[Cite as *Schmitt v. Witten*, 2019-Ohio-1953.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

LORI SCHMITT,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2018-T-0086**
- vs -	:	
DEBORAH WITTEN,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas.
Case No. 2018 CV 00129.

Judgment: Reversed and remanded.

Michael J. O'Shea, Lipson O'Shea Legal Group LPA, 700 West St. Clair Avenue, Hoyt Block Building, Suite 110, Cleveland, OH 44113; and *Mark S. Ondrejech*, The Ondrejech Law Firm LLC, 700 West Saint Clair Avenue, Suite 110, Cleveland, OH 44113 (For Plaintiff-Appellant).

Thomas J. Wilson, Comstock, Springer & Wilson Co., L.P.A., 100 Federal Plaza East, Suite 926, Youngstown, OH 44503 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Lori Schmitt, appeals from the August 17, 2018 entry of the Trumbull County Court of Common Pleas, granting summary judgment in favor of appellee, Attorney Deborah Witten, on appellant's claims of legal malpractice and breach of fiduciary duty. At issue is whether Lori's claims against appellee are barred by the doctrine of collateral estoppel. The judgment is reversed.

{¶2} Lori hired appellee to represent her in the dissolution of her 23-year marriage to Fred Schmitt. Appellee recommended that Lori seek a divorce. Lori declined and proceeded with the dissolution. Fred was unrepresented.

{¶3} Appellee drafted a Separation Agreement based on information she received from Lori and Fred, who both reviewed and signed the document. The agreement included the following provision:

> ARTICLE 5: PENSION
> The parties hereby acknowledge that any and all retirement plans held by either party shall be retained by the individual party with no claim from the other party with the exception that Petitioner/Husband shall pay the sum of $71,000.00 to Petitioner/Wife as and for her portion of the marital portion of his retirement benefit.

The Separation Agreement was incorporated into the final Decree of Dissolution issued by the Domestic Relations Division of the Trumbull County Court of Common Pleas on December 22, 2014.

{¶4} Appellee referred Lori and Fred to another attorney to draft a Qualified Domestic Relations Order ("QDRO"). It is unclear from the record whether Lori and Fred first met with this attorney prior to appellee drafting the Separation Agreement or after the dissolution decree had been issued. Nevertheless, it is undisputed that after the decree was issued, Lori contacted appellee and indicated the terms of the Separation Agreement did not reflect what she and Fred had agreed to regarding his pension. Lori told appellee that she and Fred had agreed to include a division of Fred's pension.

{¶5} Appellee sent a letter to Fred on February 17, 2015. The letter requested that Fred sign an amended Separation Agreement, or she would be forced to file a 60(B) motion to vacate the dissolution. The proposed amendment to "Article 5: Pension" reads as follows:

> The parties hereby acknowledge that the Defendant shall rollover to the Plaintiff the sum of $71,000 by a QDRO prepared by Atty. Anthony Rossi which then equalizes the parties' 401k. The Defendant also has a pension and that shall be divided one-half to the Plaintiff and one-half to the Defendant. The coverture of said pension shall be from the date of marriage to the date of the dissolution of marriage. The preparation fee shall be split one-half paid by the Plaintiff and one-half paid by the Defendant. The parties further agree that the Plaintiff does not have a pension to divide.

Fred refused to sign the amended agreement, stating he and Lori had not agreed to include a division of his pension.

{¶6} Lori retained new counsel to file a Civ.R. 60(B) motion for relief from judgment. On January 26, 2016, the Domestic Relations Court held an evidentiary hearing on the motion, at which appellee, Lori, and Fred testified. The 60(B) motion itself is not included in the record of this appeal, but a copy of the transcript of the hearing was submitted by both parties on summary judgment.

{¶7} The Domestic Relations Court denied Lori's 60(B) motion. In its entry, the court identified the grounds for the motion as (a) excusable neglect, inadvertence, or mistake, pursuant to (B)(1), in that Fred's defined benefit pension was mistakenly not made a part of the Separation Agreement and was mistakenly omitted; and (b) any other reason justifying relief, pursuant to (B)(5). The Domestic Relations Court concluded:

> After careful review and due consideration of the above pleadings, the record, evidence and testimony presented at hearing and Civil Rule 60(B), the Court finds that the requirements to prevail on a 60(B) motion have not been satisfied. Both parties [Lori and Fred] were aware of the defined benefit of Husband. It was discussed several times. Both reviewed the agreement, had the agreement revised, and had ample time to review the revised agreement to make further changes or consult with counsel.
>
> This Court finds there was no excusable neglect, inadvertence, mistake, or surprise or any other reason justifying relief from Judgment and therefore DENIES said motion.

{¶8} Lori did not appeal this decision.

{¶9} In the meantime, Lori filed a legal malpractice suit against appellee. The complaint was filed on November 12, 2015, in Mahoning County and transferred to the Trumbull County Court of Common Pleas on April 14, 2016. On January 17, 2018, Lori filed a notice of voluntary dismissal, by and through counsel, which stated: "Now comes Plaintiff Lori Schmitt ('Plaintiff'), pursuant to Ohio Civ. R. 41(A), and hereby dismissed [sic] this action, without prejudice to re-filing."

{¶10} On January 22, 2018, Lori refiled suit against appellee in the General Division of the Trumbull County Court of Common Pleas. Her complaint alleges legal malpractice and breach of fiduciary duty. Lori claims appellee failed to protect her rights in Fred's pension funds during the dissolution and, as a direct and proximate result, she has suffered damages exceeding $25,000.00, in addition to litigation expenses. Lori also contends that appellee admitted to professional malpractice in the February 17, 2015 letter sent to Fred.

{¶11} Appellee answered on February 20, 2018. She defends, in part, on the basis that Lori is barred by the theories of res judicata and collateral estoppel, due to the Domestic Relations Court's decision denying Lori's Civ.R. 60(B) motion. She also defends on the basis that the statute of limitations to bring the claim had expired.

{¶12} Both Lori and appellee were deposed.

{¶13} Appellee filed a motion for summary judgment on March 22, 2018, arguing she is entitled to judgment as a matter of law on the basis of collateral estoppel and expiration of the statute of limitations. In addition to the transcript and judgment entry

from the 60(B) proceedings, appellee supports her motion with the parties' depositions and a copy of the Separation Agreement signed by Lori and Fred.

{¶14} Lori opposed the motion on April 5, 2018. In support, she submitted copies of the dissolution decree and Separation Agreement; appellee's February 17, 2015 letter to Fred; Lori's 2015 complaint against appellee; the Trumbull County docket reflecting transfer of the case; her voluntary dismissal; and the refiled 2018 complaint. Lori also submitted the transcript and judgment entry of the 60(B) proceedings, as well as an affidavit and expert opinion from Attorney John Ready, a board-certified domestic relations specialist. Attorney Ready concluded, to a reasonable degree of professional certainty, that appellee's legal representation of Lori fell far below the standard of care for an Ohio domestic relations attorney.

{¶15} The trial court granted summary judgment in favor of appellee on August 17, 2018, holding Lori is collaterally estopped from asserting her claims for legal malpractice and breach of fiduciary duty. The trial court's entry reads, in part:

> Here, the Court agrees with Defendant that the issue regarding responsibility for the pension plan being left out of the dissolution decree was actually tried and determined at the 60(B) hearing, and that that issue is identical to the issue in this malpractice action. In the 60(B) motion, plaintiff argued that the pension plan was mistakenly not made a part of the Separation Agreement and was mistakenly omitted. The domestic relations court specifically rejected that argument and found no mistake or any other reason justifying relief from judgment. Plaintiff was a party to the 60(B) motion and was given a full and fair opportunity to litigate the issue, and the domestic relations court entered a final judgment on the merits. The Court is further persuaded that the issue was fully and fairly litigated in the 60(B) hearing as Plaintiff herself cites to the 60(B) transcript to support her claim that Witten breached her duty to Lori. Under collateral estoppel, Plaintiff is barred from re-litigating this issue, and accordingly, Defendant is entitled to summary judgment on this issue.

{¶16} Lori filed a timely notice of appeal from this decision and raises the following assignment of error for our review:

> The trial court erred in granting defendant-appellee attorney Deborah Witten's motion for summary judgment dismissing plaintiff-appellant Lori Schmitt's legal malpractice and breach [of] fiduciary duty claims based on its opinion that the doctrine of collateral estoppel barred the legal malpractice case because the Trumbull County Domestic Relations Court refused to grant Schmitt relief from judgment under Civ.R. 60(B) in the underlying domestic relations case where Schmitt sought relief from the dissolution decree that cut her out of receiving any portion of her ex-husband's Dominion East Ohio Gas Pension.

{¶17} Lori argues the trial court erred in granting appellee's motion for summary judgment. She maintains the issue of "mistake" in the context of a Civ.R. 60(B) proceeding is not sufficiently identical to the issue of "breach of duty" in the context of a legal malpractice action, therefore the latter is not barred by the doctrine of collateral estoppel.

{¶18} Civ.R. 56(C) provides that summary judgment is proper when

> (1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶19} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court [e.g., pleadings, depositions, answers to interrogatories, etc.] which demonstrate the absence of a genuine issue of fact on a material element of the moving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996), citing Civ.R. 56(C) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986). If the moving party satisfies this burden, the

nonmoving party has the burden to provide evidence demonstrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Id.* at 293.

{¶20} On appeal, we review a trial court's entry of summary judgment de novo, i.e., "independently and without deference to the trial court's determination." *Brown v. Cty. Commrs. of Scioto Cty.*, 87 Ohio App.3d 704, 711 (4th Dist.1993) (citation omitted); *see also Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Likewise, the application of collateral estoppel is a question of law we review de novo. *Knoefel v. Connick*, 11th Dist. Lake No. 2016-L-131, 2017-Ohio-5642, ¶16.

{¶21} Collateral estoppel, or "issue preclusion," is but one form of the doctrine of res judicata. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381 (1995). "The doctrine of issue preclusion, also known as collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different." *Fort Frye Teachers Assoc., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395 (1998) (citations omitted).

{¶22} "In Ohio, the general rule is that mutuality of parties is a requisite to collateral estoppel, or issue preclusion. As a general principle, collateral estoppel operates only where all of the parties to the present proceeding were bound by the prior judgment. A judgment, in order to preclude either party from relitigating an issue, must be preclusive upon both. A prior judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in the prior action." *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193 (1983), paragraph one of the syllabus.

{¶23} An exception to the principle of mutuality may be recognized where it is shown that the party against whom collateral estoppel is asserted "clearly had his day in court on the specific issue brought into litigation within the later proceeding." *Id.* at 200; *see also Yeager v. Ohio Civil Rights Comm.*, 11th Dist. Trumbull No. 2004-T-0099, 2005-Ohio-6151, ¶40 (nonmutuality may be allowed where justice reasonably requires it). "The burden of pleading and proving the identity of the issues currently presented and the issues previously decided rests on the party asserting the estoppel." *Am. Fiber Sys., Inc. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468, ¶20, citing *Goodson*, *supra*, at 198.

{¶24} Lori's complaint in the case sub judice sounds in legal malpractice and breach of fiduciary duty. Lori alleges that appellee, while representing her in the dissolution proceedings, "committed professional negligence/malpractice by: [f]ailing to protect Plaintiff's rights in pension funds."

{¶25} "To establish a cause of action for legal malpractice based on negligence, the following elements must be proved: (1) an attorney-client relationship, (2) professional duty arising from that relationship, (3) breach of that duty, (4) proximate cause, (5) and damages." *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012, ¶8, citing *Vahila v. Hall*, 77 Ohio St.3d 421, 427 (1997); *see also Ratonel v. Roetzel & Andress, L.P.A.*, 147 Ohio St.3d 485, 2016-Ohio-8013, ¶6. An attorney's duty to his or her client is to "'exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, and to be ordinarily and reasonably diligent, careful, and prudent in discharging the duties he has assumed.'" *Harris v. Rossi*, 11th Dist. Trumbull No. 2017-T-0045, 2018-Ohio-4573, ¶51, quoting 67 Ohio Jurisprudence 3d, Malpractice, Section 9, at 16 (1986) (internal quotations omitted).

{¶26} In her motion for summary judgment, appellee submits that the Domestic Relations Court "previously determined that the mistake was Lori's, not Attorney Witten's," which precludes Lori from litigating the "breach of duty" element of her legal malpractice claim. She further maintains:

> In this case, Lori Schmitt's legal malpractice claim hinges on her claim that Attorney Witten failed to include Fred's pension plan in the separation agreement. But that exact issue was already litigated in her Civ. R. 60(B) motion. The domestic relations court rendered a final judgment that Fred's pension plan was not intended to be included in the dissolution and no mistake with respect [to] the pension plan occurred.

{¶27} We initially recognize a contradiction exists within this argument, to wit: the Domestic Relations Court could not have simultaneously determined that "no mistake occurred" and that "the mistake was Lori's." The Domestic Relations Court in fact held that no mistake had occurred to justify granting Lori relief from its Decree of Dissolution.

{¶28} Further, appellee unnecessarily narrows the premise of Lori's complaint to the issue of whether appellee "failed to include Fred's pension plan in the separation agreement." The language of Lori's complaint is not so limited: the statement of her claim is whether appellee negligently failed to protect Lori's rights in Fred's pension funds. It is apparent from Lori's response on summary judgment, including the expert opinion of Attorney Ready, that the alleged breach includes failure to inquire of the parties' assets; failure to identify whether the $71,000.00 was to be made pre-tax via a QDRO or an after-tax payment; failure to ensure Lori made a "knowing waiver" of her interest in Fred's pension; failure to preserve notes of conversations in Lori's file; and, finally, failure to accurately draft the Separation Agreement. None of these issues were decided, nor should they have been decided, in the 60(B) proceedings.

{¶29} The basis of the Domestic Relations Court's decision is stated as follows:

> Both parties [Lori and Fred] testified that they were aware of Husband's defined benefit plan. Wife was aware that Husband was not in agreement to divide his defined benefit plan. Husband testified that his job is physical in nature, and due to health concerns he feared that he would be forced to retire early, which would greatly reduce his defined benefit. He testified that he did not know whether or not Wife had a defined benefit plan with any of her employers past or present.
>
> Testimony was given that Husband's defined benefit plan was discussed many times between the parties. Husband repeatedly expressed he did not wish to divide that benefit. Wife was not in agreement, but over time Wife no longer would expressly state she was in disagreement but simply would not respond as to whether or not she was in agreement.
>
> Wife's attorney testified that she drafted the Separation Agreement based on the information given to her as to what the parties agreed upon. Each party received a copy of the Separation Agreement to review.
>
> This Court finds, based on the testimony and evidence presented, that both parties [Lori and Fred] reviewed the Separation Agreement, and that both were capable of understanding the agreement as Wife is a college graduate. Husband has, at minimum, a high school degree.
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> The Court further finds that the parties made one change to the agreement after review regarding the motor vehicles for the children and all else remained the same.
>
> The Court finds that the parties received the revised Separation Agreement, and had ample time to review and make any other changes before signing. Wife testified that she did not raise any concerns with her attorney other than the one revision that was made regarding vehicles concerning the children. Husband testified that the parties had approximately a month to review the revised agreement prior to signing. He testified that he was in agreement with the revised agreement as all remained the same other than the vehicles for the children. It was his understanding, based on the plain language of Article 5, that each would retain any and all retirement plans held by either party without any claim by the other party except for the $71,000.00 payment to Wife for her interest in his retirement benefit.

> The parties had various retirement plans but none were specifically listed in the Separation Agreement.
>
> Testimony was also given that the sum of $71,000.00 to be paid to Wife was agreed upon by the parties without taking into consideration any of Husband's premarital interest in his retirement benefits.
>
> After careful review and due consideration of the above pleadings, the record, evidence and testimony presented at hearing and Civil Rule 60(B), the Court finds that the requirements to prevail on a 60(B) motion have not been satisfied. Both parties were aware of the defined benefit of Husband. It was discussed several times. Both reviewed the agreement, had the agreement revised, and had ample time to review the revised agreement to make further changes or consult with counsel.
>
> This Court finds there was not excusable neglect, [in]advertence, mistake or surprise pursuant to 60(B)(1) or any other reason justifying relief from Judgment and therefore DENIES said motion.

{¶30} In rendering this decision, the Domestic Relations Court did not determine in any way whether appellee made a mistake in drafting Article 5 of the Separation Agreement. Nor could it determine, in the context of the 60(B) motion, whether appellee had breached her duty to Lori by failing to protect Lori's rights in Fred's pension funds. Rather, it is apparent the court only considered what the evidence showed regarding the agreement between Lori and Fred and whether Lori had mistakenly, inadvertently, or through excusable neglect, signed a document that did not accurately reflect that agreement.

{¶31} Appellee cites two cases she contends support the trial court's decision to grant summary judgment based on the doctrine of collateral estoppel. The first, *Woodrow v. Heintschel*, 6th Dist. Lucas No. L-10-1206, 2011-Ohio-1840, involved a Civ.R. 60(B) motion for relief from a default judgment that was granted in favor of defendants, former

clients of an attorney. The trial court granted the 60(B) motion because it had failed to properly notify the defendants of court hearings after the attorney had withdrawn from representation. *Id.* at ¶7. Defendants then sued the attorney for malpractice, alleging his withdrawal caused the default judgment. The appellate court upheld a grant of summary judgment in favor of the attorney because the issue of what directly caused the default judgment, i.e. the trial court's failure of notice, had already been adjudicated. *Id.* at ¶27. Here, to the contrary, the issues raised in Lori's malpractice suit have not yet been adjudicated.

{¶32} The holding from the second case, *Fallang v. Becker*, 12th Dist. Butler No. CA2007-11-303, 2008-Ohio-4429, is misstated. Appellee contends "the court denied [a Civ.R. 60(B)] motion in part because the wife had a duty to use due diligence and not rely solely on the representation of the adverse party." In fact, the trial court denied the 60(B) motion because the wife knew or should have known of the husband's alleged fraudulent non-disclosure well within the applicable statute of limitations, but she failed to file suit within that time. The court of appeals agreed and thus found it "unnecessary to address her contention that the trial court erred by holding that her claims are barred, on their merits, on collateral estoppel grounds." *Id.* at ¶4. This case is obviously distinguishable from the facts at hand.

{¶33} The general requisite of mutuality is not met here. Appellee was not a party to the underlying dissolution between Lori and Fred nor was appellee bound in any way by the denial of Lori's 60(B) motion in the Domestic Relations Court. Although appellee was a witness at the 60(B) hearing, she was not a party to it. The exception to mutuality also cannot apply here, as Lori clearly has not had her day in court on the specific issues

she alleges in her legal malpractice complaint. We conclude appellee has failed to demonstrate that she is entitled to judgment as a matter of law on the basis of collateral estoppel. Accordingly, the trial court erred in granting appellee's motion for summary judgment on that theory.

{¶34} Lori's sole assignment of error is well taken.

{¶35} The judgment of the Trumbull County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this opinion. This opinion does not preclude the parties from filing motions for summary judgment, with proper leave of court, on remand.

THOMAS R. WRIGHT, P.J.,

MARY JANE TRAPP, J.,

concur.