STATE OF MICHIGAN

COURT OF APPEALS

DR. MARTIN TREPEL,

Plaintiff-Appellant/Cross-Appellee,

v

KOHN, MILSTEIN, COHEN and HAUSFELD, COHEN, MILSTEIN & HAUSFELD, and ESTATE OF JERRY S. COHEN, Deceased,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
July 14, 2000

No. 213708
Ingham Circuit Court
LC No. 92-073545-CK

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order of the circuit court granting summary disposition in favor of defendants. We reverse.

The trial court first determined that summary disposition was warranted under MCR 2.116(C)(7), reasoning that plaintiff's claim was barred by the statute of limitations. This is a question of law that we consider de novo. *McKiney v Clayman*, 237 Mich App 198, 200-201; 602 NW2d 612 (1999).

The period of limitations in a legal malpractice claim is two years. MCL 600.5805(4); MSA 27A.5805(4). MCL 600.5838(1); MSA 27A.5838(1) further provides:

> Except as otherwise provided in section 5838a, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. [Footnote omitted.]

For purposes of this section, a lawyer discontinues serving a client when relieved of the obligation by the client or the court, or upon completion of a specific legal service that the lawyer was retained to perform. *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994).

The law firm[1] litigated the post-appeal matter of costs to judgment in March, 1990. The question presented in this case is whether this constituted continuing representation of plaintiff as to the antitrust matter from which plaintiff's claim for malpractice arose. If it did, this action, filed in January, 1992, is not barred by MCL 600.5805(4); MSA 27A.5805(4).

In *Maddox*, *supra* at 447, the defendant advised the plaintiffs regarding the sale of a franchise business. Several months after the closing, the defendant revised the sale agreement to accommodate the purchasers' financial difficulties. *Id*. A year later, the defendant prepared a letter to the purchasers on behalf of the plaintiffs demanding immediate payment. *Id*. at 448. After the purchasers filed for bankruptcy, the plaintiffs learned from another lawyer that there was a problem with their security interest. *Id*. The plaintiffs called the defendant and alleged that he had committed malpractice. *Id*. The defendant discussed the matter with the plaintiffs' new lawyer and performed legal research on the issue. *Id*. This Court held that the plaintiffs' malpractice claim was not time-barred by the limitations period because the legal work performed by the defendant constituted continuing representation regarding the 1986 sale. *Id.* at 451.

Applying *Maddox* here, we conclude that plaintiff's claim was not barred by the statute of limitations. Clearly the cost issue that defendants continued to litigate on plaintiff's behalf until March of 1990 arose out of the federal antitrust litigation which gave rise to plaintiff's malpractice claim. Thus, for purposes of the statute, plaintiff's claim against defendants did not accrue until defendants discontinued serving plaintiff as his attorneys with respect to this matter, in March of 1990.

Further, we note that the trial court erred in finding plaintiff's claim to be time-barred on the basis that plaintiff had notice of "appreciable harm" after the appeal on the merits of plaintiff's federal complaint was unsuccessful. Similarly, to the extent that defendants rely on the judge's reasoning in arguing that plaintiff's claim accrued as soon as all elements of a tort claim were present (e.g., either January 30, 1987, when judgment of dismissal was entered by the federal district court, or November 7, 1988, when the United States Supreme Court denied certiorari), the argument must be rejected. MCL 600.5838(1); MSA 27A.5838(1) specifically provides that a malpractice claim *accrues* on the last day of professional service, "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." Thus, the Legislature has expressly directed the courts to ignore the vagaries that arise in determining when a claim is discovered or injury is manifested, and instead has created a bright-line test—i.e., the last day of professional service in the underlying legal matter. Indeed, in construing § 5838(1), our Supreme Court in *Gebhardt v O'Rourke*, 444 Mich 535, 541-542; 510 NW2d 900 (1994), found the statute to be unambiguous, notwithstanding inconsistent application of its plain meaning by the courts:

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[1] Defendant Cohen, Milstein & Hausfeld is the successor to defendant Kohn, Milstein, Cohen and Hausfeld. We will refer to the original and successor firms as "the law firm."

> Previous case law has confused the application of the statute by inserting traditional tort concepts of "accrual" into the clear statutory scheme. The normal rule in tort law is that a cause of action does not accrue until all elements of the tort exist. Section 5838 expressly rejects this rule by providing that accrual occurs without regard to whether the client's malpractice claim is ripe. [*Id.* at 542 (footnote omitted).]

Here, following denial of certiorari, defendant continued to represent plaintiff in court on the matter of costs, which, although tangential to the merits of the antitrust claim, was a matter arising out of that claim. Accordingly, application of the plain language of § 5838(1) leads to the conclusion that plaintiff's legal malpractice claim was not time-barred.

The trial court's grant of summary disposition to defendants was also based on principles of res judicata. Whether a suit is barred by res judicata is a question of law, which we review de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). The trial court determined that, because plaintiff had settled previous litigation he brought against Huron Valley Hospital, this action against defendants, who acted as Huron Valley Hospital's attorneys, could not proceed. We disagree.

Two requirements for application of res judicata are that the previous action and the current action involve the same subject matter and that the parties (or their privies) in the present action are the same as the parties (or their privies) in the previous action. *In re Koernke Estate*, 169 Mich App 397, 399; 425 NW2d 795 (1988). Applying these principles to the facts of the present case, we find that a close question is presented. Plaintiff's prior litigation against Huron Valley Hospital was a contractual claim, but the gist of it was that Huron Valley Hospital had failed to "vigorously pursue" the antitrust litigation as the contract required. Defendants, who acted as Huron Valley Hospital's attorneys in that litigation, were clearly implicated by that allegation, notwithstanding the fact that they were not privy to the contract out of which the allegation arose.

Nonetheless, we conclude that the present litigation involves a different subject matter and that the "party or privy" requirement is not satisfied. To avoid those conclusions, defendant cites two cases, *Krolik v Curry*, 148 Mich 214; 111 NW 761 (1907), and *DePolo v Greig*, 338 Mich 703; 62 NW2d 441 (1954). However, the contrast between this case and those cases illustrates why res judicata does not properly apply here.

Both *Krolik* and *DePolo* state that "a determination [of a cause of action] in a suit brought against the principal bars an action against the agents." *DePolo*, *supra* at 710, quoting *Krolik*, *supra* at 222. However, both *Krolik* and *DePolo* involved a prior suit against a principal that arose out of actions taken through the principal's agents, followed by a separate suit against the agents for their actions on behalf of the principal. The liability of the agents in those cases was derivative of the liability of their principals. See *Theophelis v Lansing General Hosp*, 430 Mich 473, 483; 424 NW2d 478 (1988) (liability of principal is derivative of liability of agent). In contrast to the fact scenarios in *Krolik* and *DePolo*, the present action is not lodged against defendants as agents of Huron Valley Hospital, their principal in the previous litigation, for actions that defendants took on behalf of Huron Valley Hospital. This Court has previously reversed a summary disposition granted to defendants because

defendants could well be determined, as a matter of fact, to have been the attorney for plaintiff at the time of the legal malpractice alleged in this case. *Trepel v Kohn Milstein Cohen & Hausfeld*, unpublished opinion per curiam of the Court of Appeals, issued 2/20/96 (Docket No. 167292). If that factual determination is made, plaintiff has a valid cause of action against defendants for acts or omissions in their representation of plaintiff, a cause of action that is separate from any that might have arisen out of the fact that defendants were also acting as agents for Huron Valley Hospital when, as alleged in the previous suit, Huron Valley Hospital failed to fulfill its contractual commitments to plaintiff. Thus, defendants' liability in the present case, if proven, would not be derivative of Huron Valley's liability, but would be direct liability arising from defendants' relationship to plaintiff.

Assuming that the factual determination that defendants acted as counsel for plaintiff is made, plaintiff is correct in arguing that this legal malpractice litigation is different from and does not involve the same subject matter as the previous contract litigation. Similarly, to the extent that plaintiff's present claim against defendants arises out of their direct representation of him as their client, the fact that they may have been privy to Huron Valley Hospital in the previous litigation is irrelevant. For both of these reasons,[2] summary disposition was improperly granted on res judicata grounds.

Finally, defendants argue on cross appeal that summary disposition should have been granted on the basis of collateral estoppel. However, collateral estoppel applies only "to preclude litigation of issues actually determined by final judgment and essential to the judgment in a prior action between the parties." *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transportation Authority*, 437 Mich 441, 451; 473 NW2d 249 (1991). Thus, collateral estoppel "does not apply to consent judgments where factual issues are neither tried nor conceded." *Smit v State Farm Mutual Auto Ins Co*, 207 Mich App 674, 682; 525 NW2d 528 (1994). Notwithstanding these principles, defendants argue that the consent judgment entered between plaintiff and Huron Valley Hospital in the previous litigation determined the issue of plaintiff's damages and relitigation of that issue in the present case is barred. We disagree. Nothing in the consent judgment indicates a determination of the damages plaintiff suffered as a result of the alleged breach of contract. Instead, as with most settlements, the settlement amount agreed to probably reflected some approximation of damages and some reduction of that approximation because of the risks of litigation. We cannot conclude that the settlement amount paid to plaintiff represented the damages caused by Huron Valley Hospital. Even if we could, those damages would not necessarily be the same as the damages allegedly arising out of the legal malpractice claimed here.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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[2] Because summary disposition was improperly granted for these reasons, we need not consider whether it was also improperly granted for lack of mutuality. See, e.g., *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 51; 191 NW2d 313 (1971).

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra