

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARIANA KEROS and PAUL  
SPRINGTHORPE,

UNPUBLISHED  
June 14, 2012

Plaintiff-Appellants,

v

FREDERICK P. BIBIK,

No. 303356  
Oakland Circuit Court  
LC No. 10-107492-NM

Defendant-Appellee.

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Before: DONOFRIO, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

In this legal malpractice case, plaintiffs appeal by right from the trial court's orders granting summary disposition to defendant. We reverse and remand because plaintiffs have presented sufficient evidence of malpractice to preclude summary disposition.

**I. FACTS**

The alleged malpractice in this case occurred during a previous malpractice lawsuit filed against attorney Binkley who had handled plaintiffs' claims during the bankruptcy of Kmart Corporation. Both plaintiffs are former Kmart executives who sought to recover unpaid severance packages in the underlying bankruptcy case. Each had hired Binkley during the bankruptcy and claim that he failed to take appropriate action and give appropriate legal advice to file and preserve claims as general unsecured creditors of Kmart. They also claim that they informed Binkley of the administrative expense filing deadline in the bankruptcy court, but that he failed to preserve those claims as well.

Given the lack of preserved claims, plaintiffs were not eligible to receive payments as creditors in the bankruptcy proceedings. By contrast, those former executives who had filed administrative and general claims in the bankruptcy court received substantial settlements on their claims for the unpaid severance packages. Plaintiffs hired Bibik to sue Binkley for malpractice in failing to preserve and properly pursue their bankruptcy claims. In the case filed by Bibik, it was alleged that Binkley should have timely filed administrative claims in the bankruptcy action. It was not alleged that Binkley should have timely filed general claims. The trial court dismissed the case after concluding that plaintiffs had not provided evidence that if administrative claims had been filed, plaintiffs would have received settlements.

After the case filed by Bibik was dismissed, Bibik failed to timely file an appeal. In a letter to plaintiffs, he conceded that had he intended to file an appeal, but that he miscalculated the deadline.

Plaintiffs brought suit against Bibik. The trial court initially granted partial summary disposition on the grounds that plaintiffs failed to present sufficient evidence of malpractice and causation to create a question of fact as to Bibik's representation in the trial court. On defendant's motion for reconsideration, the trial court granted summary disposition on plaintiff's remaining claim arising out of Bibik's failure to timely file their appeal as to the dismissal of the Binkley claim.<sup>1</sup>

## II. ANALYSIS

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). When reviewing such a motion, this Court considers the pleadings and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). A grant of summary disposition is only appropriate "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 552.

The elements of a legal malpractice claim are:

- (1) the existence of an attorney-client relationship;
- (2) negligence in the legal representation of the plaintiff;
- (3) that the negligence was a proximate cause of an injury; and
- (4) the fact and extent of the injury alleged. [*Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995)].

Defendant does not dispute that there was an attorney-client relationship between himself and plaintiffs, and thus that he owed plaintiffs a duty. That duty is "to use and exercise reasonable skill, care, discretion and judgment in the conduct and management" of the clients' cause. *Id.* at 655-656. Defendant does, however, contest the second and third elements, arguing that a

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<sup>1</sup> The issue of the appellate deadline missed by defendant is irrelevant as plaintiffs would not have been successful on appeal given the trial court record developed by defendant in the suit he prosecuted against Binkley.

reasonable jury could not properly find him negligent and that any negligence on his part could not have been a cause of the plaintiff's failure to prevail in the suit against Binkley.

Plaintiffs allege that Bibik, due to an inadequate understanding of ordinary bankruptcy law and procedure, failed to argue that Binkley should have filed and preserved general unsecured claims on their behalf in the bankruptcy case and failed to make the appropriate causation arguments in the prior case as to the effect of Binkley's failure to file administrative claims. The trial court rejected each of these arguments in granting summary disposition. We reverse, largely on the basis of the affidavit of plaintiff's expert witness, Kathleen Klaus, a bankruptcy attorney who was also involved in the Kmart bankruptcy. Notably, in its two opinions, the trial court makes no reference to the Klaus affidavit. Given its significance, we reproduce that affidavit in full:

I, Kathleen H. Klaus, make the following affidavit based on my personal knowledge and, if called, I called, I would testify consistently with this affidavit.

### **BACKGROUND**

1. I am an attorney licensed to practice law in the state of Michigan and Illinois.

2. From 1999 until 2004, my practice focused primarily on bankruptcy litigation. In that capacity, I represented Mariana Keros and Paul Springthorpe in litigation brought against them by the Kmart Creditor Trusts in an effort to recover retention bonuses Kmart paid to Ms. Keros and Mr. Springthorpe prior to Kmart's bankruptcy. Ms. Keros and Mr. Springthorpe retained me in the fall of 2003, immediately after they were served with the complaints filed against them by the Kmart Creditor Trusts.

3. In the course of that representation, I learned that Ms. Keros filed a timely proof of claim by the bar date for unsecured claims for her pension benefits and that Mr. Springthorpe did not file a proof of claim. Neither filed claims for any administrative expense or any other claim for losses they incurred as a result of the breach of their employment contracts. By the time I was retained, the relevant bar dates had passed and the bankruptcy court would not allow us to bootstrap untimely claims to our answer by way of a counterclaim or set-off.

4. At a later date, Ms. Keros and Mr. Springthorpe asked me about suing their bankruptcy attorney for failing to file a timely claim. We had learned that unsecured claims were being paid in full or very nearly in full. I referred them to Larry Acker, whom I knew to be an expert in handling legal malpractice cases. Mr. Acker referred the matter to his associate, Fred Bibik. Mr. Bibik then filed a lawsuit against Cox Hodgman & Giamarco, P.C. and David Binkley on behalf of Ms. Keros and Mr. Springthorpe ("Binkley Litigation"). Soon after the Binkley Litigation was filed, I settled the litigation with the Kmart Creditor Trusts.

5. From time to time, Mr. Bibik would consult with me about the Binkley Litigation. Each time Mr. Bibik called me, I was clear that I could not provide substantive assistance to him or be engaged formally in the litigation because to do so would create a conflict with work I then was doing for my employer Maddin Hauser. However, I did provide Mr. Bibik with background information and informed him that he needed to consult with a bankruptcy expert. Mr. Bibik listed me as an expert witness in the Binkley Litigation even though I told him that I could not be so engaged because of the conflict of interest.

### OPINIONS

6. I have reviewed Mr. Bibik's affirmative defenses in the instant case.

7. Mr. Bibik's third affirmative defense is not valid.<sup>2</sup> This defense is based on the argument the defendants raised in the Binkley Litigation that Mr. Binkley's failure to file a timely administrative expense on behalf of Ms. Keros and Mr. Springthorpe did not "cause" a loss because the bankruptcy court determined as a matter of law that the claims based on employment contracts were not entitled to administrative priority. While this is true, it is not dispositive. If a timely administrative expense claim had been filed and was denied priority as an administrative expense, that claim would be reclassified as a general unsecured claim that related back to the bar date for such claims. Indeed, other former employees who filed administrative expense claims timely were paid hundreds of thousands of dollars on those claims, even though the claims were deemed not to be entitled to a priority. The standard of care required Mr. Bibik to raise this argument in response to the defendants' motion for summary disposition in the Binkley Litigation but he failed to do so.

8. Likewise, Ms. Keros and Mr. Springthorpe's claim could also be construed as claims for "rejection damages" that were not subject to the bar date for general unsecured claims. Had Mr. Binkley filed a time administrative claim – and the standard of care required him to do so – Ms. Keros and Mr. Springthorpe would have standing to argue that their timely administrative expense claim should not be denied, but merely re-classified as timely claim for rejection damages. Again, Mr. Bibik did not raise this argument in response to defendants' motion for summary disposition, and he should have.

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<sup>2</sup> "Claims pursued under the Severance Agreement theory were conclusively adjudicated as not entitled to administrative priority, thereby barring Plaintiffs' claims."

9. Had Mr. Binkley raised the recharacterization arguments – and the standard of care required him to do so – he would have created (at the very least) a genuine issue of material fact as to whether Mr. Binkley’s failure to file a timely administrative expense claim caused Ms. Keros and Mr. Springthorpe to suffer a loss.

10. Mr. Bibik’s fourth affirmative defense is also invalid.<sup>3</sup> Although the employment contracts were rejected, Ms. Keros and Mr. Springthorpe had claims for damages because, under the bankruptcy code, the rejection of an executory contract constitutes a breach of that contract and the creditor is entitled to breach of contract damages. Thus, the fact that the employment agreements were rejected supports Plaintiffs’ claims, it does not bar them.

11. Mr. Bibik’s fifth affirmative defense makes no sense and underscores Mr. Bibik’s lack of familiarity with the bankruptcy code.<sup>4</sup> The relevant section of the bankruptcy code states:

*Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executor contract or unexpired lease of the debtor constitutes a breach of such contract or lease –*

*(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition;*

Thus, this provision of the bankruptcy code tells the parties when a breach of contract occurs if the contract is rejected and was never assumed under a plan of reorganization order otherwise. The section does not bar a claim for breach of contract or a claim for rejection damages based on the rejection of an employment contract.

12. In responding to the dispositive motion in the Binkley Litigation, Mr. Bibik failed to understand the legal significance of the unique circumstances presented by Kmart’s bankruptcy case. As a general rule, attorneys representing creditors file and defend proofs of claim if there is any colorable basis for asserting the claim. Thus, while Kmart court eventually found that the executive’s contract claims were not entitled to be an administrative priority, filing proofs of claims for administrative expenses was the “foot in the door” that allowed the creditors to argue that their proofs of claim should be recharacterized as general proofs of claim. In Kmart (unlike nearly every other significant

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<sup>3</sup> “A Pre-Petition Severance Agreement cannot be assumed by conduct, and the Severance Agreements of the Plaintiffs were ultimately rejected, resulting in the failure of the Plaintiffs’ claims.”

<sup>4</sup> “Plaintiffs’ claims are barred as a matter of law pursuant to 11 U.S.C. § 365(g)(1).”

chapter 11 case) general unsecured claims were paid nearly a 100% dividend, *i.e.* were paid just as much as they would have been paid if they were entitled to an administrative priority.<sup>5</sup>

13. Therefore, the argument in the underlying legal malpractice case against Mr. Binkley – that if theirs had been filed as administrative expense claims, Ms. Keros and Mr. Springthorpe would have been paid – is actually true. Had Mr. Bibik argued this point correctly (with the help of a retained expert), it is my opinion that Mr. Bibik could have defeated the motion for summary disposition in the Binkley Litigation.

14. As to Ms. Keros, Mr. Bibik did not argue that Mr. Binkley should have filed an objection to the omnibus objection to her general proof of claim. This is a standard and formulary thing among bankruptcy lawyers, and doing so was required by the standard of care applicable to Mr. Binkley. It is routine to do so and was routine to have done so in the Kmart bankruptcy. If it had been done, it would have automatically taken the Ms. Keros claim out from under the gambit of Kmart's effort to expunge it. the bankruptcy law has changed since then so that Debtors can no longer file huge "Omnibus Objections" against tens of thousands of claims, hoping that the creditors will not respond to the objection and their claims will be denied by default, as Ms. Keros's was. Ms. Keros's claim was meritorious and would have been paid, had Mr. Binkley filed a one-page response to the Omnibus Objection. Mr. Binkley did not file such an objection when he should have done so and had an opportunity to do so. Ms. Keros had hired Mr. Binkley within two weeks of the date of her being fired, which was on January 16, 2003.

15. As to Mr. Springthorpe, Mr. Bibik failed to understand (and did not argue) that a general proof of claim should have been filed by Mr. Binkley. Mr. Binkley had Mr. Springthorpe not to file a general proof of claim because, by staying under the radar of Kmart, he would not be sued by Kmart seeking to require him to disgorge the pre-petition payments made to him under the contract. That advice from Mr. Binkley violated the standard of care and was not the reasonable advice of a fully informed attorney. The Kmart Creditor Trusts were charged with bringing litigation to recover the tens of millions of dollars paid prepetition to Kmart's executives like Mr. Springthorpe. Under the Creditor Trusts fiduciary duties to their constituents, they had to bring those adversary actions, regardless of whether or not the defendant filed a proof of claim. Moreover, the proof of claim could become leverage in any negotiations over the Creditor Trusts efforts to recover the retention bonus. Mr. Springthorpe was fired

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<sup>5</sup> That is so because at the time it declared bankruptcy, Kmart had far undervalued its leasehold rights, and so it was demonstrable that the company actually had a lot more asset than were being claimed by its schedules and representations to the bankruptcy court.

on May 10, 2002 and he Mr. Binkley in May of 202, within only a few days of his being fired. There was plenty of time to file a general administrative claim. Mr. Binkley's failure with respect to Mr. Springthorpe was to file such a claim on Mr. Springthorpe's behalf.

16. Mr. Bibik failed to fully understand and to adequately explain to the Oakland County Circuit Court in the legal malpractice case against Mr. Binkley exactly why all others similarly situated who had filed general proofs of claim (e.g. Mr. Springthorpe) and those who had taken steps to object to the expungement of their claim (e.g. Ms. Keros) had survived with their claims intact and had them paid.

17. Mr. Bibik failed to act in a timely way to preserve the rights of either Plaintiff to appeal Judge Chabot's ruling, as Mr. Bibik has admitted.

18. I anticipate that my opinions will be changed or expanded based upon the materials which are not presently available to me or the Plaintiffs' attorney. It would be junk science to suggest that a final, inalterable opinion can be given when some information is not yet available.

The affidavit of this expert witness creates questions of fact as to both negligence and causation. Paragraphs 14-16 set forth expert testimony that Binkley committed malpractice by failing to file and preserve general claims on plaintiff's behalf in the bankruptcy action and that Bibik committed malpractice by not making this claim against Binkley. Paragraphs 7-8 set forth expert testimony that Bibik committed malpractice by failing to argue that Binkley's failure to file administrative claims was causative of a loss because those administrative claims would have been reclassified by the bankruptcy court as general claims. Paragraphs 7, 9, and 10-14 set forth expert testimony on each of the causation issues. Accordingly, we conclude that the instant malpractice claim could not properly be dismissed for failing to demonstrate a material question of fact on either negligence or causation.

Defendant also argues that he is protected by the attorney judgment rule, but that rule only applies "where the attorney acts in good faith and exercises reasonable care, skill, and diligence." *Simko*, 448 Mich at 658. As described above, Klaus's affidavit creates a question of fact regarding whether defendant in fact exercised reasonable care, skill and diligence, particularly given Klaus's statements that she had advised defendant to consult with a bankruptcy expert, that one of Binkley's errors not raised by Bibik was a "standard and formulary thing among bankruptcy lawyers," that Bibik "failed to understand" the effect that the filing of a general claim would have had in the bankruptcy case and that he "failed to fully understand and to adequately explain to the Oakland County Circuit Court in the legal malpractice case against Mr. Binkley exactly why all others similarly situated [who had filed and preserved general claims] had survived with their claims intact and had them paid."

Defendant also argues that plaintiffs' claims are barred by res judicata and collateral estoppel. Our Supreme Court has held that res judicata bars a second action when:

(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. [*Sewell v Clean Cut Mgmt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001) (internal quotation omitted)].

Defendant argues that the Binkley case was decided on the merits and involved the same question of whether Binkley's malpractice prevented plaintiffs from recovering their severance packages. However, defendant was not a party to that action, nor was he a privy of Binkley.

[A] privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to an agent, a master to a servant, or an indemnitor to an indemnitee. A privy includes one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through one of the parties, as by inheritance, succession, or purchase. In order to find privity between a party and a nonparty, Michigan courts require both a substantial identity of interests and a working or functional relationship in which the interests of the non-party are presented and protected by the party in the litigation. [*Peterson Novelties, Inc v City of Berkeley*, 259 Mich App 1, 12-13; 672 NW2d 351 (2003) (internal citations omitted)].

Defendant's interests were certainly not represented by Binkley at the time of the litigation against Binkley—they were diametrically opposed. We also reject defendant's suggestion that he somehow inherited or succeeded to Binkley's position. The only relationship between Binkley and defendant is that defendant represented plaintiffs in their suit against Binkley.

Further, the application of res judicata according to defendant's logic would prevent any lawyer from ever being sued for malpractice involving litigation. Under the case within a case requirement, a plaintiff in a legal malpractice case involving litigation must demonstrate that he would have prevailed in the prior case if adequately represented. *Manzo*, 261 Mich App at 712. Defendant's reasoning would effectively prevent, as a matter of res judicata, any legal malpractice plaintiff from asserting that with proper counsel he could have succeeded in the prior litigation. Defendant's collateral estoppel argument is barred for the same reason. *Radtke v Miller Canfield*, 290 Mich App 606 (1995), *rev'd on other grounds*, 453 Mich 413 (1996). Defendant cites several cases for his argument to the contrary, but those cases all involve situations where the competence of the attorney had already been decided—that is, the plaintiff had already litigated the issue of the attorney's competence, not merely the plaintiff's underlying substantive claims or defenses.<sup>6</sup> Those cases would only be applicable if plaintiffs were suing Binkley or defendant a second time.

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<sup>6</sup> *Knoblauch v Kenyon*, 163 Mich App 712; 415 NW2d 286 (1987) (client's post-conviction ineffective assistance of counsel argument was rejected, and he was thus estopped from suing for legal malpractice); *Schlumm v Terrence J. O'Hagan, PC*, 173 Mich App 345; 433 NW2d 839 (1988) ("plaintiffs' claim of malpractice rests upon the very same issues previously decided in plaintiff's ineffective assistance of counsel claim").



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

/s/ Pat M. Donofrio  
/s/ Kathleen Jansen  
/s/ Douglas B. Shapiro