prescribes, as provided in Article 2031 of the Code of Civil Procedure. A judgment so revived is subject to the prescription provided by the first paragraph of this Article. An interested party may have a money judgment rendered by a court of this state revived as often as he may desire."

For the above reasons we hold the collectibility rule cannot be applied in legal malpractice actions to limit the amount of damages otherwise due to a legal malpractice plaintiff.

DECREE

AFFIRMED.

11/19/20

SUPREME COURT OF LOUISIANA

No. 2020-C-00339

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ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD CIRCUIT, PARISH OF ST. LANDRY

WEIMER, J., concurring in the result.

I agree with and commend the majority's decision which declines to import into our law the "collectibility rule" adopted by a number of common law states. The jurisprudential rule embodied therein is neither appropriate nor necessary to our civilian tradition in which tort liability (including liability for legal malpractice) is founded in and stems from our codal provisions. See La. C.C. art. 2315(A) ("Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."); La. C.C. art. 2316 ("Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."). It is also inconsistent with our jurisprudence, which eschews the "case within a case" doctrine in the legal malpractice arena. See, e.g., **MB Indus., LLC v. CNA Ins. Co.**, 11-0303, 11-0304, p. 20 (La. 10/25/11), 74 So.3d 1173, 1187; **Jenkins v. St. Paul Fire & Marine Ins. Co.**, 422 So.2d 1109 (La. 1982).

As the majority notes, to establish a claim for legal malpractice in Louisiana, a complainant must prove: (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, p. 9 (La. 1/21/04), 864 So.2d 129, 138. It is in

connection with this third element of the malpractice claim that the issue of the wholly impecunious tortfeasor (in the underlying action) arises. As the majority correctly recognizes, causation is an essential element of any tort claim, and a plaintiff must always prove that the defendant's negligence caused him or her some loss. **Jenkins**, 442 So.2d at 1110. However, in the legal malpractice arena, this initial burden is satisfied once the plaintiff has proved that his former attorney accepted employment and failed to assert the claim timely. ***Id.*** At this point, the plaintiff has established an inference of causation of damages resulting from the loss of opportunity for recovery, and it is incumbent upon the negligent attorney to produce evidence sufficient to overcome the plaintiff's prima facie case. ***Id.***

It is at this juncture that the issue of the collectibility of the underlying judgment becomes relevant, because a plaintiff who would have recovered no damages in the underlying claim has arguably suffered no loss from the lost opportunity to pursue his underlying claim.[1] In this connection, however, it is important to note that there is a difference between a tortfeasor in the underlying proceeding who is wholly impecunious, and the value of a lost judgment. As the majority astutely points out, "impecunity is a snapshot in time;" and "[a] money judgment rendered against a tortfeasor has intrinsic value, regardless of the collectibility of that judgment." **Ewing v. Westport Ins. Co.**, 20-00339, slip op. at 11 (La. 11/19/20). Thus, while it may be the case that in certain (and rare)

[1] Such a proposition does not conflict with this court's decision in **Rodriguez v. Traylor**, 468 So.2d 1186, 1188 (La. 1985), in which the court held that the wealth or poverty of a party to a lawsuit is not a proper consideration in the determination of compensatory damages. **Rodriguez** is not a legal malpractice case. See ***Id.*** In a legal malpractice case, the impecuniosity of the tortfeasor in the underlying action is a factor in the causation inquiry, and not a consideration in the assessment of the amount of compensatory damages owed by the defendant attorney, whose wealth or poverty is not a consideration in the assessment of compensatory damages against him or her.

circumstances the underlying tortfeasor may be truly judgment proof,[2] and summary judgment in favor of the defendant attorney appropriate, that is not the case here. On the record before this court, the district court manifestly erred in capping the plaintiff's damages at $30,000 based on the tortfeasor's deposition testimony that "hypothetically" if a judgment were rendered against him in the amount of $30,000, $20,000 or even $10,000, he would "consider" bankruptcy. A "hypothetical" bankruptcy does not establish that more probably than not, the defendant attorney's negligence did not cause the plaintiff in this case to suffer damages in excess of the $30,000 insurance policy limits.

For the foregoing reasons, I respectfully concur in the result in this case, which affirms the judgment of the court of appeal reversing the summary judgment capping plaintiff's damages at $30,000 and remands the case to the district court for consideration of the amount of damages sustained by plaintiff as a result of her attorney's negligence.

[2] For example, the tortfeasor filed for bankruptcy and the debt was discharged; thus, the debt is uncollectible.

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GENOVESE, J., dissents for the reasons assigned by Justice Crain.

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CRAIN, J., dissents and assigns reasons.

Thirty states have determined collectibility is relevant in a legal malpractice action.[1] No state has reached a contrary conclusion, until now. In reaching this conclusion, the majority correctly observes there is no codal, statutory, or jurisprudential authority that requires it. Close scrutiny of the distinct causes of action and damages unique to such claims confirms that in this instance, our civilian traditions align with those of our common law neighbors.

Louisiana Code of Evidence article 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "All relevant evidence is admissible," except as otherwise provided by positive law. La. C.E. art. 402. The majority errs by conflating relevant evidence for the underlying negligence claim with that of the legal malpractice action. In doing so, it effectively puts the malpractice attorney in

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[1] In addition to the twenty-two jurisdictions cited by the majority, another eight jurisdictions have ruled the issue of collectability is a relevant consideration in a legal malpractice action. *See also,* D.C. Circuit (*Smith v. Haden*, 868 F. Supp. 1, 3 (D.D.C. 1994)); Oregon (*Ridenour v. Lewis*, 854 P.2d 1005, 1006 (Or. Ct. App. 1993)); Florida (*Fernandes v. Barrs*, 641 So. 2d 1371, 1376 (Fla. Dist. Ct. App. 1994)); Minnesota (*Christy v. Saliterman*, 179 N.W. 2d 288, 306 (Min. 1970)); New Mexico (*Carrillo v. Coors*, 901 P. 2d 214, 217 (N.M. Ct. App. 1995)); Tennessee (*Sitton v. Clements*, 257 F. Supp. 63, 67 (E.D. Tenn. 1966)); Washington (*Lavigne v. Chase*, 50 P. 3d 306, 311 (Wash. Ct. App. 2002)); and North Carolina (*Rorrer v. Cooke*, 329 S.E. 2d 355, 361 (N. C. 1985)).

the shoes of the defendant in the underlying negligence claim. However, the harm caused by these defendants is distinctly different.

Under Louisiana Civil Code articles 2315 and 2316, plaintiffs are entitled to actual damages caused by the defendant. Compensatory damages are intended to make the victim whole and are designed to place the plaintiff in the position in which he would have been if the tort had not been committed. *Wainwright v. Fontenot*, 00-0492, p. 5 (La. 10/17/00), 774 So.2d 70, 74.) The object, then, of the underlying negligence claim is to obtain a judgment that reflects the actual monetary value for the injuries suffered by the plaintiff. The object of the legal malpractice suit is to obtain a judgment that reflects the actual monetary value for the *lost opportunity to recover* in that underlying negligence claim, *i.e.*, the value of the "lost judgment." These two concepts are not interchangeable.

With this distinction in mind, it is necessary to determine what evidence is relevant to determine those damages. In the underlying negligence claim, the defendant's inability to pay is clearly *irrelevant*, as it does not help the trier of fact determine the extent of the plaintiff's injuries. In the legal malpractice action, the underlying defendant's inability to pay is just as clearly *relevant,* as it is determinative of the actual harm caused by the negligent attorney. If the "lost judgment," which was intended to fully compensate for the plaintiff's injuries in the underlying negligence claim, is uncollectible, then the negligent attorney who fails to preserve that claim only causes the plaintiff nominal, if any, harm.[2] Therefore, collectibility should be a fact considered by the factfinder in determining the loss caused by the negligent attorney.

[2] In some instances, the plaintiff may prove he would have been able to collect from the underlying defendant some of the judgment, but not all. There, the negligent attorney would be exposed to liability for that portion of the judgment. Other times, like in the case of an insolvent underlying defendant, the plaintiff would not be able to collect at all. The negligent attorney would be exposed to liability only for the value a trial court, in its discretion, assigns to that uncollectible judgment. Regardless, it is the value of the lost judgment that is quantified by a trial court, subject to an abuse of discretion standard of review, like every other damage award.

For example, assume an insolvent, uninsured driver rear-ends a world-class professional athlete rendering him a paraplegic, resulting in damages of $50 million. The plaintiff hires a lawyer to sue the insolvent, uninsured driver. Then, the lawyer misses the prescription date. The plaintiff sues the lawyer for legal malpractice. The lawyer has $50 million legal malpractice insurance coverage. What did the plaintiff lose, or what harm did the lawyer cause the plaintiff, when the lawyer failed to preserve the claim against the insolvent, uninsured driver? The lawyer did not cause the paraplegia, nor did he cause the loss of $50 million, as that money was clearly uncollectible. Instead, the plaintiff lost the right to obtain a judgment against the insolvent, uninsured driver in the amount of $50 million. The determinative question, then, by a trial court is: "What is the value of the 'lost judgment'?" That value depends largely, if not totally, on the collectibility of the "lost judgment." This quantum determination should be left to the trial court after considering the relevant collectibility evidence, which should not be barred by the bright-line rule adopted by the majority.

This approach is in line with the well-established maxim that a plaintiff shall have no greater rights against his attorney than he had against the original defendant. *Costello v. Hardy*, 2003-1146 (La. 1/21/04), 864 So.2d 129, 138. The majority allows the plaintiff to recover a greater amount from the negligent attorney, when the attorney did not cause the plaintiff to lose that amount. This result incentivizes malpractice. Encouraging such claims detrimentally alters insurance rates, increases the cost for attorneys to practice law, and creates a windfall for plaintiffs.

The majority finds its holding conforms to our court's prior jurisprudence. Specifically, it notes the "case within a case" requirement in legal malpractice cases has been eliminated. However, *Jenkins v. St. Paul Fire & Marine Ins. Co.*, 422 So.2d 1109, 1110 (La. 1982), did not remove the relevancy of such proof. It merely shifted the burden of proving success in the underlying case from the plaintiff to the

negligent attorney. The admissibility of relevant evidence is a wholly separate concept from the determination of which party has the burden of proof using that evidence. Thus, allowing collectibility as an affirmative defense is a natural extension of *Jenkins*, not a departure from it.

Moreover, the majority finds its conclusion consistent with *Rodriguez v. Traylor*, 468 So.2d 1186, 1188 (La. 1985). For nearly 100 years (from 1898 to 1985) the jurisprudentially-created "inability to pay" rule prevailed in this state, allowing evidence of a defendant's inability to pay as a defense to a plaintiff's personal injury claims. In *Rodriguez*, our court held that the wealth or poverty of a party to a lawsuit is not a proper consideration in the determination of compensatory damages, and each litigant should stand equal in the eyes of the law regardless of his financial standing. *Rodriguez* was correctly decided, as it recognized the legal reality that a defendant's ability to pay a judgment is completely irrelevant to determining the extent of the injuries caused by that defendant. However, *Rodriguez* involved an ordinary negligence claim filed by the victim of a rear-end automobile accident against the defendant driver. Nothing in *Rodriguez* requires its holding to be extended to a legal malpractice claim, which is a distinct cause of action with its own damages.

An additional argument the majority relies on is the notion that "impecunity is a snapshot in time." Other courts have considered this argument and rejected it as non-determinative.[3] Indeed, all damage awards involve snapshots in time. Each day courts make future damage awards without knowing what economic climate those damages will mature in. Those present day dollars may appreciate or depreciate in a manner not even economists can predict. This imprecise measuring system,

[3] *See, e.g., Lindeman v. Kreitzer*, 7 A.D. 3d 30, 35-36 (N.Y. App. Div. 2004) and *Hoppe v. Ranzini*, 385 A2d 913, 919 N.J. Super.Ct. App. Div. 1978 (both courts limiting the negligent attorney's burden of proving non-collectibility to the period between the date of the malpractice and the end of a reasonable period of time after the malpractice trial, short of the full twenty-year life span of the underlying judgment.)

though, does not prevent the awarding of those damages; nor should the valuation of an uncollectible judgment be barred because the underlying defendant's patrimony may increase.

While collectibility of a judgment is not relevant in other suits, a legal malpractice action is distinctly different from an ordinary negligence claim. The attorney being sued for malpractice did not cause the original harm or damage to the plaintiff; a third party caused that harm. It is patently inequitable to allow the plaintiff to obtain a greater recovery against his attorney than he could have recovered against the third party defendant who caused the plaintiff's injuries. I dissent.