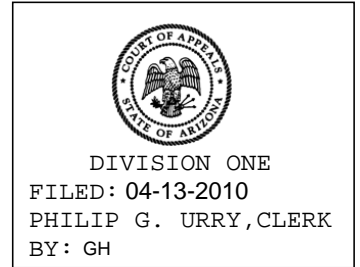


THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



NICHOLAS D. KOWALCZYK and ANDRIA)	1 CA-CV 09-0161
KOWALCZYK, husband and wife,)	
)	DEPARTMENT D
Plaintiffs/Appellants,)	
)	MEMORANDUM DECISION
v.)	(Not for Publication-
)	Rule 28, Arizona Rules
MURPHY LAW FIRM, INC., an)	of Civil Appellate
Arizona corporation; THOMAS J.)	Procedure)
MURPHY and ANA ORRANTIA MURPHY,)	
husband and wife,)	
)	
Defendants/Appellees.)	
)	

Appeal from the Superior Court of Maricopa County

Cause No. CV 2006-092020

The Honorable Louis Araneta, Judge

AFFIRMED

Nicholas D. Kowalczyk and Andria Kowalczyk	Chandler
<i>In propria persona</i>	
Plaintiffs/Appellants	
Murphy Law Firm, Inc.	Phoenix
By Thomas J. Murphy	
Attorneys for Defendants/Appellees	

T H O M P S O N, Judge

¶1 Appellants Nicholas D. Kowalczyk (Kowalczyk) and Andria Kowalczyk appeal from the trial court's grant of summary judgment in their malpractice case against attorney Thomas J. Murphy. For the reasons that follow, we affirm the judgment of the trial court.

¶12 In 1994, Nicholas Kowalczyk was a licensed optometrist. That year, the Arizona State Board of Optometry (the Board) investigated a complaint accusing Kowalczyk of failing to perform follow-up treatments on patients that he had charged their insurer for. In December 1995, the Board offered to resolve the disciplinary investigation by consent decree. Kowalczyk was required to admit liability. Kowalczyk was represented by an attorney other than appellee in connection with the consent order.

¶13 Subsequently, in 2002, the Kowalczyks hired appellee attorney Thomas J. Murphy (Murphy) to represent them in a lawsuit against the Board for rescission of the consent decree and a denial of public records claim. The rescission case was unsuccessful. In a sixteen-page memorandum decision filed February 26, 2004, this court affirmed the dismissal of the Kowalczyks's rescission claim.

¶14 The memorandum decision described the events leading up to the entry of the consent decree:

In December 1995, the Board offered to resolve the disciplinary investigation through a consent decree without requiring Kowalczyk to admit liability. During negotiations with the Board regarding this proposal, Kowalczyk asked the Board to disclose the "exact nature and extent" of its investigation. The Kowalczyks wanted assurances from the Board that the factual basis for the Board's investigation of and claims against Kowalczyk were unrelated to his dispute with [Vision Service Plan (VSP)]. The Board refused to disclose this information and/or made only limited disclosure, although a Board investigator led the Kowalczyks to believe that the Board had audited certain non-VSP patient files.

Kowalczyk executed the Consent Order, and the Board approved it on January 5, 1996. . . .

The decision went on to hold that "the Kowalczyks failed to state a claim for rescission of the Consent Order based on extrinsic fraud." The court also rejected an assertion that Kowalczyk was entitled to rescission of the consent order on the basis that he allegedly signed it under duress.

¶15 The Kowalczyks then filed a complaint for legal malpractice and negligence against appellee Murphy in the instant case. Murphy filed a motion for summary judgment, which the trial court granted. The Kowalczyks timely appealed.

¶16 In granting summary judgment, the trial court found that "no reasonable judge or jury would have found that [Kowalczyk] was entitled to rescind the Consent Agreement and Order due to extrinsic fraud," and therefore Kowalczyk was unable to meet his burden of proving that but for attorney Murphy's alleged negligence he would have been successful in the prosecution of the original suit seeking rescission. See *Molever v. Roush*, 152 Ariz. 367, 374, 732 P.2d 1105, 1112 (App. 1987) ("client's recovery depends on a showing that 'but for' the alleged negligence of the attorney the injury complained of would not have occurred.")

¶17 In our 2004 memorandum decision, this court found that to rescind the consent agreement and order there would have had to have been extrinsic fraud, and that the Kowalczyks had failed to

state a claim for extrinsic fraud. We find no error in the trial court's grant of summary judgment in this case. The most competent lawyer could not have changed the fact that Kowalczyk waived his right to a hearing by signing the consent agreement, which agreement became final due to Kowalczyk's waiver of any judicial review. On appeal from subsequent proceedings in which the superior court refused to rescind the consent decree, we reviewed the circumstances of Kowalczyk's acquiescence in the probationary sanction. We noted that Kowalczyk had been suspicious of possible behind the scenes improprieties in the Board's investigation of the complaint against him. However, when the Board failed to respond to his inquiries on this point, Kowalczyk nonetheless accepted a negotiated resolution of the complaint. We concluded that no extrinsic fraud justified rescission of the consent decree, and Kowalczyks cannot now argue a contrary assertion. The facts supporting this conclusion had already occurred before Murphy undertook to represent Kowalczyks, and the result on appeal cannot be attributed to deficiencies in Murphy's representation.

¶18 Although Murphy argues in this appeal that this Court's previous decision constitutes "law of the case," that case involved litigation between the Board and the Kowalczyks, while this case is between the Kowalczyks and attorney Murphy. The prior determination that rescission on the basis of fraud was not justified is binding on the Kowalczyks by virtue of the doctrine of collateral estoppel. See *Hibbs v. Calcot, Ltd.*, 166 Ariz. 210,

214, 801 P.2d 445, 449 (App. 1990) ("Collateral estoppel or issue preclusion is applicable when the issue or fact to be litigated was actually litigated in a previous suit, a final judgment was entered, and the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and actually did litigate it, provided such issue or fact was essential to the prior judgment.")

¶9 The Kowalczyks argue that Murphy is estopped from asserting that there was no extrinsic fraud. We discussed the doctrine of judicial estoppel in *State Farm Auto Ins. Co. v. Civil Serv. Emp. Ins. Co.*, 19 Ariz. App. 594, 599, 509 P.2d 725, 730 (1973). We said, "It is well established in Arizona law that where a party *has obtained judicial relief* against an adversary by asserting or offering proof to support one position, he cannot later in another action . . . take a contrary position on the same issue." *Id.* (emphasis added) (citations omitted). "The essence of judicial estoppel is that a party *has gained an advantage*" previously by an assertion now controverted. *Id.* at 600, 509 P.2d at 731. Murphy did not gain any advantage by his prior assertion on Kowalczyks's behalf, and judicial estoppel does not apply.

¶10 For the foregoing reasons, the judgment of the trial

court is affirmed.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

DIANE M. JOHNSEN, Judge