STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA MARROQUIN, Personal Representative of the Estate of WALDEMAR BIHLER,

Plaintiff-Appellant,

v

THOMAS G. MCHUGH, TIMOTHY R. NOONAN, and FRASER & MCHUGH, P.C.,

Defendants-Appellees.

and

STUART A. FRASER,

Defendant.

UNPUBLISHED
May 18, 2004

No. 248229
Van Buren Circuit Court
LC No. 02-049958-NM

Before: Gage, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition to defendants in this legal malpractice action. We affirm.

I. Factual Background

In early 1991, the decedent, Waldemar Bihler, sought treatment at the emergency room at South Haven Community Hospital.[1] Allegedly, as a result of the treatment, Mr. Bihler suffered a rupture to his lower colon resulting in infection, peritonitis and other related consequences, and thereafter suffered a long series of complications. In 1992, Mr. Bihler retained the services of

[1] The factual background of this case is somewhat confusing because this case deals with proceedings that occurred in the probate court and in the Illinois courts. Because, this Court does not have a complete record of the proceedings from those other courts, most of the facts have been taken from either the parties' appellate briefs or from pleadings in the lower court.

Chicago attorney Stephen J. McMullen of Stephen J. McMullen, P.C., to pursue a medical malpractice claim against South Haven Community Hospital and the treating physicians. That suit was filed in Van Buren Circuit Court. Because of alleged procedural deficiencies and mismanagement by Mr. McMullen, the case was dismissed with prejudice as to all the defendants in March and April of 1994.

Mr. Bihler thereafter retained the services of defendants, Thomas G. McHugh and Fraser & McHugh, P.C., to prosecute a legal malpractice claim against Mr. McMullen, and the parties entered into a contingency agreement by which defendants would be entitled to one-third of any recovery obtained. This suit was filed against McMullen & McMullen, P.C. in Van Buren Circuit in March 1997. Apparently there were problems with effecting service on Mr. McMullen, but the court ultimately entered defaults against Mr. McMullen and McMullen & McMullen, P.C. Defendants ultimately obtained a default judgment against both McMullen and his law firm in the amount of $3,000,000, which was entered January 27, 1997.

Thereafter, defendants took action to "domesticate" the default judgment in Illinois – the judgment was filed and a "Citation to Discover Assets Notice" was served – and defendants hired an Illinois collection firm to attempt to collect the judgment. Mr. McMullen filed a number of attacks against the judgment alleging ineffective service of process, and the Illinois court apparently denied McMullen's motion to quash the citation. This matter thereafter went through the Illinois court system without any of the judgment being collected.

Mr. Bihler died on July 9, 2000, and his estate was opened and probated by his daughter, plaintiff Patricia Marroquin, in the Allegan County Probate Court. Because she was dissatisfied with the lack of progress on the legal matter pending against Mr. McMullen, plaintiff terminated defendants' representation of the estate by letter dated March 14, 2002. Plaintiff hired another Illinois attorney, Steven Gertler, to pursue collection of the Illinois judgment, and agreed to pay Mr. Gertler 45% of any recovery obtained. Mr. Gertler was eventually able to obtain a settlement from Mr. McMullen in the amount of $1,000,000 and Mr. Bihler's estate was reopened.

Mr. McHugh filed a "claim of entitlement" to $430,500 against the estate as attorney fees claimed to be due and owing under his original contingent fee with Mr. Bihler. Mr. Gerther also filed a claim for attorney fees. Apparently, because the combined fees amounted to 90% of the settlement, plaintiff denied the claims. The Allegan County Probate Court ordered the estate to non-binding mediation to attempt to resolve the dispute and when mediation failed, the matter was set for trial. Meanwhile, on July 9, 2002, plaintiff filed a legal malpractice action against defendants in the Van Buren Circuit Court. While the new circuit court case was pending, the probate court held a two-day trial on September 5 and October 13, 2002, to consider the attorney fee issue. The trial ended with an award by the probate court of $166,666.67 to Mr. McHugh and $283,333.33 to Mr. Gertler. Despite the claims of the estate, the probate court found no showing of legal malpractice on the part of Mr. McHugh and determined that he was entitled to a *quantum meruit* portion of the settlement.

Thereafter, defendants filed motions for summary disposition in the circuit court seeking dismissal of the present legal malpractice action, asserting that the probate court's ruling had res judicata/collateral estoppel effect, and thus, barred the legal malpractice action. On March 11, 2003, the circuit court entered an order granting summary disposition to defendant McHugh. An

order granting summary disposition to the final defendant Timothy Noonan was entered on April 7, 2003.

II. Standard of Review

This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(7) where the action is barred due to the disposition of the claim before commencement of the action, such as res judicata or collateral estoppel. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). When determining whether summary disposition should be granted, the court must consider the pleadings and any evidence submitted in the light most favorable to the nonmoving party. *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).

The applicability of res judicata and collateral estoppel are questions of law that are also reviewed de novo on appeal. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999); *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996).

III. Analysis

A. Jurisdiction

The Michigan Estates and Protected Individual's Code (EPIC), MCL 700.1101, *et seq*, contains a statutory grant of jurisdictional powers to the probate court. MCL 700.1302 provides in pertinent part:

> The court has exclusive legal and equitable jurisdiction of all of the following:
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> (a) A matter that relates to the settlement of a deceased individual's estate, whether testate or intestate, who was at the time of death domiciled in the county or was at the time of death domiciled out of state leaving an estate within the county to be administered, including but not limited to, all of the following proceedings:
>
> (i) The internal affairs of the estate.
>
> (ii) Estate administration, settlement, and distribution.
>
> (iii) Declaration of rights that involve an estate, devisee, heir, or fiduciary.
>
> * * *
>
> (d) A proceeding to require, hear, or settle the accounts of a fiduciary and to order, upon request of an interested person, instructions or directions to a fiduciary that concern an estate within the court's jurisdiction.

MCL 700.1303 provides in pertinent part:

> (1) In addition to the jurisdiction conferred by section 1302 and other laws, the court has concurrent legal and equitable jurisdiction to do all of the following in regard to an estate of a decedent, protected individual, ward, or trust:
>
> (a) Determine a property right or interest.
>
> (b) Authorize partition of property.
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> * * *
>
> (i) Hear and decide a contract proceeding or action by or against an estate, trust or ward.
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> * * *
>
> (2) If the probate court has concurrent jurisdiction of an action or proceeding that is pending in another court, on the motion of a party to the action or proceeding and after a finding and order on the jurisdictional issue, the other court may order removal of the action or proceeding to the probate court. If the action or proceeding is removed to the probate court, the other court shall forward to the probate court the original of all papers in the action or proceeding. After that transfer, the other court shall not hear the action or proceeding, except by appeal or review as provided by law or supreme court rule, and the action or proceeding shall be prosecuted in the probate court as a probate court proceeding.

Plaintiff argues that the probate court's decision could not have res judicata/collateral estoppel effect because the probate court was without jurisdiction to hear a legal malpractice claim. Plaintiff is correct in that the probate court does not necessarily have jurisdiction to hear and decide a legal malpractice action by itself. However, in this case, the probate court had jurisdiction over the affairs and settlement of the decedent's estate. Defendants filed a claim for attorney fees against the estate and plaintiff denied the claim. In order to determine whether defendants were entitled to fees, the probate court had to analyze defendants' conduct and essentially determine whether that conduct amounted to malpractice.

B. Res Judicata and Collateral Estoppel

Plaintiff contends that the probate court's decision does not have res judicata or collateral effect on the legal malpractice claim brought in the circuit court.

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to the prior litigation. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001); *Dart v Dart*, 224 Mich App 146, 156; 568 NW2d 353 (1997). The doctrine applies to both facts and law. *Jones v State Farm Mut Automobile Ins*, 202 Mich App 393, 401; 509 NW2d 829 (1993). Michigan courts have broadly applied the doctrine. *Dart, supra*. Res judicata requires that: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter

contested in the second case was or could have been resolved in the first; and (4) both actions involved the same parties or their privies. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002); *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994).

Here, the probate court determined that defendants did not commit legal malpractice and thus were entitled to a *quantum meruit* portion of attorney fees. The parties do not dispute that the probate court's order was a final order and the dispute involved the same parties.

In the present case, plaintiff alleges malpractice against defendants on grounds including that defendants failed to effect service on McMullen after obtaining a default and failed to enforce the default entered. However, in the probate court, plaintiff alleged that defendants were not entitled to attorney fees because defendants committed legal malpractice. Specifically, plaintiff alleged that defendants abandoned the case against McMullen. After hearing arguments in the probate court, noting in part the case of *Reynolds v Polen*, 222 Mich App 20; 564 NW2d 467 (1997), which holds that an attorney who engaged in disciplinable conduct is not entitled to fees, the court determined that defendants did not commit legal malpractice:

> Now, some of the issues that we talked about earlier, I don't think the issues rise to the level of – that there's been a showing of legal malpractice by Mr. McHugh. I think abandonment of the matter, or performance – even though there may be disagreement as to what actually took place, or should take place. I believe that, certainly, arguing with – under the experience he has and his skills, he used his professional judgment.
>
> Having said that, however, I am concerned, as Mr. Clarke pointed out, that there was a period of time – and that's even evidenced by the summary Mr. McHugh submitted to the Court, showing a lack of activity – admittedly relied upon what everyone indicates is one of the better collection firms in Illinois if not one of the best, but not, at least, monitoring them for – for over a year. Perhaps there could have been a little better contact with the PR. Again, I don't see it rising to the level of requiring some sort of a professional sanction. . . . So again, I don't find fault with either of the parties.

Plaintiff raised the issue of legal malpractice in the probate court. It is clear that the probate court found defendants were not professionally negligent. Plaintiff now attempts to bring a legal malpractice claim against defendants based on the conduct that the probate court already found not to be malpractice. In fact, the probate court granted defendants attorney fees despite the claimed negligent conduct.

"Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). The ultimate issue in the second case must be the same as that in the first proceeding. *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990). For collateral estoppel to apply, "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment . . . the parties must have had a full opportunity to litigate the issue, and

there must be mutuality of estoppel." *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995). "To be necessarily determined in the first action, the issue must have been essential to the resulting judgment; a finding upon which the judgment did not depend cannot support collateral estoppel." *Bd of Co Road Comm'rs for the Co of Eaton v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994). If the same parties or their privies were not involved in both the prior litigation and the subsequent litigation, collateral estoppel is not available. *APCOA, Inc v Dep't of Treasury*, 212 Mich App 114, 120; 536 NW2d 785 (1995). The lack of mutuality of estoppel, however, should not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit. *Monet v State Farm Ins Co*, ___ Mich ___; ___ NW2d ___ (2004).

In *Knoblauch v Kenyon*, 163 Mich App 712; 415 NW2d 286 (1987), the plaintiff was convicted of a sex-related crime. The plaintiff appealed the conviction, claiming he received ineffective assistance of counsel, but his conviction was affirmed. The plaintiff then brought suit against the attorney for legal malpractice, asserting similar grounds as those in his appeal. The attorney filed a motion for summary disposition arguing that the legal malpractice suit was barred by collateral estoppel. The trial court granted the attorney's motion for summary disposition and this Court affirmed. Likewise, in *Barrow v Pritchard*, 235 Mich App 478; 597 NW2d 853 (1999), the plaintiff was convicted of charges relating to income tax evasion and fraud. The plaintiff brought a motion for new trial based on ineffective assistance of counsel, but the court denied the motion. The plaintiff thereafter filed a legal malpractice action against his attorneys. The attorneys moved for summary disposition on the basis of collateral estoppel, arguing that the trial court's denial of the plaintiff's motion for a new trial based on ineffective assistance of counsel precluded the plaintiff from asserting malpractice. The trial court granted the attorneys' motion for summary disposition and this Court affirmed.

In the present case, in the probate court, the parties litigated the issue of defendants' alleged malpractice and the probate court determined that defendants had not committed malpractice. The standard used by the probate court was similar to that used in a malpractice suit, in fact, the probate court explicitly found no evidence rising to the level of malpractice. The issue of defendants' malpractice was critical to the probate court's determination whether defendants were entitled to attorney fees. The circuit court correctly determined that plaintiff's legal malpractice claim against defendants is barred.[2]

Affirmed.

/s/ Hilda R. Gage
/s/ Peter D. O'Connell
/s/ Brian K. Zahra

[2] Because we find the circuit court correctly granted defendants summary disposition, we need not address defendants' alternative argument for affirmance of summary disposition as to defendant Noonan.