STATE OF MICHIGAN

COURT OF APPEALS

SCHMIDT BAGEL CREATIONS, INC., and ELIOT CHARLIP,

Plaintiff-Appellants,

v

MICHAEL ALAN SCHWARTZ and FIEGER, FIEGER & SCHWARTZ, P.C.,

Defendant-Appellees.

UNPUBLISHED
September 21, 1999

No. 206602
Oakland Circuit Court
LC No. 97-544829 NM

Before: Doctoroff, P.J., and Markman and J.B. Sullivan*, JJ.

SULLIVAN, J. (*Concurring in part and dissenting in part.)*

While I agree with footnote 2, in which the majority determines that Schmidt Bagel was not a party to the underlying arbitration proceeding, I dissent from the majority's conclusion that plaintiff Charlip failed to state a claim for legal malpractice.

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action "*between the same parties"* when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. *Cole v West Side Auto Credit Union*, 229 Mich App 639, 647; 583 NW2d 226 (1998), quoting from *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995) (emphasis in *Cole, supra*). The "factual findings made by an arbitrator after a proper arbitration proceeding are conclusive in a later-filed civil suit *between the same parties . . .*" *Cole, supra* (emphasis added).

A legal malpractice action and the litigation from which it arose are distinct. *Coleman v Gurwin*, 443 Mich 59, 66; 503 NW2d 435 (1993). In the instant suit for legal malpractice, Charlip is suing Schwartz and his law firm. In the underlying suit, Charlip was being sued by then-plaintiff Ehrmann in a suit involving a business transaction. Since the parties are not the same, collateral estoppel does not apply.

The issue in the instant malpractice case is whether plaintiff would have fared better had he had the opportunity to have a jury trial rather than the arbitration, i.e., whether he can "establish that, absent

the . . . omission complained of [here, the failure of counsel to advise him that the common law arbitration agreement could have been revoked by either party at any time prior to the issuance of the arbitration award], the . . . judgment suffered [would have been] avoided." *Coleman, supra*, at 64 (citations omitted). I disagree with the majority's finding that plaintiff cannot show whether he would have fared better, and whether therefore the defendants' negligence was the proximate cause of his injury.

In his "suit within a suit," *id.*, plaintiff can present evidence to the jury, including Ehrmann's testimony, and the jury will be instructed to determine what damages they would have awarded and to whom in the underlying lawsuit. That amount will then be compared to the result of the arbitration, which was an award of $165,000 against plaintiff. If the jury determines that they would have awarded less against plaintiff than the result of the arbitration, the difference is the amount of plaintiff's damages in the instant malpractice case. If, on the other hand, the jury determines that they would have awarded more against plaintiff than the amount of the arbitration, then plaintiff has no damages, and cannot prove either element three, proximate cause, or element four, the fact and extent of the injury. *Coleman, supra*, at 63.

Alterman v Provizer, Eisenberg, Lichtenstein & Pearlman, PC, 195 Mich App 422; 491 NW2d 868 (1992), and the cases cited therein, cited by the majority, are factually distinguishable from the instant case, and do not compel a different result.

I would reverse.

/s/ Joseph B. Sullivan