

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-000567-MR

JULANE SIMPSON, ADMINISTRATOR  
OF THE ESTATE OF WILFORD DOLL;  
GUY BARNES, BY AND THROUGH HIS  
GUARDIAN HEATHER MOSER; AND  
TOM CARDOSI

APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE GREGORY M. BARTLETT, JUDGE  
ACTION NO. 11-CI-00809

STANLEY M. CHESLEY; ROBERT  
STEINBERG; AND WAITE, SCHNEIDER,  
BAYLESS AND CHESLEY, LPA

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Appellants<sup>1</sup> appeal from a Kenton Circuit Court order granting Appellees<sup>2</sup> motion for summary judgment and dismissing Appellants' claims of breach of fiduciary duty, professional negligence (legal malpractice), and fraud. We agree with the circuit court that Appellants' claims are barred by the doctrine of collateral estoppel, and affirm its order.

This case arises out of a class action lawsuit filed in Boone Circuit Court in 2003 against the Catholic Diocese of Covington, Kentucky, styled: *John Doe, et al. v. Roman Catholic Diocese of Covington, et al.*, Case No. 03-CI-181 (hereinafter "the *Catholic Diocese* litigation"). Appellants were members of a certified class, along with hundreds of other plaintiffs, who alleged that they had been sexually abused, when they were children, by clergy or other Diocese employees. Appellees served as class counsel in the *Catholic Diocese* litigation, which lasted for approximately two and a half years before the parties reached a proposed settlement.

The Boone Circuit Court conducted an evidentiary fairness hearing to evaluate the proposed settlement, after giving proper notice and affording all class members an opportunity to object to its terms. Pursuant to the court-approved final settlement, reached in January 2006, the Diocese and its insurers paid approximately \$84 million into various settlement funds.<sup>3</sup> Following the

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<sup>1</sup> Julane Simpson (as Administrator of the Estate of Wildord Doll), Guy Barnes (by and through Guardian Heather Moser), and Tom Cardosi. Barbara Hellman, an original Plaintiff, voluntarily dismissed her Complaint on April 6, 2011.

<sup>2</sup> Stanley M. Chesley, Robert Steinberg, and Waite, Schneider, Bayless, & Chesley, L.P.A.

<sup>3</sup> The amount of the settlement ultimately increased as a result of interest that accrued on investments before payments were made to claimants.

settlement, the Boone Circuit Court approved a procedure for evaluating claims by class members and distributing settlement funds. The amount of each class member's award was determined by his or her placement in a settlement matrix.<sup>4</sup> The court also approved the award of attorney's fees pursuant to the settlement terms.

In 2007, Appellants each signed a "General Release" form acknowledging receipt of their individual settlement payments in exchange for a broad release of claims.<sup>5</sup> Thereafter, Appellants filed motions for a hearing to inquire about their placement in the settlement matrix, copies of their files, and a detailed accounting of the funds disbursed in the case. The Boone Circuit Court found that the claims process had been completed and all settlement funds had been distributed.

Accordingly, the court denied Appellants' motions by order entered June 3, 2009, and entered a final order of dismissal in the class action case on May 28, 2009.

Appellants appealed the circuit court's orders, but their appeal was later dismissed by a panel of this court for failure to join necessary or indispensable parties.

Appellants took no further action to appeal from the Boone Circuit Court's orders.

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<sup>4</sup> The matrix consisted of four categories, each representing a certain level of severity of abuse and range of possible compensation. Class members' placement in the matrix was determined by two special masters appointed by the Boone Circuit Court. With respect to class members who fell into one of the two highest categories (Category 3 or 4), the special masters also determined whether additional compensation from the Extraordinary Injury Fund (EIF) was appropriate. EIF awards were based on the extraordinary nature of a class member's injuries, as compared to other class members in those categories. Class members could appeal either award determination to a third special master.

<sup>5</sup> The release specified the amount of the individual's award and the terms of the settlement, and confirmed that no misrepresentations had been made to the individuals signing the release.

On March 18, 2011, Appellants filed a complaint in Kenton Circuit Court alleging breach of fiduciary duty, professional negligence, and fraud against their former class counsel.<sup>6</sup> In essence, they claimed that Appellees' representation of them during the course of settling the *Catholic Diocese* litigation caused them to receive less money than they believed they were entitled to receive. The complaint was removed to the U.S. District Court of the Eastern District for Kentucky, which found that it lacked subject matter jurisdiction to consider Appellants' claims, and remanded the case to the Kenton Circuit Court for further consideration. *Hellman v. Chesley*, No. 2:11-57-DCR, 2011 WL 3328867 (E.D. Ky. Aug. 2, 2011). The Federal Court's ruling noted that Appellants were seeking to attack the final settlement in the *Catholic Diocese* action and described their alleged injury as "a less-than-desired payout" from that settlement. *Id.* at \*2. The Federal Court further observed that the Boone Circuit Court, after conducting a fairness hearing, had already determined that the *Catholic Diocese* settlement was fair, reasonable, and adequate and that Appellants' counsel's performance was sufficient. *Id.*

On remand, Appellees filed a motion to dismiss Appellants' complaint, which the Kenton Circuit Court considered as a motion for summary judgment. Appellees argued that the complaint was barred by the doctrine of collateral estoppel because Appellants' malpractice action was an attempt to relitigate the class action which had already been settled and dismissed. Appellees further argued that the complaint was barred by the one-year statute of limitations

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<sup>6</sup> Appellants sought an accounting, a disgorgement of attorney's fees, and the imposition of a constructive trust on all settlement funds.

governing professional negligence. They also claimed that the complaint failed to plead fraud with specificity and that the allegations of fraud failed to state a cause of action. Lastly, Appellees maintained that Appellants Simpson and Barnes lacked standing to maintain the lawsuit.

The Kenton Circuit Court held that Appellants' claims were barred by collateral estoppel, citing in support a number of federal cases which are discussed below. Specifically, the Kenton Circuit Court found that Appellants had the opportunity to make objections before the Boone Circuit Court during the settlement proceedings of the *Catholic Diocese* class action. However, Appellants did not object to the amount of the settlement or the manner in which it was to be distributed, including the award of attorney's fees. As a result, the final order dismissing the *Catholic Diocese* class action resolved their claims with finality, subject to their right to appeal. Accordingly, the circuit court granted summary judgment in favor of Appellees as a matter of law. This appeal followed.

Appellants argue on appeal that the Kenton Circuit Court erred by granting summary judgment in favor of Appellees because the doctrine of collateral estoppel does not apply in this instance. We disagree.

Summary judgment shall be granted only if “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR<sup>7</sup> 56.03.

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<sup>7</sup> Kentucky Rules of Civil Procedure.

The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Further, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482.

On appeal from a grant of summary judgment, our standard of review is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996)). We review the trial court’s legal conclusions *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

The doctrine of collateral estoppel, also known as issue preclusion, “allows the use of an earlier judgment by one not a party to the original action to preclude relitigation of matters litigated in the earlier action.” *Miller v. Admin. Office of Courts*, 361 S.W.3d 867, 871 (Ky. 2011). In order for collateral estoppel to apply, the following elements must be met:

- (1) at least one party to be bound in the second case must have been a party in the first case;
- (2) the issue in the second case must be the same as the issue in the first case;
- (3) the issue must have been actually litigated;
- (4) the issue was actually decided in that action; and
- (5) the decision on the issue in the prior action must have been

necessary to the court's judgment and adverse to the party to be bound.

*Id.* at 872 (internal quotations omitted).

The parties do not direct this court to any Kentucky authority addressing the application of collateral estoppel in the same context as this case, but instead discuss at length federal case law considering the issue.<sup>8</sup> Though the federal case law is not binding on this court, we find it supports the application of collateral estoppel in this circumstance. Indeed, the Sixth, D.C., Eighth, and Ninth Circuits have all held that a plaintiff is collaterally estopped from bringing a malpractice suit against his/her class action attorneys when the plaintiff had the opportunity to object to the class action settlement, and to the adequacy of class counsel's representation, prior to the court's approval of the settlement.

In *Laskey v. Int'l Union (UAW)*, 638 F.2d 954 (6th Cir. 1981), the plaintiffs brought an independent suit to challenge the adequacy of the UAW's legal representation of them during a prior class action suit. The plaintiffs alleged that during the class action proceedings, the UAW failed to inform them of certain details of the case, agreed to a settlement to which class members objected, and misrepresented to the court that the class approved the settlement. *Id.* at 955-56.

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<sup>8</sup> Appellants improperly rely on *Cunningham v. Abbott*, 2011 WL 336459 (Ky. App. 2011), in support of their argument that collateral estoppel does not apply. That case has no factual or legal application here. First, the Kentucky Supreme Court granted discretionary review of that case and ordered it depublished by operation of CR 76.28(4). *Abbott v. Chesley*, No. 2011-SC-000291, 2013 WL 4635160 (Ky. Aug. 29, 2013). And on review, the Supreme Court did not address the Court of Appeals' holding with respect to the application of collateral estoppel. Second, that case was not settled as a class action and thus the procedural safeguards and necessary findings with respect to the adequacy of the settlement and counsel's representation implicit in the *Catholic Diocese* litigation were not made.

The Sixth Circuit affirmed a grant of summary judgment in favor of the UAW on grounds that the trial court had conducted a fairness hearing, during which it heard class members' objections to the settlement. *Id.* at 957. Because the trial court was fully aware of the plaintiffs' objections at the time it approved the settlement, and the plaintiffs had been afforded an opportunity to object to counsel's representation before the settlement was approved, the Sixth Circuit held that the plaintiffs were collaterally estopped from challenging the adequacy of counsel's representation in an independent, subsequent suit. *Id.*

In *Golden v. Pacific Maritime Ass'n*, 786 F.2d 1425, 1427-29 (9th Cir. 1986), the Ninth Circuit held that the plaintiffs in a prior class action suit were collaterally estopped from suing their former class counsel for malpractice and fraud because the plaintiffs had objected to counsel's representation during a fairness hearing during the class action proceedings and had a full and fair opportunity to litigate the issues on which they based their subsequent malpractice action. Similarly, in *Thomas v. Powell*, 247 F.3d 260, 264 (D.C. Cir. 2001), the D.C. Circuit held that the plaintiffs' malpractice claims were barred because in approving the earlier class action settlement, the court below had "squarely decided" that the settlement was fair and reasonable and that counsel had protected the interests of the class.

In *Koehler v. Brody*, 483 F.3d 590, 598 (8th Cir. 2007), the Eighth Circuit concluded that the plaintiff was collaterally estopped from renewing his attacks on the quality of counsel's representation and the settlement amount in an earlier class



action suit because the trial court had approved the class settlement as fair and reasonable, despite the plaintiff's objections, and had determined that class counsel had adequately protected the class's interests. As a result, the Eighth Circuit held that the plaintiff was barred from alleging breach of fiduciary duty against his former counsel in a separate, subsequent suit. *Id.* at 599.

The cases Appellants cite in support of their argument that collateral estoppel does not apply are distinguishable, in material respects, from the present case. In *Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir. 1996), the Ninth Circuit held that a court-approved settlement of a shareholder derivative suit did not preclude a subsequent malpractice action because special circumstances existed to warrant an exception to the normal rules of preclusion. Specifically, the defendant's impending bankruptcy was not disclosed to the magistrate judge prior to approval of the settlement. *Id.* at 1513. The court allowed the subsequent malpractice action to proceed because the fairness of the class action proceeding itself was in question. *Id.* In the case at bar, the Boone Circuit Court found that the *Catholic Diocese* settlement was fair and reasonable, and that class counsel's representation was adequate. Appellants have failed to show the existence of special circumstances that would justify reconsideration of the Boone Circuit Court's previous resolution of the issues presented on appeal.

Moreover, we note that *Durkin* did not involve a disgruntled class member suing former class counsel. *Id.* Rather, the court in *Durkin* permitted an individual (Durkin), appointed by the bankruptcy court to represent the bankruptcy estate of

one of the class action defendants and to take action against, among others, counsel for one of the defendants in the former class action. *Id.* at 1512. The legal malpractice claims asserted by Durkin were against the law firm and counsel that represented the defendants in the class action, not the firm that represented the class members. *Id.* Accordingly, the court presiding over the class action did not address the adequacy of counsel for the defendants. *Id.* at 1516. Because of these factual distinctions, we do not find the holding in *Durkin* to be particularly helpful or persuasive to resolving the current case.

Appellants also cite *Kahn v. Morse & Mowbray*, 117 P.3d 227 (Nev. 2005), in support of their argument, but that case is likewise distinguishable. *Kahn* involved a claim of malpractice arising out of individual litigation, not a class action. *Id.* at 230. The court presiding over the underlying litigation did not review counsel's performance, make a finding on the adequacy of counsel's representation, or otherwise litigate the issues supporting the plaintiff's malpractice claims. *Id.* at 236. For that reason, collateral estoppel did not apply. *Id.*

Furthermore, *Janik v. Rudy, Exelrod & Zieff*, 14 Cal. Rptr. 3d 751 (Cal. Ct. App. 2004), which Appellants cite, is also inapposite. In *Janik*, class members brought a separate malpractice action against the attorneys who represented the class, alleging failure to assert a claim in the class action proceedings that could have produced a greater recovery. *Id.* The *Janik* court held that the plaintiffs were not collaterally estopped from challenging counsel's alleged failure to consider all related claims because that issue had not been resolved in the class action. *Id.* at

762. Notably, in *Martorana v. Marlin & Saltzman*, 96 Cal. Rptr. 3d 172, 180 (Cal. Ct. App. 2009), the California Court of Appeals explained that *Janik* did not hold that class members could bring a subsequent malpractice action to relitigate issues actually ruled on in the prior class action proceeding. Instead, the *Janik* court recognized that “[i]f the issue on which a malpractice complaint is based has been considered and determined in the class action proceedings, the rulings of the class action court will be binding on members of the class and preclude reconsideration of those matters in another forum.” *Martorana*, 96 Cal. Rptr. 3d at 180 (quoting *Janik*, 14 Cal. Rptr. 3d at 763). In *Martorana*, the court acknowledged the unique circumstances presented in *Janik*, and restated the general rule that a plaintiff is collaterally estopped from bringing a separate malpractice suit against former class counsel when the plaintiff had the opportunity to object to the settlement and to challenge counsel’s representation prior to the court’s approval of the settlement. 96 Cal. Rptr. 3d at 179-80.

In so ruling, the *Martorana* court addressed the public policies underlying the doctrine of collateral estoppel and the importance of the doctrine’s application to class action lawsuits. *Id.* at 180. Particularly, “a class action court ‘expects that its findings on the fairness of a settlement, adequacy of notices, and adequacy of class representation are final and have the force of law.’” *Id.* (quoting *Thomas v. Albright*, 77 F. Supp. 2d 114, 123 (D.D.C. 1999)). Permitting a plaintiff to assert a malpractice claim challenging the adequacy of a judicially approved settlement, when the plaintiff had ample opportunity to object to the settlement and to

counsel’s representation before its approval, “would undermine the authority of the class action court . . . and would result in the relitigation of issues that were decided in the prior class action proceeding.” *Martorana*, 96 Cal. Rptr. 3d at 180. In addition, “the threat of a malpractice action could discourage future class counsel from attempting to settle class action claims if the attorneys could not rely upon the finality of the trial court’s findings regarding the fairness of the settlement . . . .” *Id.* at 181. While attorneys are not always immune from suit for legal malpractice based on their actions in settling a class action, the plaintiff in *Martorana* was precluded from asserting a malpractice claim based on the theory that class counsel breached a duty of care by failing to negotiate different notice procedures in the settlement. *Id.*

Having reviewed the record and relevant legal authority, we agree with the Kenton Circuit Court that Appellants’ claims are barred by the doctrine of collateral estoppel. Appellants had ample opportunity to object to the settlement and to the distribution of settlement funds as part of the class action proceeding. The final order of dismissal of the class action resolved their claims with finality, subject to their right to appeal. Thus, Appellants’ claims regarding the adequacy of the settlement and the representation of class counsel were litigated and resolved by the Boone Circuit Court. Appellants are therefore collaterally estopped from relitigating these claims in a separate, subsequent malpractice action.<sup>9</sup>

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<sup>9</sup> Since we affirm on grounds of collateral estoppel, we decline to address the other issues raised on appeal: statute of limitations, pleading fraud with specificity, and standing to file suit.

The order of the Kenton Circuit Court granting summary judgment in favor of Appellees is affirmed.

ALL CONCUR.

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