

STATE OF MICHIGAN
COURT OF APPEALS

BANCORP GROUP, INC.,

Plaintiff-Appellant/Cross Appellee,

v

KURT J. MEISTER and CLARK, KLEIN &
BEAUMONT,

Defendants-Appellees/Cross Appellants.

UNPUBLISHED

January 20, 1998

No. 174566

Wayne Circuit Court

LC No. 91-129474 NM

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff was granted a final judgment in the amount of \$1,056,564.07 in conformance with a favorable jury verdict on its legal malpractice claim. Defendants moved to set aside the judgment and the trial court granted the motion in part and ordered a new trial on certain issues. The court also granted partial judgment notwithstanding the verdict for defendants as to plaintiff's claim of damages. A new trial was ordered on both liability and damage issues. Plaintiff filed a delayed application for leave to appeal to this Court, which was granted. Defendants cross appeal from the trial court's order granting a new trial and judgment notwithstanding the verdict. We affirm in part and reverse in part.

Plaintiff, a client of defendant law firm, retained the firm to handle the transactions involving the financing of leasing equipment. The equipment was leased by a company known as Straight Creek Processing Company. Plaintiff handled the financing of the leasing agreement. Due to Straight Creek's questionable financial situation, two guarantors were required to guarantee the original lease agreement. Those guarantors were Walter Buhl Ford and Peter Stroh. After the original lease with Straight Creek ended, Straight Creek was in default and it did not exercise any of its options under the original lease. Defendants drafted a lease extension agreement that allowed Straight Creek to continue to lease the equipment. However, as a result of extending the original lease without securing new guaranties, Stroh's and Ford's guaranties were extinguished and plaintiff was left with an unsecured lease agreement. Plaintiff's theory was that defendants were negligent in drafting the lease extension which eliminated the

guaranties for the lease extension and also prevented plaintiff from suing on the original lease. When plaintiff tried to enforce the guaranties under the original lease agreement, it lost the lawsuit.

In short, plaintiff's theory was that defendants were negligent in advising plaintiff to negotiate a lease extension because the guaranties would apply to an extension and also to wait to sue under the original lease agreement until after the first extension of the lease was executed.

I

Plaintiff argues that the trial court erred in granting the motion for judgment notwithstanding the verdict because plaintiff was barred by collateral estoppel from presenting evidence of statements made by defendant Meister and defendant law firm's managing partner, Laurence Scoville. We agree with plaintiff that the trial court erred in its ruling.

Whether a party is collaterally estopped from disputing an issue is a legal question, and the trial court's decision is reviewed under the de novo standard. *Horn v Dep't of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996).

In ruling on defendants' motion for judgment notwithstanding the verdict, the trial court held that it had erred when it admitted statements made by defendant Meister because those statements were not presented in the litigation against Straight Creek, Stroh, and Ford involving the lawsuit to collect on the original lease agreement and the original guaranties. Thus, plaintiff should have been estopped from relying on those statements in this case. Defendants did not raise this issue during the trial, but waited until after trial to argue that collateral estoppel barred the admission of this evidence. We disagree with the trial court's analysis of this issue.

Collateral estoppel precludes relitigation of an issue in a subsequent, different case between the same parties if the prior action resulted in a valid final judgment and the issue was actually and necessarily determined in the prior action. *Horn, supra* at 62. The ultimate issue in the second case must be the same as that in the first proceeding. *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990). The doctrine requires that the same parties must have had a full opportunity to litigate the issue in the prior proceeding, and there must be mutuality of estoppel. *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995).

If the same parties or their privies were not involved in both the prior litigation and the subsequent litigation, collateral estoppel is not available. *APCOA, Inc v Dep't of Treasury*, 212 Mich App 114, 120; 536 NW2d 785 (1995). Under the requirement of privity, a party is one who is directly interested in the subject matter and has a right to defend or control the proceedings and to appeal from the judgment. *Duncan v State Highway Comm*, 147 Mich App 267, 270; 382 NW2d 762 (1985). A person is in privity to a party if, after rendition of the judgment, the person has an interest in the subject matter affected by the judgment through one of the parties, such as by inheritance, succession, or purchase. *Id.*

The requisite mutuality of estoppel is present if both litigants in the second suit are bound by the judgment rendered in the first suit. *Id.* However, lack of mutuality does not necessarily preclude the application of collateral estoppel. Some limited exceptions to the requirement of mutuality have been recognized by the courts. For instance, where the issue in a legal malpractice case is identical to the issue decided in previous, underlying litigation, this Court has waived the

mutuality requirement for collateral estoppel. *Alterman v Provizer Eisenberg Lichtenstein & Pearlman, PC*, 195 Mich App 422, 424-427; 491 NW2d 868 (1992). In *Alterman, supra* at 423-424, the issue involved whether the plaintiff was allowed to settle a matter while not mentally competent. This Court would not allow the parties to relitigate the issue of the plaintiff's competency at the time of settlement because that issue had been litigated in the underlying action. *Id.* at 427.

The trial court in this case relied on *Alterman, supra*, presumably because the court believed that Meister's statement should have been presented in the collection case before Judge Kaufman as evidence that Stroh and Ford were liable on their original guaranties because Meister stated he negotiated with both men. However, the holding from *Alterman* has no application to this case because there are differences in the type of malpractice alleged. *Alterman* involved malpractice in the actual litigation of an issue. The case at bar, however, was not limited to malpractice in the litigation, but in the drafting of the documents that were at issue in that case. Thus, Judge Kaufman's ruling did not dispositively resolve the issues present in this matter, i.e., whether defendants committed malpractice in the course of the attorney-client relationship and in drafting the lease extension, not in the course of litigation. The issues in the two cases were therefore not identical.

Furthermore, Meister's statement regarding the guaranties was offered as an explanation to plaintiff's agents why new guaranties were not required for the lease extension. The statement was made in the scope of the attorney-client relationship between Meister and plaintiff. Plaintiff offered the statement as evidence of a misrepresentation made by Meister to plaintiff, not as evidence that Meister had actually negotiated with either Stroh or Ford, or as evidence of Meister's erroneous legal advice. Thus, the statement was admitted in this case for a different purpose than the statement would have been used for in the collection suit.

The trial court erred in ruling that the statement should not have been admitted at trial under collateral estoppel. This portion of the trial court's order granting a new trial is reversed. On retrial, plaintiff is not barred by collateral estoppel from presenting evidence of statements made by Meister and Laurence Scoville that was not presented in the litigation before Judge Kaufman.

II

Plaintiff next cites error with the trial court's decision to grant partial judgment notwithstanding the verdict when plaintiff did not present sufficient expert testimony on proximate cause to prove malpractice. We agree with the trial court that plaintiff did not support its theory of malpractice with sufficient evidence.

The standard of review for judgments notwithstanding the verdict requires this Court to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. A motion for judgment notwithstanding the verdict should only be granted where the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995). If reasonable jurors honestly could have reached different conclusions based on the evidence, neither the trial court nor this Court may substitute

its judgment for that of the jury. *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995).

As part of its malpractice claim, plaintiff was required to prove that defendants' negligence was a proximate cause of the alleged injury. *Pontiac School Dist v Miller Canfield Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997). The plaintiff must prove that the defendants' malpractice was a cause in fact of the plaintiff's injury and the plaintiff may not rely on speculation or conjecture in finding the defendants liable. *Id.* at 613.

Plaintiff's theory at trial was that defendants were negligent in drafting the lease extension by invalidating the guaranties and then misrepresenting whether the guaranties were needed for the lease extension. The damages plaintiff requested for defendants' malpractice were the value of the lease extension (approximately \$1 million). Thus, as the trial court correctly pointed out, plaintiff was seeking the benefit of the bargain for the lease extension as its damages.

At trial, plaintiff did not have an expert testify that the lease extension could have been drafted to extend the original guaranties to apply to the new agreement even if Meister had drafted it correctly. There also was no evidence that, had plaintiff been correctly advised that the new lease agreement required new guaranties, either Stroh or Ford, or other persons, would have offered to execute new guaranties. Thus, on the evidence presented, the jury was left to speculate on whether in fact plaintiff was denied the benefit of the bargain as a result of defendants' alleged malpractice because there was no evidence admitted that Meister could have drafted the lease extension and still had guaranties for the lease extension. In the absence of such evidence, plaintiff was not entitled to seek the benefit of its bargain, i.e., the damages it was due as if the lease extension had been properly drafted and executed.

The trial court properly granted judgment notwithstanding the verdict in part on plaintiff's malpractice theory. While plaintiff presented other evidence of malpractice, its claim for benefit-of-the-bargain damages was not supported by the evidence. The jury appeared to award plaintiff the amount requested as if the lease extension had been properly drafted. On these facts, defendants were entitled to a new trial.

III

Plaintiff next argues that the trial court erred in granting a new trial based on its erroneous ruling allowing into evidence statements made by Laurence Scoville, defendant's managing partner. The trial court ruled that it erred in admitting Scoville's statement that "Kurt screwed up" when drafting the lease extension because this statement was made during the course of settlement negotiations. We agree with plaintiff that the trial court erred in granting a new trial for this reason.

The trial court abused its discretion in granting a new trial due to the erroneous admission of this evidence. *Mahrle v Danke*, 216 Mich App 343, 351; 549 NW2d 56 (1996). There was an inadequate offer of proof by defendants to show that the statement was made during the course of settlement discussions. At the time the statement was made, there was no pending malpractice action. Plaintiff was still trying to resolve the underlying litigation involving the suit to enforce the guaranties and

an appeal. While plaintiff was upset with defendants' handling of its affairs, there simply was no evidence that the parties were discussing settling any claim plaintiff may have had, but rather, how to resolve their relationship when defendants had declined to represent plaintiff in this matter and plaintiff wanted to pull all of its work from defendants' firm.

Furthermore, defendants delayed in bringing to the court's attention that MRE 408 barred this evidence. When the issue was first raised, defendants only argued that the evidence was unfairly prejudicial. It was well after testimony had already been offered in front of the jury that defendants argued that MRE 408 barred the admission of Scoville's statement. Defendants also delayed in making their offer of proof on this issue until after the court had made its ruling and admitted the testimony.

Based on the record before us, we conclude that the trial court abused its discretion in ordering a new trial on the ground that this evidence was erroneously admitted. This evidence was properly admitted into evidence at trial when the court initially ruled on the matter. On retrial, this ruling may be revisited in the event additional proofs are adduced.

IV

In their cross appeal, defendants raise three issues related to trial and pretrial matters. These issues include (1) whether the trial court erred in denying defendants' motion for summary disposition, (2) whether the trial court erred in not granting a directed verdict when plaintiff did not present proof of the collectability of the guarantors, and (3) whether the trial court erred in the scope of opinion testimony it permitted for plaintiff's expert witness.

We need not reach the merits of these issues for the reason that this Court lacks jurisdiction. Plaintiff's delayed application for leave to appeal was filed from the trial court's order granting a new trial, not the final judgment. MCR 7.203(B). This Court's jurisdiction is limited to issues related to the order appealed or only matters raised in the motion for a new trial or judgment notwithstanding the verdict. While defendants had the right to file a cross appeal, the cross appeal was still limited to the order appealed, i.e., the trial court's decision to grant a new trial. MCR 7.207(A)(1). Defendants' issues one, two, and three in their brief on cross appeal involve issues that, while raised at trial or before trial, were not raised or addressed in the motion for a new trial or for judgment notwithstanding the verdict. Accordingly, this Court lacks jurisdiction to decide the merits of these issues.

V

Finally, defendants argue that plaintiff's counsel's closing argument denied defendants the right to a fair trial when there were numerous references made to defendants' wealth, power, and size. This issue was raised in defendants' motion for a new trial. However, because there was no objection made below at the time of trial, defendants are not entitled to a new trial.

Because there was no objection made below to plaintiff's closing argument, appellate review is only available if the error complained of could not have been cured. An incurable error is generally one

that may have affected the result or played too large a part and may have denied a party a fair trial. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 100-103; 330 NW2d 638 (1982).

An attorney's comments ordinarily will not be cause for reversal unless the comments indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). Reversal is required only when prejudicial statements of an attorney reflect "a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." *Id.*

After reviewing the challenged comments, we do not agree with defendants that plaintiff's counsels' comments indicate a deliberate attempt to inflame or prejudice the jury. Plaintiff's attorneys spent a considerable amount of time discussing the evidence in this case and why defendants were not credible or believable. While there were some questionable references to defendants' wealth and size, the comments did not deflect the jury from resolving the issues before it. If there was error, it was curable. Had defendants objected, the court could have remedied the harm by issuing a cautionary instruction.

Affirmed in part and reversed in part. No taxation of costs, neither party having prevailed in full. Remanded for a new trial and further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ David H. Sawyer

/s/ Peter D. O'Connell