

STATE OF MICHIGAN
COURT OF APPEALS

MARY T. SCOTT,

Plaintiff-Appellant,

v

FRANK HARON WEINER & NAVARRO;
DAVID L. HARON; MONICA P. NAVARRO;
and J. LAEVN WEINER,

Defendants-Appellees.

UNPUBLISHED

August 18, 2009

No. 286833

Oakland Circuit Court

LC No. 07-086204-NM

Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by right from the circuit court's order granting defendants' motion for summary disposition, in this action alleging legal malpractice. We affirm.

This action arises from defendant's representation of plaintiff in an action in federal district court, wherein plaintiff alleged that her employer, Metropolitan Health Corporation ("Metropolitan") engaged in fraudulent billing of medical claims. The facts of the underlying case are set forth in the federal district court's opinion in *United States ex rel Scott v Metro Health Corp*, 375 F Supp 2d 626, 628 (WD Mich, 2005), and we draw from that opinion to briefly state the facts.

In 1996, plaintiff began work as a consultant for Metropolitan, a hospital in Grand Rapids, Michigan. *United States ex rel Scott, supra* at 629. During her consulting relationship with Metropolitan, plaintiff expressed legal compliance (tax and Medicare) concerns about Metropolitan's purchases of physician practices. *Id.* In 1997, Metropolitan hired the plaintiff as vice president of network development, in which capacity plaintiff functioned as a leading manager for Metropolitan's for-profit sister entities, "Metropolitan Enterprises." Metropolitan Enterprises provided billing services for Metropolitan's associated physicians, managed the "Metro Health Plaza" offices, managed the third-party payer relationships for the Hospital and physicians, and performed other tasks generally related to the Hospital's mission. As a part of this assignment, plaintiff served as one member of Metropolitan's Compliance Committee, as well as a member of Metropolitan's Billing and Coding Task Force, an important legal compliance committee assignment because of its role in private and governmental billings. Soon thereafter, however, problems arose concerning plaintiff's interactions with co-workers, subordinates, and physicians. *Id.* at 630. Plaintiff began making secret tape recordings of certain

conversations. *Id.* at 631. Plaintiff also lodged complaints about various legal compliance concerns she had. *Id.* at 634.

Eventually, in February 2002, plaintiff met with a lawyer to contemplate filing a sex discrimination or whistle blowers lawsuit against Metropolitan. *United States ex rel Scott, supra* at 634. Plaintiff also began investigating her employer at work. *Id.* at 636-637. “The truck load of straw that broke the camel’s back in terms of [one manager’s] tolerance of Scott’s personal investigation was Scott’s treatment of audiotapes and minutes of the February 7, 2002 Metropolitan Enterprises Board meeting.” *Id.* at 636. The tapes included tapes of a meeting of the Executive Committee of Metropolitan’s Board. After that Board meeting, another manager caught plaintiff rifling through the manager’s desk, looking for the tapes of the meeting, because plaintiff believed the drafted minutes were inaccurate. *Id.* The manager told plaintiff to return the tapes, but they were not returned. *Id.*

Later, three tapes “showed up,” in plaintiff’s words, by “sheer luck,” but one tape was, according to plaintiff, “lost.” *United States ex rel Scott, supra* 637. On May 28, 2002, the manager received the minutes back from plaintiff (a while after they had been emailed to her), in amended form. The federal district court reviewed the evidence in detail, and concluded that plaintiff’s changes misrepresented what was said at the meeting. *Id.* at 637-640. Plaintiff was placed on administrative leave, so that she could not interfere with an internal investigation concerning her allegations. *Id.* at 639. After plaintiff was placed on administrative leave, her counsel and Metropolitan’s counsel discussed the location of the tapes and the alterations of the minutes. Plaintiff quoted a portion of what was said at the infamous meeting.” *Id.* at 639. This caused a Metropolitan manger to ask plaintiff if she had the tapes. Plaintiff then admitted that she had a tape of the meeting, but refused to produce it. “It was not disclosed until Plaintiff’s opposition brief filing [in the underlying case] on March 15, 2005, that Plaintiff, in fact, possessed all three tapes of the meeting.” *United States ex rel Scott, supra* at 639.

Metropolitan completed its investigation, which concluded in part that Scott should be terminated. Scott was given the opportunity to resign from Metropolitan with a severance package, through the vehicle of a “neutral” administrative reorganization. *United States ex rel Scott, supra* at 639-640. Plaintiff refused this offer, so Metropolitan terminated her. *Id.* at 640.

Plaintiff then commenced the underlying action against Metropolitan in July 2002, in federal district court, alleging fraudulent billing by Metropolitan of Medicare claims (a *qui tam* claim) under the federal False Claims Act (FCA), 31 USC 3730(h). Plaintiff was the *qui tam* relator. Plaintiff also alleged that Metropolitan retaliated against her for disclosing fraudulent billings. Initially, plaintiff was represented by the law firm of Sommers Schwartz. However, plaintiff later fired Sommers Schwartz, and was thereafter represented by her husband, attorney Mark Scott, and the law firm of Frank Haron Weiner & Navarro. *United States ex re Scott, supra* at 627. The United States joined the lawsuit, after which The United States and Metropolitan settled the *qui tam* claim (for fraud upon Medicare). Plaintiff’s *qui tam* relator fee was impounded, and her retaliation claim against Metropolitan remained.

Following the settlement with The United States, Metropolitan filed a motion for partial summary judgment of the retaliation claim. *United States ex rel Scott, supra* at 627-628. The district court granted the motion. *Id.* at 649.¹ The federal district court held that, even assuming that plaintiff could prove a prima facie case, summary judgment was warranted by the established record of plaintiff's misconduct:

In this case, Plaintiff has admitted facts which establish beyond any genuine issue of material fact that she wrongly altered corporate records and that she withheld from the corporation tapes evidencing corporate minutes. The withholding of the tapes was not 'protected conduct' Moreover, the alteration of the corporate minutes was not only bad conduct, it was a crime under Michigan and common law. [*Id.* at 646.]

The federal district court also held that plaintiff failed to show that the reasons for her termination were pretextual, given her extensive misconduct:

There is no evidence raise a serious doubt that the Board lacked a 'reasonable belief' as to the manifold reasons for discharging Plaintiff – i.e., falsification of evidence, concealment of evidence, insubordination as to Fraser, refusal to obey the protocol, inappropriate conduct as to management assessment, verbal abuse of colleagues, efforts to manipulate management assessments, disparaging fellow officers, and threatening to retaliate against staff to name a few reasons. [*United States ex rel Scott, supra* at 647.]

Metropolitan then brought a motion for sanctions against plaintiff on the basis of alleged misconduct during the litigation. In September 2005, the federal district court granted the motion. The court found that plaintiff's affidavit, filed in response to Metropolitan's renewed motion for partial summary judgment, disclosed, in relevant part, (1) that plaintiff had originally produced only a fragmentary tape of a meeting; (2) that she had deleted from the minutes a statement made at the meeting; and (3) that plaintiff added to the minutes a statement by her, even though she had not made the statement at the meeting. The federal district court further held that plaintiff's affidavit, and other record evidence, demonstrated that plaintiff unlawfully retained the original three tape recordings that were Metropolitan's property, that plaintiff's amendments to the minutes were dishonest, and that plaintiff withheld the tapes in order to avoid discovery that there had been unauthorized amendments to the minutes. In addition, the federal district court held that the piecemeal disclosure of the minutes by plaintiff, during the litigation, made the evidence unreliable, and "delayed the eventual admissions by plaintiff that resulted, inevitably, in her loss of the case." *United States ex rel Scott v Metro Health Corp*, unpublished opinion of the United States District Court for the Eastern District of Michigan (issued September 29, 2005), slip op at p *5.

¹ The federal district court also dismissed the state law claims (for breach of contract and defamation) without prejudice under 28 USC 1367(c)(3). *United States ex rel Scott, supra* at 649.

The federal district court also concluded, based on evidence presented in relation to the motion for sanctions, “that Plaintiff and her counsel kept from Defendants other copies of tapes after Defendants had requested disclosure” *United States ex rel Scott, supra*, unpublished opinion of the United States District Court for the Eastern District of Michigan (issued September 29, 2005), slip op at p *4, and that plaintiff’s nondisclosures were intentional, and were motivated by a bad-faith desire to conceal discovery materials. *Id.* at *6. The district court further concluded that affidavits filed by plaintiff early in the case were intentionally false, and were filed in bad faith. *Id.* Furthermore, the district court concluded that the nondisclosure of the recordings “was due primarily to Plaintiff” *Id.* at *11.

The district court further held that plaintiff’s filing of the retaliation claim against Metropolitan, when she knew that she had wrongfully altered the Board minutes, “was not objectively reasonable and was done in bad faith.” *United States ex rel Scott, supra*, unpublished opinion of the United States District Court for the Eastern District of Michigan (issued September 29, 2005), slip op at p *12. Accordingly, the district court awarded costs and all attorney fees incurred by Metropolitan in defending the retaliation claim. *Id.* The district court concluded that the case “demands the sanctions,” and that the claim was frivolous. *Id.* at *13.²

Plaintiff appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed. *Scott v Metro Health Corp*, 234 Fed Appx 341, 349, 367-368 (CA 6, 2007). The federal appeals court held that: (1) Metropolitan’s stated reasons for plaintiff’s termination were not pretexts for retaliation; and (2) the federal district court correctly imposed sanctions on plaintiff, based on her bad faith conduct during litigation. *Scott, supra* at 349, 367-368.³

Plaintiff then filed this action, alleging that her retaliation claims in the federal district court were dismissed by summary judgment, and sanctions were imposed upon her, because of defendant’s legal malpractice. Defendants filed a motion for summary disposition, arguing, in relevant parts, that (1) plaintiff is collaterally estopped from asserting facts different from those found by the federal courts, and from relitigating the federal court’s rulings; (2) plaintiff cannot recover for harms caused by her own wrongful conduct; (3) plaintiff has failed to establish proximate cause between their representation of her and her alleged damages; and (4) the attorney-judgment rule bars the claim.

² After additional briefing, the district court specified the amount of attorney fees awarded at over \$1.6 million, for what it called disreputable and widespread bad faith conduct by plaintiff. *United States ex rel Scott v Metro Health Corp*, unpublished opinion of the United States District Court for the Eastern District of Michigan (issued December 13, 2005), slip op at p *12. The district court also held that “there is no legal impediment preventing the seizure of Plaintiff’s *qui tam* award funds to be applied to the attorney fees judgment in favor of Defendants.” *Id.* at *11.

³ The federal appellate panel held that the district court did not clearly err in finding that plaintiff committed discovery violations by not producing the tapes, and did not clearly err in concluding that plaintiff submitted affidavits that she knew were untruthful, and therefore presented them in bad faith. *Scott, supra* at 367-368. The panel held that, once the district court made those findings, it was *obligated* to impose sanctions on plaintiff under the Federal Rules of Civil Procedure. *Id.*

In response to the motion for summary disposition, plaintiff consented to summary disposition of her claims which asserted that (1) defendants negligently failed to file an interlocutory appeal; (2) defendants violated attorney-client privilege; (3) defendants negligently failed to challenge the impoundment of plaintiff's *qui tam* relator fee; and (4) defendants negligently failed to file a motion to recuse the district court judge. Plaintiff also implicitly abandoned her claim that her case was dismissed on summary judgment due to defendant's malpractice. In arguing that defendant's malpractice resulted in the imposition of sanctions against her and that summary disposition was inappropriate, plaintiff asserted that there was uncontroverted evidence that, prior to the *qui tam* case, plaintiff was advised (apparently by prior counsel) not to turn over an audiotape, and evidence that, during the *qui tam* case, her attorneys (defendants herein) possessed all the tapes, analyzed them, and failed to turn the disputed tapes to Metropolitan. Plaintiff further argued that the federal district court concluded that plaintiff was responsible for the nondisclosures because, given defendant's conflict of interest, defendants failed to fully disclose the true facts to the district court. Plaintiff also argued that there had been insufficient discovery, and that the motion was premature.

Plaintiff also argued below that because of defendants' negligence, there were deficiencies in the record in the underlying case, which deficiencies were influential on the federal district court. Further, plaintiff denied that collateral estoppel applied, arguing that where negligence by the defendant caused the prior ruling, collateral estoppel cannot apply. Plaintiff also argued that there was a genuine issue of material fact as to proximate causation, that defendants' actions are not protected by the attorney-judgment rule, and that her husband, Mark Scott did *not* represent her in the underlying case, so as to obviate a conflict of interest by defendants. Plaintiff argued that her claim based on an ethics violation was valid, because a violation of the ethics rules creates a rebuttable presumption of breach of the standard of practice. Finally, plaintiff denied having engaged in any wrongful conduct necessitating or causing the sanctions ruling.

The circuit court concluded that plaintiff could not establish that, but-for defendant's alleged conflict of interest regarding the sanctions issue, plaintiff would not have been sanctioned. The circuit court noted that both the federal district court, and the federal appellate court, examined plaintiff's conduct, and her attorney's conduct, and concluded that only plaintiff should be sanctioned. Accordingly, the trial court granted the motion for summary disposition.⁴

Plaintiff first argues that defendants' motion was premature. Because plaintiff fails to state this issue in her statement of questions presented, the issue is abandoned. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

Plaintiff next argues that defendants seek to use their own alleged malpractice in the federal litigation to shield themselves against her claims. Defendants asserted below and on appeal that plaintiff has failed to present evidence of factual causation, and that plaintiff is

⁴ The circuit court denied defendants' request for sanctions against plaintiff for filing what they said was a frivolous action. In a later order regarding the affidavit of Mark Scott, the circuit court held that even if false statements were made, any harm inflicted was *de minimus*.

collaterally estopped from relitigating the federal courts' findings that plaintiff's own misconduct warranted the imposition of sanctions.

We review summary dispositions de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38; 718 NW2d 386 (2006). Under MCR 2.116(C)(7), collateral estoppel is a basis for summary disposition. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 36 n 5; 620 NW2d 657 (2000). The applicability of collateral estoppel to bar a claim is a question of law. *Id.* at 34. We review questions of law de novo. *Morden v Grand Traverse Co*, 275 Mich App 325, 340; 738 NW2d 278 (2007).

Collateral estoppel "requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493, 500 (2008). Mutuality of estoppel requires that a party invoking collateral estoppel was a party, or in privity to a party, in the prior action, and would have been bound by it had it gone the other way. *Monat v State Farm Ins Co*, 469 Mich 679, 684-685; 677 NW2d 843 (2004). Here, had the prior litigation gone the other way, plaintiff could not have applied collateral estoppel against defendants herein, because defendants herein were not parties to the prior litigation. *Id.* Therefore, mutuality is absent here, and collateral estoppel does not apply. *Id.*

Although collateral estoppel does not apply to the federal courts' findings that plaintiff committed bad faith misconduct in the federal litigation, nevertheless, plaintiff must also show the existence of a genuine issue of material fact regarding factual causation in order to survive summary disposition of this action. Because she failed to do so, we find no error in the trial court's grant of summary disposition of this case.

Proximate cause has two components: (1) cause-in-fact, and (2) proximate or legal cause. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). Cause-in-fact requires plaintiff to show that *but for* the defendants' actions, the injury in question would not have occurred. *Id.* at 86-87. "Hence, a plaintiff must show that but for an attorney's alleged malpractice, the plaintiff *would have been successful* in the underlying suit." *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004) (emphasis added), citing *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-587; 513 NW2d 773 (1994).⁵

Here, plaintiff fails to present sufficient to establish a genuine issue of material fact that the federal courts' findings of bad-faith litigation misconduct (that plaintiff unlawfully retained the original three recordings of meetings; that the nondisclosure of the recordings was due primarily to Plaintiff; and that affidavits filed by plaintiff early in the case were intentionally

⁵ Also see *Coble v Green*, 271 Mich App 382, 387; 722 NW2d 898 (2006); *Colbert v Conybeare Law Office*, 239 Mich App 608; 609 NW2d 208 (2000); *Pontiac Sch Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 616-617, 621-622; 563 NW2d 693 (1997); and *Teodorescu v Bushnell, Gage, Reizen & Byington (On Remand)*, 201 Mich App 260, 266; 506 NW2d 275 (1993).

false) were based on anything defendants did, as opposed to plaintiff's own misconduct. For example, plaintiff presents no evidence that defendants had any responsibility for the falsity of her affidavits, filed early in the underlying case. As the affiant, plaintiff swore to the truth of the statements in the affidavit, and when she signed the affidavit, she knew whether in fact her statements were true or false. However, plaintiff has not shown that defendants had any personal knowledge that her affidavit statements were actually false. As such, plaintiff has failed to demonstrate a causal link between the federal courts' imposition of sanctions on her and the conduct of her attorneys. Therefore, summary disposition in favor of defendants was properly granted.⁶

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Cynthia Diane Stephens
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

⁶ Because we affirm the trial court's ruling that there is no genuine issue of material fact regarding factual causation, we need not address the issue of whether the attorney-judgment rule protects defendants' conduct in the underlying case.