STATE OF MICHIGAN

COURT OF APPEALS

GREGORY A. NEUFFER and MICHAEL KILLBREATH,

Plaintiffs-Appellants,

v

PELAVIN & POWERS, P.C., PELAVIN POWERS & BEHM, P.C., RICHARD J. BEHM, MICHAEL J. BEHM and MICHAEL A. PELAVIN,

Defendants-Appellees.

UNPUBLISHED
October 26, 2001

No. 219639
Genesee Circuit Court
LC No. 97-059466-NM

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants summary disposition. We reverse and remand for further proceedings.

Plaintiffs commenced this action in September 1997, alleging claims for legal malpractice and breach of fiduciary duty. Plaintiffs averred that defendants provided erroneous advice and otherwise mishandled the default of Tri-County News, Inc. under the terms of a consent judgment, and the company's subsequent bankruptcy. After Tri-County News' default on its debt, a creditor of the company repossessed its assets and all stock in the company, which stock plaintiffs had owned until the occurrence of defendants' asserted professional negligence.

Defendants in February 1999 filed a third motion for summary disposition under MCR 2.116(C)(7), (8) and (10). Defendants' arguments included that they had no attorney-client relationship with plaintiffs because they represented Tri-County News exclusively regarding the matters that gave rise to the alleged claims of malpractice, and that according to the doctrine of res judicata the resolution of the company's bankruptcy proceedings barred any subsequent malpractice action in the circuit court. The court agreed with defendants and dismissed the case.

Plaintiffs first contend that the trial court erred in determining that defendants, who represented Tri-County News through the company's bankruptcy proceedings, could not simultaneously represent the company's individual shareholders. We agree that the trial court erred to the extent that it relied on *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC,*

107 Mich App 509, 514; 309 NW2d 645 (1981), for the proposition that because defendants represented the corporate entity Tri-County News, no attorney-client relationship with plaintiffs could exist. This Court in *Fassihi* did not hold as a matter of law that an attorney who represents a corporation may not ever simultaneously represent an individual shareholder, but merely noted that in light of "the general proposition of corporate identity apart from its shareholders," a corporate attorney's client is the corporation and not the shareholders. *Id.* In *Fassihi*, nothing indicated that the law firm undertook to represent the plaintiff individually.

In this case, however, the complaint alleges that defendants represented the plaintiffs individually regarding their purchase of Tri-County News stock, and thereafter through the period of the company's default and the creditor's repossession of company assets and the stock that plaintiffs owned. Both plaintiffs also submitted affidavits averring that defendants (1) provided plaintiffs with individual legal advice regarding their purchase of Tri-County News stock, (2) negotiated on behalf of the individual plaintiffs with the company creditor regarding the status of their stock as collateral for a loan to the company, (3) represented plaintiffs' individual interests in the subsequent bankruptcy proceedings, and (4) prosecuted an appeal of an order awarding plaintiffs' stock to the company's creditor. Defendants failed to submit any contrary evidence tending to prove their claim that they represented only the corporate entity. Accepting as true the allegations within plaintiffs' complaint, which we must, we find that summary disposition was not warranted under MCR 2.116(C)(8). *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Furthermore, viewing the pleadings and other documentary evidence in the light most favorable to plaintiffs, we conclude that summary disposition of their complaint was not warranted under MCR 2.116(C)(10). *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994).[1]

Plaintiffs next argue that the trial court erred in dismissing their case on the basis of res judicata. The applicability of res judicata is a question of law that we review de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

In *Pierson Sand & Gravel*, *supra* at 380-381, our Supreme Court discussed the doctrine of res judicata, explaining as follows:

> The doctrine of res judicata was judicially created in order to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. Both Michigan and the federal system have adopted a broad approach to the application of res judicata.
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> * * *

[1] In light of our finding that the trial court erred in ruling that as a matter of law no attorney-client relationship could have existed between plaintiffs and defendants, we similarly conclude that the trial court erred to the extent that it dismissed plaintiffs' breach of fiduciary claim on the basis that no attorney-client relationship existed. Moreover, even assuming that no attorney-client relationship existed in this case, the lack of this relationship does not preclude the existence of a fiduciary relationship. *Fassihi*, *supra* at 514-515.

> In Michigan, the doctrine of res judicata applies, except in special cases, in a subsequent action between the same parties and not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.
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> As a general rule, res judicata will apply to bar a subsequent relitigation based upon the same transaction or events, regardless of whether a subsequent litigation is pursued in a federal or state forum.
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> If a plaintiff has litigated a claim in federal court, the federal judgment precludes relitigation of the same claim in state court based on issues that were or could have been raised in the federal action, including any theories of liability based on state law. The state courts must apply federal claim-preclusion law in determining the preclusive effect of a prior federal judgment. [Quotations and citations omitted.]

In *Sanders v Confectionery Products, Inc. v Heller Financial, Inc*, 973 F2d 474, 480 (CA 6, 1992), which addressed the preclusive effect of a prior federal bankruptcy action, the court set forth the following requirements for res judicata: (1) "[a] final decision on the merits in the first action by a court of competent jurisdiction;" (2) "[t]he second action involves the same parties, or their privies, as the first;" (3) "[t]he second action raises an issue actually litigated or which should have been litigated in the first action;" and (4) "[a]n identity of the causes of action."

We conclude in this case that the third and fourth res judicata elements do not exist. Regarding the third element, it is undisputed that no malpractice claims against defendants actually were litigated in Tri-County News' bankruptcy proceedings. Furthermore, because the instant action alleges defendants' malpractice in managing the *individual* plaintiffs' efforts to maintain *their ownership of stock* in Tri-County News, plaintiffs' instant claims are not sufficiently related to the Tri-County News bankruptcy case such that they should have been litigated during the bankruptcy proceeding. *Sanders*, *supra*. In light of the bankruptcy court's own finding that Tri-County News had "no property interest in the shares of its stock owned by its shareholders [plaintiffs]. . . . even if the stock was pledged as security for a corporate obligation," we conclude that plaintiffs' instant claims involving their loss of ownership of Tri-County News stock due to defendant's malpractice could have had no conceivable effect on the administration of Tri-County News' bankruptcy estate. *Sanders*, *supra* at 482.

Moreover, with respect to the fourth element requiring an "identity of the facts creating the right of action and of the evidence necessary to sustain each action," *Sanders*, *supra* at 484, we find no indication that the bankruptcy court previously considered any of the facts pertinent to plaintiffs' instant allegations of malpractice. Accordingly, we conclude that the trial court erred to the extent that it dismissed plaintiffs' action on the basis of res judicata.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder