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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0661-08T2

JULIA GERE, formerly known as
Julia Gere Ricker,

Plaintiff-Appellant,

v.

FRANK A. LOUIS, ESQ., an attorney
at law of the State of New Jersey,
LOUIS, ROE & WOLF, ESQS, LOUIS,
STOLFE & ZIEGLER, ESQS, JOHN
DEBARTOLO, ESQ., an attorney at
law of the State of New Jersey,
and ATKINSON & DEBARTOLO, P.C.,

Defendants-Respondents.

Argued December 1, 2009 - Decided August 25, 2010

Before Judges Carchman, Lihotz and
Ashrafi.

On appeal from the Superior Court of New
Jersey, Law Division, Monmouth County,
Docket No. L-5569-07.

Diane Marie Acciavatti argued the cause
for appellant.

Shaji M. Eapen argued the cause for
respondents Frank A. Louis, Esq., and
Frank A. Louis P.C., F/T/A Louis, Roe &
Wolf, Esqs, N/K/A Louis, Stolfe & Ziegler,
Esqs. (Morgan Melhuish Abrutyn, attorneys;
Elliott Abrutyn, of counsel; Mr. Eapen and
Joshua A. Heines, on the brief).

Scott Tenenbaum argued the cause for respondents John DeBartolo, Esq. and Atkinson & DeBartolo, P.C. (Winget, Spadafora & Schwartzberg, LLP, attorneys; Mr. Tenenbaum and Dianna D. McCarthy, on the brief).

PER CURIAM

In this legal malpractice action, plaintiff Julia Gere appeals from an order of the Law Division granting summary judgment in favor of her former attorneys - defendants Frank A. Louis and John DeBartolo. We affirm.

These are the facts that were before the motion judge. In 1997, plaintiff was a party to a matrimonial action in Monmouth County Superior Court captioned Peter Evans Ricker v. Julia Gere Ricker, Docket No. FM-13-1761-97. Louis, an attorney and partner at Louis, Roe & Wolf, represented plaintiff in this litigation. "[A]fter protracted and contentious negotiations over a period of many months," on March 13, 2000, the parties reached a Property Settlement Agreement (the 2000 Settlement). The 2000 Settlement contained a provision regarding the disposition of real estate and a marina business.

ARTICLE XVII - ANCILLARY REAL ESTATE INVESTMENTS, section 17.1(a), provides:

> The parties acknowledge having acquired interests in various parcels of real estate which are more particularly itemized upon

> Ex. D. The Wife shall have a period of [six] months from 4-1-2000, subsequent to the execution of this Agreement to review all financial records concerning these investments. Tom Flynn, CPA, the Wife's expert, shall have access to all books and records of those investments thus enabling the Wife to make an informed decision whether she shall retain an interest (see Art. 17.3) in these investments. Any expense for Mr. Flynn shall be the Wife's responsibility. Prior to the expiration of six months, the Wife shall be required to notify the Husband of her decision concerning the status of these investments. If the Wife determines she no longer wishes to be remain [sic] an equal partner in these assets, then and in that event, she shall relinquish any and all claims, legal or equitable, as to the distributability of these properties. Upon execution of that waiver, the Wife shall execute any and all documents required by the Husband's attorney (and shall not unreasonably withhold her consent to do so), subject to review by the Wife's counsel, implementing transfer of ownership of these assets to the Husband. In the event the Wife opts to waive her interest in these assets, then and in that event, the Husband shall fully and completely indemnify the Wife as to any obligations arising out of these assets.

Article 17.3 of the 2000 Settlement further provides:

> In the event the Wife fails to notify the Husband in writing within the six months [] period subsequent to final execution of this Agreement, then and in that event, the parties shall maintain these assets jointly and equally in a fashion to be set forth in a Partnership Agreement consistent with all the terms and conditions of the husband's present partnership agreement to be prepared at that time. This Agreement shall be prepared by counsel mutually selected by the

> parties. The cost of the preparation of this Agreement shall equally be shared by the parties. The Agreement shall provide that the parties shall be joint and equal owners as to all aspects of these investments, including but not limited to enjoyment of all economic benefits or obligations arising therefrom. The Agreement shall confirm both parties have equal decision making.

On October 4, 2000, plaintiff's husband, Peter Ricker, sent Louis a letter referring to "the real estate deadline of October 20, which needs to be addressed immediately." Louis then had a conversation with John Hope, plaintiff's co-habitant with whom she had a close personal relationship. According to Louis, plaintiff relied on Hope for advice and "viewed [his] conversations with [Hope] to be the function of both [his] conversations with [plaintiff]." Louis recalls that he had "a conversation with Hope and maybe [plaintiff] as well, and it was a short conversation because I was saying, I got to write this letter. You guys make a decision yet? And he said the real estate, yes, marina, no and I wrote a quick letter to get it out."

Hope, in his certification, however, stated that he "was never authorized by [plaintiff] to make any decision for her concerning any aspect of her divorce case." He stated that he received a call some time after October 1, 2000, at plaintiff's residence where he was living. Hope certified that he "answered

the phone and Mr. Louis started to discuss the Navesink Marina with me. Mr. Louis did not ask to speak to [plaintiff], who was also home, nor did he ask for a conference call with [plaintiff], Mr. Louis and I participating." Hope recalled the conversation as "short, approximately two minutes, and abrupt in nature, and it was my startled impression that Mr. Louis was in a hurry." Hope specifically claimed that "[d]uring the short and abrupt conversation, Mr. Louis never indicated that he was asking what [plaintiff's] decision was with respect to whether she would waive her interest in any of the real estate investments." Hope recalled commenting that "[plaintiff] 'preferred' not to continue to own the [marina] business and to own only the real estate[.]"

Plaintiff averred that she did not have a phone conversation with Louis prior to him sending the letter, and she did not recall hearing Hope on the phone with Louis. Plaintiff, however, acknowledged that she stated in her deposition on February 13, 2003, that she "guess[es]" she authorized Louis to write that letter. Plaintiff claimed that she was under stress at that time and that the true answer is that she did not authorize the letter to be sent.

Louis next sent a letter to Ricker's attorney, Philip Jacobowitz on October 11, 2000, which stated:

> In accordance with the option provided [plaintiff] under the real estate portion of the Property Settlement Agreement, this will confirm that except for the Marina, [plaintiff] wishes to maintain one-half interests in all other properties.

Particularly noteworthy, plaintiff also received a contemporaneous copy of Louis' October 11, 2000 letter.

Louis sent a letter to Jacobowitz on December 17, 2001, stating that plaintiff "wishes to terminate her business relationship with [Ricker] concerning the other assets." Louis wrote that "[w]e need to establish a methodology for her equitable interest in these assets to be acquired or alternatively agree that assets are to be sold." Louis then sent plaintiff a letter on January 15, 2002, advising her that Ricker had contacted him and stated that it was Ricker's position "that you had relinquished your rights in the Marina. He didn't view that as an issue. I only shared with him during the conversation that that was not the position you were taking."

Louis thereafter filed a motion seeking enforcement and/or implementation of various provisions of the 2000 Settlement accompanied with a certification from plaintiff on May 20, 2002. Within plaintiff's certification it stated that:

> Pursuant to Art. 17.1 of the PSA, I was provided [with] a period to determine whether I would retain an interest in

> certain real estate investments. After examining the financial information, I made the decision to maintain an interest in the assets. Art. 17.3 provides what would happen if I maintained an ownership, either by failing to notify [Ricker] or exercising an option. I did, within the time period, exercise my option to remain a partner. The Agreement provided specifically that we were to maintain these assets "jointly and equally" in a fashion to be set forth in a Partnership Agreement to be consistent with the terms of the existing Partnership Agreements [Ricker] had with his partners. No such Partnership Agreement was prepared by [Ricker] nor does any Agreement limit, eliminate, or restrict any rights I might have as a partner, including but not limited to the right I am now exercising to terminate that partnership. Based upon a series of factors (some personal and some economic), caused by my cancer operation on March 13, 2002. I have now determined there should be a termination of the entanglement between [Ricker] and I. I have chosen to exercise the rights I have as a partner under law to end the ongoing business relationship. Since exercising my original option, not only hasn't the Partnership Agreement been prepared, but I have not received periodic financial information since the original analysis concerning the operation of the entities which I seek to be compensated for. Those entities are: Sea Bright Apartments; Sea Bright Marina; and the Shopping Center known as Panther Valley Center. Simply put, I no longer wish to be in business with [Ricker].

Ricker's attorney, on August 13, 2002, advised Louis that "it is my understanding that your client waived her interest in that Marina and was thus not a party to that refinance." Louis responded by letter on August 19, 2002, requesting "written

verification . . . to support the claim that [plaintiff] 'waived her interest' in the Marina."

Plaintiff and Ricker agreed to a consent order on October 30, 2002, giving the parties sixty days for discovery prior to a plenary hearing on all the relevant issues. Plaintiff retained DeBartolo on November 6, 2002, to represent her in the "Post Judgment Plenary Hearing, Including Discovery Process In The Matter Of Ricker v. Ricker, Docket #FM-13-176-97C." On February 4, 2003, Ricker filed a motion for summary judgment in the matter. One of the issues included "[plaintiff's] waiver of her retaining an interest in the Sea Bright Marina" relying upon Louis' October 11, 2000 letter as proof of plaintiff's waiver.

On July 11, 2003, DeBartolo filed a cross-motion for summary judgment seeking "to maintain equal ownership" of the Marina and "[e]mploying an attorney competent to draft and prepare Partnership Agreement pursuant to the provisions of Paragraph 17.3 of the Property Settlement Agreement to establish and maintain equal partnership ownership by plaintiff and defendant of the real estate set forth above[.]" Along with the cross-motion for summary judgment, plaintiff certified:

> [Ricker] has attempted to make much of a letter from Frank Louis, Esquire to Philip Jacobowitz, Esquire dated October 11, 2000. . . . Under no circumstances was this letter ever intended by me, nor more importantly authorized by me, to waive any interest I

> had in the marina real estate. At the very most, this letter expressed, rather inartfully, my request as an owner of the real estate partnership that I did not want to be a business partner with [Ricker] in the marina. I did not want to be involved in a business which involved risks relating to employees, etc. I wanted, as an equal partner with [Ricker], my ownership interest in the docks, improvements, restaurant and valuable real estate. If anything, Mr. Louis' letter represented, albeit in less articulate terms than I wished, my expression of these wishes to [Ricker]. While I was willing to ride out the natural lifespan of the partnerships in Sea Bright properties and Panther Valley, I was not willing to engage in an endless partnership that involved the operation of the marina business. On October 1, 2000, I was the joint and equal owner of the partnership interest with [Ricker]. The intent of the Louis' letter [sic] was to advise [Ricker] of my desires to end the business. I have annexed hereto as Exhibit "F", a letter from Kushner Companies, a very substantial real estate developer, indicating my efforts at marketing the Marina. Obviously, I believed I owned an interest, otherwise I couldn't attempt to sell it.

Plaintiff's cross-motion for summary judgment was denied on August 7, 2003.

In February 2006, Carl Soranno substituted for DeBartolo as plaintiff's counsel in the "post judgment matrimonial litigation, Ricker v. Gere, Superior Court of New Jersey Monmouth County, Chancery Division, Family Part, Docket No. FM-13-1761-97." Soranno stated that when he received plaintiff's file, he found that "no discovery had been conducted by Mr.

DeBartolo on behalf of [plaintiff] with respect to the alleged waiver issue." Soranno conducted limited discovery in the short time he was allotted by the motion judge. Soranno certified that "[t]he Court's limitation of [his] ability to discover correspondence after the date of the October 11, 2000 letter from Mr. Louis impacted the case greatly because [he] was limited in obtaining discovery of evidence concerning the parties' actions following receipt of the October 11, 2000 letter." Soranno ultimately concluded that notwithstanding Louis' January 15, 2002 letter to plaintiff, "the earliest [plaintiff] was aware that Mr. Ricker was asserting that a waiver occurred was August, 2002."

The plenary hearing was held over a period of months beginning on April 12, 2006. Soranno wrote a letter to Louis on September 29, 2006, stating that the matter would not be resolved by the end of the six-year statute of limitations period on October 11, 2006, and requested that Louis

> enter into a tolling agreement that would toll the computing of any deadline through January 9, 2007 that may be applicable to the commencement of an action by [plaintiff] alleging that you may be liable to [plaintiff] as a result of your role in drafting the letter or waiver or loss of [plaintiff's] interest in marital property.

The parties ultimately agreed that the "time is tolled beginning on the date hereof and extending through and including January 9, 2007."

Plaintiff and Ricker ultimately reached another settlement on July 27, 2007 (the 2007 Settlement), prior to obtaining a ruling on whether plaintiff had waived her interest in the Marina in the October 11, 2000 letter. The 2007 Settlement stated in pertinent part that "[plaintiff] shall share equally with [Ricker] in the net proceeds of any money attributable to [Ricker's] LLC ownership interest when received by [Ricker] arising out of the LLC's ownership of the Real Estate." The 2007 Settlement further stipulated that "40% of all monies received by [Ricker] from the LLC arising out of its Business Operations (including its rents received) shall be paid over to [plaintiff] upon [Ricker's] receipt of those monies." With regard to this, Soranno stated that:

> [Plaintiff's] case was unique in the respect that she was not complaining or challenging the underlying settlement, but seeking to preserve the terms of that settlement by litigating to repair the mistake made by counsel. Consequently, as the offers of settlement more closely approached the original intentions of the underlying Property Settlement Agreement the risk of further litigation became greater. Ultimately, in my discussions with [plaintiff], she recognized that the prospect of continuing the litigation to obtain a complete 50 percent interest in Mr.

> Ricker's interest in the [M]arina versus the potential that the Court could find that a complete waiver had occurred was too great. The cost of continuing the litigation was becoming prohibitive and a loss of the entire asset would have been a catastrophe.

During the hearing addressing the settlement on July 27, 2007, plaintiff was asked about the fairness of the agreement.

> Counsel: [] [D]id anyone force you, threaten you or coerce you into signing this agreement?
>
> Plaintiff: No.
>
> Counsel: Did you voluntarily sign the agreement?
>
> Plaintiff: Yes.
>
> Counsel: Given all th[e] facts and circumstances of this litigation, do you believe the agreement is fair and reasonable to you?
>
> Plaintiff: Yes. I'm signing it. It's the best I could do.
>
> Counsel: Do you understand that by signing this agreement, you are waiving your right to later argue at any future time against [Ricker] that you believe the agreement was unfair?
>
> Plaintiff: Yes. I understand that.
>
> Counsel: And as Mr. Soranno accurately noted, there has been some testimony in this case about your dyslexia, and I heard you testify that you had plenty of time to go through it. And I just wanted to ask you, you reviewed each an[d] every page of this document with your attorney?

Plaintiff: Yes. I've read it.

Counsel: And reviewed it with you attorney?

Plaintiff: Yes. I have.

Counsel: And are you satisfied with the quality of the representation that Mr. Soranno and the members of his firm have offered to you?

Plaintiff: Yes. I am.

Also during the same hearing, Soranno stated on the record that the 2007 Settlement would not "preclude" or "be used as a defense in the future by any future third parties to defend against an action she may ultimately bring against those former attorneys or experts." He further elaborated that "[plaintiff's] understanding is that she has not waived that right. This agreement does not in fact waive that right and it's specifically being carved out."

Plaintiff filed a complaint against Louis and DeBartolo on November 19, 2007. After discovery, defendants moved for summary judgment.

In granting the motions, the judge concluded:

> So [] there are two issues this Court has to decide. One, are there genuine issues of material fact which would keep this Court from being able to grant the defendant summary judgment?
>
> And as I indicated, there clearly are material issues. The question is, are they material for purposes of the statute of

limitation, or for the Puder [v. Buechel, 183 N.J. 428 (2005)] argument.

And I find that if this case went to trial, there are clearly material issues of facts that would have to be determined. But for purposes of this motion, even in the light most favorable to [plaintiff], as the Court must do under summary judgment, that the issues, the factual issues are in agreement. We know there was a first property settlement agreement, which was an equitable distribution to [plaintiff]. We know it had a provision that in six months she would decide whether or not she wanted any of those particular designated interests. And if she said nothing, she would still maintain that 50 percent.

We know that her ex-husband read it differently and put the onus on her by sending a letter saying if I don't hear from you by the 20th, I will assume she's waiving everything, or waiving her interests. We know there was a conversation at least between Mr. Louis and Mr. Hope. And based on that he sent a letter saying that she wants everything [but] the marina. And we know that there was a plenary hearing, that at that plenary hearing there was -- during the course of the plenary hearing there was a settlement of all issues. And we know that [plaintiff] testified [] in light of the circumstances that she would accept that settlement. That -- none of that is contested.

She does put in there at Page 24 and 25 of her testimony as to the agreement, as I say, her reluctance. But she does say it's fair and reasonable in light of where she is and the fact that she couldn't take that risk.

So in analyzing all this, the Court relies on those agreed statements. The

Court finds this case is more similar to Puder than to the other cases, because this was a matrimonial action with the first property settlement agreement, which the plaintiff [] found was fair and reasonable.

There was litigation having to do with whether or not that first agreement was still valid and should be enforced in light of the October 11th, 2000 letter.

That was settled after discovery, part of the plenary hearing. And that settlement was a property settlement agreement which was not as favorable as the first, but almost as favorable. And there's a ten percent difference in the amount of the interest in the business at the marina.

I'm not addressing all the inconsistencies alleged in [plaintiff's] position as to wanting the land, not the business. Those are material issue[s] which the plaintiff disputes and which would be a subject if there were a legal malpractice action. But I find that the rationale of the Supreme Court in Puder, that if a plaintiff has a first agreement and is involved in litigation to enforce that first agreement and decides to settle it, that she is going to be bound by that settlement, even with the carve-out for the legal malpractice action, because that occurred in Buechel too -- Puder.

I find that this case is not as similar to Ziegelheim versus Apollo [128 N.J. 250 (1992)]. I also find that Spaulding [v. Hussain, 229 N.J. Super. 430 (App. Div. 1988)] that is distinguishable. I find we're not dealing with a litigation catastrophe. We are dealing with [plaintiff] being out a tremendous amount of money. There's no question about this. It was a property settlement of an estate, matrimonial estate, a lot of substance, and,

clearly, but for the letter, they wouldn't have been involved in the plenary hearing. But she might have been successful in the plenary hearing, and she might have been able to recoup fees. That's the reason that the tolling agreements were entered.

So the Court finds that under Puder, both the representation by Mr. Louis and the representation by Mr. DeBartolo, who really on represented plaintiff for the discovery period leading up to the plenary hearing, that Puder would indicate that the legal malpractice case against both of them should be barred.

As to the statute of limitations, as an additional issue that not only affects Mr. Louis, if this were only an issue of the waiver, whether or not the October 11th, 2000 letter was a waiver, I would agree with plaintiff's position that the statute would run sometime in '09. But that isn't her position. It's part of her position, but the plaintiff's position is Mr. Louis was not authorized to send the October 11th, 2000 letter. And not only was he not authorized, but the letter did not contain her agreement, and what it is that her position was. So when she received a copy of that letter sometime close to or after October 11th, 2000, she knew or should have known that that letter was unauthorized, it contained inaccurate information, and it was provided to her attorneys -- her husband's attorney.

So I find the accrual is on the date she alleges, that Mr. Louis committed malpractice, and that she -- he sent a letter that was unauthorized, rather than the discovery date after the May '02. It's not a question only of whether that letter instituted waiver, but was he authorized to send it in the first place.

> So as a corollary, I'm granting the summary judgment motions under Puder. I find that this factually similar. We're not dealing with a litigation catastrophe like in Ziegelheim or in Spaulding. There was another remedy. The other remedy was the negotiations undertaken during the plenary hearing to settle the issues.
>
> And as an alternate, I'm also granting the summary judgment on the statute of limitations.

This appeal followed.

On appeal, plaintiff raises two issues. She asserts that the judge erred by premising her decision on the principles enunciated by the Supreme Court in Puder, and that her claim against Louis was not barred by the statute of limitations.

I.

We first address the issue of the statute of limitations as it applies to Louis as we believe that issue is dispositive as to him.

N.J.S.A. 2A:14-1 requires that a legal malpractice action commence within six years from the accrual of the cause of action. Vastano v. Algeier, 178 N.J. 230, 236 (2003). Plaintiff's action was filed on November 19, 2007, and the letter that forms the basis of her malpractice claim was dated

October 11, 2000.[1] Plaintiff asserts, however, that the statute does not apply since she did not know of the malpractice until her husband disputed plaintiff's claim to the Marina in August 2002.

Under the discovery rule, "the statute of limitations begins to run only when the client suffers actual damage and discovers, or through the use of reasonable diligence should discover, the facts essential to the malpractice claim." McGrogan v. Till, 167 N.J. 414, 417 (2001); Grunwald v. Bronkesh, 131 N.J. 483, 495 (1993). Plaintiff further asserts that the issue of when she knew of should have known of the malpractice cause of action necessitated a hearing. Lopez v. Swyer, 62 N.J. 267 (1973).

The undisputed facts presented here obviate the need for a hearing and support the motion judge's conclusion that the claim against Louis was barred by the six-year limitation provision. Plaintiff was copied on the October 11, 2000 letter, which forms the basis of her claim. Her allegation is not simply that her former husband disputed her claim to the Marina, but as she stated in her complaint, the letter was sent in October 2000 without plaintiff's knowledge, consent or authorization. The

[1] There is no dispute that she received a copy of the letter at approximately the time it was written.

absence of authorization, consent or knowledge was apparent from plaintiff's receipt of the letter in October 2000, not after the dispute as to its meaning arose. To restate, the complaint was not derived from the husband's belated dispute as to the import of the letter but according to plaintiff, from the issuance of the letter in the first instance.

Equally as compelling is plaintiff's own conduct through counsel at the time of the settlement. In his September 29, 2006 letter to Louis, Soranno wrote:

> [Plaintiff] is desirous of continuing with discussions [regarding the settlement of the post judgment motion] but the matter will not be resolved by October 11, 2006. As we have discussed, we believe that it would be in everyone's best interest that you and [plaintiff] enter into a tolling agreement that would toll the computing of any deadline through January 9, 2007 that may be applicable to the commencement of an action by [plaintiff] alleging that you may be liable to [plaintiff] as a result of your role in drafting the letter or waiver or loss of [plaintiff's] interest in marital property.
>
> [(Emphasis added).]

The tolling period was extended to January 9, 2007, and yet again until March, but not until November when the complaint was filed.

In a later certification, Soranno indicates that he was proceeding in the exercise of "abundance of caution," prompting

him to extend the tolling agreement. Nothing in the record supports that position and his earlier correspondence notes that he speaks about a "deadline." He perceived, and correctly so, that the claim against Louis was barred as of October 2006, six years after plaintiff first became aware of Louis' letter.

Finally, plaintiff's claim of lack of authorization and consent is bolstered by her companion Hope. In his certification, Hope indicated that he was never authorized to make any decisions concerning her divorce case on behalf of plaintiff. He describes in detail his conversation with Louis and his stated preference on behalf of plaintiff and adds "Mr. Louis specifically did not state during the telephone conversation that he intended to write to Mr. Ricker's attorney or to Mr. Ricker to communicate a decision made by [plaintiff] based on our very brief conversation." Yet, that is exactly what Louis did, and he forwarded a copy at the same time to plaintiff.

This galaxy of related events - plaintiff's claim of lack of authorization, knowledge and consent, Soranno's acknowledgment of the limitations period as well as Hope's direct knowledge of the transaction and the absence of plaintiff's consent to submitting the letter all bespeak of one conclusion - that plaintiff and her representatives viewed the

October 11 letter as the precipitating event of the malpractice action against Louis. They allege more than simply Ricker's interpretation of the letter. They attack the bona fides of the letter as of October 11, 2000.

We conclude that the motion judge correctly determined that plaintiff's claim as to Louis was barred by the six-year limitations period.

II.

We reach the same result as to defendant DeBartolo. The claims against him are premised on his alleged failure to conduct discovery and otherwise inappropriately defend the claim that plaintiff had waived her interest in the Marina. In granting summary judgment in DeBartolo's favor, the judge relied on Puder.

In Puder, supra, the plaintiff, Kathleen Buechel, retained defendant, Virginia B. Puder, to represent her in her divorce action. 183 N.J. at 431. Over a period of months "there were numerous conferences and telephone discussions between counsel and the parties for the purpose of settlement." Ibid. The parties' primary dispute centered on the valuation of "several lucrative patents" held by Buechel's husband. Ibid. With an imminent trial date, Puder negotiated "an oral proposed settlement agreement that she deemed 'clearly more favorable to

[Mrs.] Buechel than the proposal recommended by the Early Settlement Panel.'" Ibid. Puder recommended Buechel accept the settlement and Buechel did. Id. at 432. Then the husband's "attorney sent Puder a letter memorializing the proposed settlement agreement" and Puder "advised the trial court that the parties had orally settled the matter and that the attorneys were in the process of finalizing the written agreement." Ibid.

The next month, Buechel spoke with another attorney who stated her settlement was "'ridiculously inadequate.'" Ibid. As a result of this, Buechel told Puder she would not abide by the terms of the settlement, fired Puder and then hired new counsel. Ibid. The husband moved to enforce the settlement, and "[t]he trial court ordered that a plenary hearing be conducted to determine whether the parties had reached a binding agreement, and, if so, whether the agreement was enforceable." Ibid.

While the hearing was still pending, Buechel also brought a legal malpractice claim against Puder alleging that she "negotiated an 'insufficient and inadequate' settlement agreement 'without . . . adequate discovery and information concerning [Dr. Buechel's] income and assets'" and that "Puder accepted the agreement 'without properly informing [Mrs.

Buechel] of the shortcomings of th[e] proposed settlement and obtaining from her complete authority to enter into it.'" Ibid.

The judge held a plenary hearing but did not reach a decision as to the enforceability of the settlement. Id. at 433. "After six days of testimony, [] Buechel's counsel informed the court that [] Buechel had agreed to settle the divorce." Ibid. The judge noted that "[t]he new settlement was substantially similar to the disputed settlement" with "[t]he principal differences between them [being] that [] Buechel received an additional $100,000 IRA distribution, and $8,000 more per year in alimony with all alimony payments now taxable to [her husband]." Ibid.

Buechel was questioned by the judge and her attorney regarding the new settlement. Id. at 433-35. The judge emphasized that Buechel was not being forced into the agreement and that it had "not yet decided whether or not that agreement was to be enforced." Id. at 433. Buechel stated that she understood the judge had not yet made a decision on the prior settlement, that she had discussed the settlement with her attorney, that she thought the agreement was acceptable, that she was voluntarily accepting the agreement, that by agreeing to it she understood she was bound by the settlement and that she was waiving her right to a trial on the issues by agreeing to

the settlement. Id. at 433-34. "Buechel [then] testified that she was only agreeing to the settlement because she believed that the trial court would find the first settlement enforceable and because it was her understanding that the second settlement would not affect the status of her malpractice claim against Puder[.]" Id. at 434.

Puder then moved for summary judgment on the legal malpractice claim against her "arguing that [] Buechel waived her right to sue Puder by entering into the second settlement before the validity of the first settlement was determined." Id. at 435. The trial judge granted summary judgment on the grounds that the legal malpractice claim "would violate principles of judicial estoppel." Ibid. Buechel appealed and we reversed.

> In a published opinion, the Appellate Division reversed and remanded, holding that the trial court erred in dismissing Mrs. Buechel's malpractice counterclaim. First the panel concluded that our holding in Ziegelheim [] "plainly allows a former client to bring a legal malpractice action against an attorney for professional negligence in divorce litigation where a settlement ensued." Second, the panel held that the trial court's use of the judicial estoppel doctrine was erroneous because the conditions justifying application of this extraordinary remedy were not present.
>
> [Puder, supra, 183 N.J. at 436 (citations omitted).]

The Supreme Court ultimately granted certification and found:

> Here, once informed that the Buechels had decided to settle their divorce, the trial court sought to determine whether [] Buechel entered into the settlement voluntarily and whether she was satisfied with the outcome of the settlement negotiations. The court repeatedly asked [] Buechel whether the agreement was acceptable to her, whether it was a fair compromise of the issues, and whether she accepted the agreement voluntarily--questions that she answered affirmatively. Those responses demonstrate that [] Buechel bargained for, and received, what she believed was an equitable distribution of the marital estate. Thus, any alleged deficiency resulting from the first settlement was ameliorated by the second settlement that she deemed to be fair and equitable. It would contravene principles of fairness and our policy in favor of encouraging conclusive settlements in matrimonial cases to allow [] Buechel to now pursue her attorney for greater monetary gain. She is bound by her calculated decision to resolve the dissolution of her marriage by accepting her former spouse's settlement offer, a settlement she approved in open court.
>
> [Id. at 438-39.]

The same factual scenario exists here. Plaintiff retained Louis for the matrimonial manner. Louis negotiated a settlement, to which plaintiff agreed. An issue later arose as to whether plaintiff had waived her share of the Marina, the genesis of plaintiff's malpractice claim. A plenary hearing was then held, but no decision was rendered as to whether she in

fact waived her share of the Marina under the 2000 Settlement. Before the judge could rule on the waiver issue, plaintiff and Ricker reached another settlement. In both Puder and the present case it was made clear on the record that the plaintiffs had reviewed the second settlement with their attorneys and that they were accepting the terms voluntarily.

The Supreme Court has emphasized the strong public policy in favor of the settlement of litigation and the overwhelming burden matrimonial proceedings have placed upon New Jersey's courts. Id. at 437-48. The Court has further emphasized that "'[w]ith more divorces being granted now than in history, and with filings on the rise, fair, reasonable, equitable and, to the extent possible, conclusive settlements must be reached, or the inexorable and inordinate passage of time from initiation of suit to final trial will be absolutely devastating . . . .'" Id. at 438 (quoting Davidson v. Davidson, 194 N.J. Super. 547, 550 (Ch. Div. 1984)). As we have stated before, "[w]e are indeed 'bound to comply with the law established by the Supreme Court.'" State v. J.K., 407 N.J. Super. 15, 21 (App. Div.) (quoting State v. Hill, 139 N.J. Super. 548, 551 (App. Div. 1976)), certif. denied, 200 N.J. 209 (2009).

Plaintiff argues that Puder does not absolve DeBartolo of her malpractice claim against him because her claim was "not

based on his representation . . . in negotiating a settlement[.]" Plaintiff instead urges that "[i]t is instead based on DeBartolo's failure to conduct necessary discovery on the issue of whether or not there had been a waiver of the Plaintiff's interest in the Marina, and otherwise failing to prepare to litigate at the plenary hearing the issue of whether a waiver had occurred." Plaintiff explains that if DeBartolo had offered competent representation, she "would have achieved a settlement recognizing her interest in the Marina and providing income to Plaintiff from the operations of the Marina earlier than the settlement achieved in July of 2007[.]" Plaintiff also contends that while represented by DeBartolo in 2005, she was "deprived of the corporate opportunity to participate as a member of the BPC Marina, LLC," which was purchased by the partnership she would have been a part of had she retained interest in the Marina's business operations.

These arguments fail to address the guiding principle enunciated in Puder, supra, that "[i]t would contravene principles of fairness and our policy in favor of encouraging conclusive settlements in matrimonial cases" to allow litigants to continue to pursue malpractice claims against attorneys after they have received the benefit of agreeing to a fair settlement. 183 N.J. at 438. The claim against DeBartolo is also derived

from the settlement process. Plaintiff urges that it was DeBartolo's "failure to conduct necessary discovery on the issue of whether or not there had been a waiver of the Plaintiff's interest in the Marina," which is directly related to the settlement process. To continue malpractice litigation against DeBartolo, simply because he was not the "first" attorney to commit alleged malpractice with regard to the first settlement, would create an exception to Puder that is not supported by the policy underlying that decision.

Plaintiff contends that:

> To uphold the trial court's ruling that Puder bars [her] legal malpractice claims establishes as precedent that a client victimized by an attorney's negligence must invariably litigate to conclusion the underlying litigation and can never accept a reasonable settlement that would mitigate the damages for the legal malpractice case, without sacrificing the right to seek to recover the remaining economic damages in a legal malpractice action.

While that view may have surface allure, the Court in Ziegelheim, supra, recognized that after denial by the Family Court of the plaintiff's application to set aside the challenged settlement agreement, the plaintiff was left with only one remedy – the legal malpractice action. 128 N.J. at 257-58. That is not the case here.

The Court recently decided Guido v. Duane Morris, LLP., 200 N.J. 79 (2010), and explained that Ziegelheim represented the standard to be applied in legal malpractice cases, while Puder represented "a limited exception" to Ziegelheim, applying equitable principles. Guido, supra, 200 N.J. at 94. In Guido, the Court indicated that a plaintiff need not seek relief from a settlement prior to seeking relief against an attorney. Id. at 96. In Guido, unlike here, the plaintiffs did not represent that they were satisfied with the settlement. Here, plaintiff made that affirmative representation.[2]

We do not conclude that plaintiff was required to await the motion judge's decision on the enforcement application; however, we do acknowledge the rule established by Ziegelheim recognizing the sole remedy of a malpractice action as a critical factor in that decision. That was not the case here.

We, likewise, do not consider plaintiff's opportunity for a judicial determination of her application to enforce the settlement as a condition precedent to commencement of a

[2] One element discussed in Puder is the similarity of the first and second settlements. Although plaintiff alludes to the differences between the first and second settlement asserting that plaintiff was disadvantaged by the latter as opposed to the former, on its face, it appears, that plaintiff may have received a greater interest in the "Marina" than she bargained for in Hope's original message to Louis. This issue was not resolved.

malpractice action, yet, on the facts presented here and the observation of the Court in Ziegelheim, together with an acknowledgment of the fairness of the settlement, plaintiff can no longer proceed with the malpractice action.

As we have previously noted and consistent with Puder, plaintiff cannot made a calculated decision regarding the vagaries of litigation and voluntarily settle one claim and look to counsel in the matrimonial action for "greater monetary gain." Puder, supra, 183 N.J. at 439. To allow plaintiff's position would compromise the settlement process in favor of the litigation process. We note that as in Puder, plaintiff noted a compulsion to agree to the second settlement. Most noteworthy is that in both instances, plaintiff agreed and acknowledged the fairness of the settlement.

We likewise reject plaintiff's claim that she was facing a "litigation catastrophe." Plaintiff argues that "it would have been catastrophic for the plaintiff to continue spending her assets to continue and complete the plenary hearing, then lose and have the court conclude a waiver occurred and that the plaintiff was not entitled to any recovery for the Marina interest." In reality, however, plaintiff would have been in the same litigation posture she now finds herself. She has resolved by settlement as opposed to adverse decision her

underlying claim with her former husband and now seeks to prosecute the malpractice action.

Plaintiff relies on Spaulding, Covino v. Peck, 233 N.J. Super. 612 (App. Div. 1989), and Prospect Rehab. Servs., Inc. v. Squitieri, 392 N.J. Super. 157 (App. Div.), certif. denied, 192 N.J. 293 (2007), in support of her argument.

In Spaulding, supra, a plaintiff in a personal injury action was forced to settle his claim for a "grossly inadequate sum" because his physician failed to appear to testify on his behalf. 229 N.J. Super. at 432-35. The physician's failure to appear "after he had promised to come, after the proofs had been taken out of order on his account, after trial had been continued for half a day on his account, and after his whereabouts could not be ascertained, threatened a litigation catastrophe to plaintiff and his attorney." Id. at 444. There was no comparable circumstance present here.

The plaintiff in Spaulding was left with the decision to continue with the trial without the key witness to show his damages or to accept a lesser settlement and pursue the difference through litigation against the doctor. Plaintiff here had the option of allowing the judge to decide whether she had waived her claim, a position on which she may well have prevailed, unlike in Spaulding where the plaintiff's entire

damage claim was jeopardized at trial by the absence of the physician.

Covino, is also distinguishable. In Covino, supra, the plaintiff sought damages against certain manufacturers and distributors of asbestos products. 233 N.J. Super. at 614. However, the plaintiff's attorney had failed to file suit within the statute of limitations period and the only state where the plaintiff could still bring suit was Mississippi. Id. at 619. We reasoned:

> Here, defendant attorney failed to file suit within the statute of limitations and plaintiff was threatened with a "litigation catastrophe." It is undisputed that if plaintiff had sued in Mississippi, the claim against the manufacturers and distributors of asbestos would have been preserved, just as the claim against the owners of the scrap metal yard, Cumberland, might have been preserved in Spaulding if plaintiff there had sought a mistrial rather than accepted a settlement. But that is not the question. In both cases, plaintiffs were obviously entitled to deal with the litigation catastrophe in any reasonable manner which they believed would best protect their interests, not defendants'. In neither case was there any suggestion that plaintiff's options were not reasonable from plaintiff's point of view.
>
> Here, it was not reasonable to require plaintiff, in order to absolve defendant from damages, to: expend time and money to travel to Mississippi; locate and hire an attorney; finance any investigations required in Mississippi; travel to Mississippi and stay there for whatever

> period of time was required; undergo depositions and a physical examination; travel and stay in Mississippi for the trial; pay and transport witnesses, as well as a medical doctors, to Mississippi for testimony; and leave his job and family. "An injured party should not be required to lay out money, as defendants' approach would require, upon a questionable assumption that one day its worth will be recaptured." N.J. Power & Light Co. v. Mabee, 41 N.J. 439, 442 (1964).
>
> [Covino, supra, 233 N.J. Super. at 619.]

Plaintiff, here, only had to decide whether she would accept a settlement which was similar to the initial settlement or await the judge's decision on the issue of her waiver. She was not in a situation where, choosing the latter, she would be left without a claim. This was not an "all-or-nothing" decision for plaintiff; it was a decision with options and she chose to accept the settlement.

Plaintiff's reliance on Squitieri is similarly misplaced. In Squitieri, supra, the plaintiff's attorney, Squitieri, had neglected to pursue several potential Medicare denial claims in its pending lawsuit which totaled about $400,000. 392 N.J. Super. at 159-60. After the plaintiff relieved counsel, the substitute attorney filed a motion for leave to file an amended complaint on April 25, 2002, while unbeknownst to him, a July 1, 2002 trial date had already been scheduled. Id. at 159. The motion was denied. The plaintiff eventually succeeded on its

remaining claims but appealed the denial of its motion to amend the complaint to include the $400,000 Medicare claims.

> In June 2003, plaintiff settled all of its outstanding claims against the nursing home defendants for a total of $ 115,000, or $ 40,000 in excess of the judgment awarded to plaintiff at trial.
>
> . . . .
>
> Plaintiff then filed this malpractice action against Squitieri, alleging negligence in failing to assert the Medicare denial claims against the nursing homes, misnaming parties, and failing to propound any discovery. Plaintiff alleged that as a result of Squitieri's negligence, it lost the means to recover almost $ 400,000 in damages for denied Medicare claims and the means to obtain a potential award from the jury for punitive damages, and it was also required to expend significant attorneys' fees in rectifying Squitieri's errors. Plaintiff contended its "efforts to mitigate its damages have yielded only $ 40,000 on its claims," and thus, it sought damages for the difference.
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> [Id. at 161-62.]

The trial judge granted Squitieri's motion for summary judgment citing Puder. On appeal we reversed:

> We are persuaded by many of plaintiff's arguments and are satisfied the complaint should not have been dismissed on summary judgment. This case is factually and legally distinguishable from Puder and does not have the "fairness and the public policy [considerations] favoring settlements" or the equities that pervaded that case. Plaintiff's principal never represented to anyone, let alone a court, that its

> settlement with the nursing homes was a "fair" and satisfactory resolution of its underlying claims. Nor by now suing Squitieri for malpractice is plaintiff seeking to profit from litigation positions that are "clearly inconsistent and uttered to obtain judicial advantage." Puder, supra, 183 N.J. at 444 [] (quoting Newell v. Hudson, 376 N.J. Super. 29, 46, (App. Div. 2005)). Moreover, plaintiff did not settle the underlying suit with the nursing homes prior to the trial court ruling on its motion to amend the complaint to assert the omitted Medicare-denied claims. That plaintiff chose to take the further steps and appeal the trial court's denial of its motion to amend and to file the subsequent lawsuits to preserve the statute of limitations on its underlying claims, and thereafter decided, for a variety of reasons, to settle with the nursing homes prior to obtaining judicial determinations did not, under the circumstances of this case, preclude plaintiff's malpractice claim as a matter of law.
>
> [Squitieri, supra, 392 N.J. Super. at 167-68.]

Critically important is that "plaintiff did not settle the underlying suit with the nursing homes prior to the trial court ruling on its motion to amend the complaint to assert the omitted Medicare-denied claims." Ibid. (emphasis added). In contrast, here plaintiff entered into the 2007 Settlement prior to the court's ruling on the issue of plaintiff's alleged waiver.

Likewise in Ziegelheim, supra, the "family court denied [the plaintiff's] motion to set aside the settlement agreement, concluding that the record demonstrated that 'both plaintiff and defendant unequivocally accepted the agreement and felt that it was fair.'" 128 N.J. at 257-58. As we have noted, the plaintiff in Ziegelheim had no other recourse than to pursue a malpractice action.

In sum, the Court in Puder sought to bring finality to the litigation process when a settlement purports to resolve the underlying dispute between the settling parties. Litigated cases are settled everyday where plaintiffs and defendants have to weigh the costs and benefits of settling or allowing a judge or jury to decide their fate. Here, plaintiff had the option of allowing a judge to decide whether she would receive 50% of the Marina or find that she had waived her interest. Plaintiff also had the option to forego further litigation and take the guaranteed 40% interest in the Marina under the 2007 Settlement. She made her peace with the litigation and this action as well.

Affirmed.