

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

DONALD BLEICH and DAVID BLEICH,

Plaintiffs,

v

File No. 00-20078-NM
HON. PHILIP E. RODGERS, JR.

BRANDT, FISHER, ALWARD & ROY, P.C., a
Michigan Professional Service Corporation, and
JOSEPH C. FISHER,

Defendants.

Timothy P. Murphy (P25941)
Attorney for Plaintiffs

Steven L. Barney (P10465)
Attorney for Defendants

DECISION AND ORDER DENYING
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

This is a breach of contract, fraud in the inducement, and legal malpractice action arising out of Defendant Joseph Fisher's representation of Plaintiff David Bleich in a criminal matter. Plaintiffs Donald Bleich and David Bleich are father and son. In 1997, Plaintiff David Bleich was arrested and charged with possession with intent to deliver at least 50 grams but not more than 224 grams of cocaine, in violation of MCL 333.7401(2)(A)(iii); MSA 14.15(7401)(2)(A)(iii) and with conspiracy with intent to deliver at least 50 grams but not more than 224 grams of cocaine, in violation of MCL 750.157(a); MSA 28.354. This was a felony punishable by a sentence of 10 to 20 years for each offense. In addition, the complaint also gave notice that the prosecution would seek to enhance any sentence imposed upon conviction, pursuant to MCL 333.7413(2); MSA 14.15(7413)(2), for the reason that David Bleich had been convicted in 1981 of a drug offense (use of marijuana).

Plaintiff Donald Bleich met with and retained Defendant Fisher to represent his son. Donald Bleich claims that Defendant Fisher made various representations which induced him to retain Fisher

to represent his son, including that Fisher was a specialist in the practice of criminal law; that he was able to negotiate both a bond reduction and a plea agreement with the prosecuting attorney, conditioned upon David's full cooperation with police officers wishing to question him; and that he would "do everything he could to ensure that David would not have to serve a lengthy prison term."

The Plaintiff David Bleich claims that Defendant Fisher committed legal malpractice by advising David to plead guilty to count one and acknowledge his previous conviction because "there was no legal defense to the criminal charge or to the sentencing enhancement." Plaintiff David Bleich plead guilty, acknowledged his prior conviction and was sentenced to 20 to 40 years in prison, pursuant to the sentence enhancement provision. Plaintiffs allege that Defendant Fisher, "neither investigated nor asserted an adequate legal defense - . . . a legal defense which ultimately prevailed" to the use of the 1981 conviction for enhancement purposes.

The Plaintiff Donald Bleich retained other counsel to represent David in seeking postconviction relief. That attorney reviewed the District Court file regarding the 1981 case and determined that "the prosecution could not have proven that David Bleich had been convicted of a prior drug offense" at sentencing. This determination was based upon the fact that there was no abstract of the prior conviction and no transcript of the prior proceedings available to the prosecution¹. Plaintiff David Bleich had only acknowledged his prior conviction because of the Defendant Fisher's representation that there was no legal defense to the enhancement. The prosecution, therefore, stipulated to resentence David Bleich. He was ultimately resentenced to 7½ to 20 years in prison.

Defendant Joseph Fisher filed a motion for summary disposition of Plaintiff Donald Bleich's breach of contract and fraud in the inducement claims, pursuant to MCR 2.116(C)(8), for failure to state a claim upon which relief can be granted. Fisher contends that he did not have an attorney-client relationship with Plaintiff Donald Bleich and, therefore, Plaintiff Donald Bleich has no claim against him and the breach of contract and fraud in the inducement claims must be dismissed. Fisher

¹The Plaintiffs assert that "the approved methods of establishing a prior offense are by (1) an abstract of conviction, (2) a transcript of the prior proceedings, or (3) the admission of the accused that he has such a prior conviction." However, the existence of a prior conviction may be established by any evidence that is relevant for that purpose, including information contained in the presentence report. MCL § 769.13(5)(c); MSA § 28.1085(5)(c).

also filed a motion for summary disposition of Plaintiff David Bleich's legal malpractice claim, pursuant to MCR 2.116(C)(10), claiming that the malpractice claim is based upon the erroneous assertion that the 1981 prior conviction was not a conviction for enhancement purposes and, therefore, the legal malpractice claim must be dismissed. The Plaintiffs filed a timely answer to the motion.

The Court heard the oral arguments of counsel on Monday, September 19, 2000. At that time, new arguments were asserted and the Court granted the parties additional time to file supplemental briefs. Both sides filed supplemental briefs. Defendant Fisher argued that the alleged contract between the Plaintiff Donald Bleich and the Defendant Fisher was "not specific enough" to be enforced. Defendant Fisher also argued that Plaintiff Donald Bleich's claim is barred by the case within a case doctrine. Finally, Defendant Fisher argued that his conduct was not the proximate cause of the Plaintiff David Bleich's injury. The Plaintiffs have responded to these arguments.

For the reasons stated herein, this Court now issues this written Decision and Order denying the Defendants' motion.

STANDARDS OF REVIEW

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc*, 167 Mich App 202, 205; 421 NW2d 631 (1988).

MCR 2.116(C)(10)

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was recently set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

PLAINTIFF DONALD BLEICH'S BREACH OF CONTRACT AND FRAUD IN THE INDUCEMENT CLAIMS

In his motion, the Defendant Fisher contends that he and his firm cannot be liable to Plaintiff Donald Bleich because they owed no duty to Plaintiff Donald Bleich. He asserts that he did not have an attorney-client relationship with Plaintiff Donald Bleich and "an attorney will be held liable for . . . negligence only to his client, and cannot, in the absence of special circumstances, be held liable to anyone else." *Atlanta International Ins Co v Bell*, 438 Mich 512, 517; 475 NW2d 294 (1991). He also asserts that the contract for services was with Plaintiff David Bleich only and that Plaintiff Donald Bleich merely volunteered to pay David's legal fees.

During the oral arguments, the Defendant Fisher also argued that the alleged contract was not specific enough to be enforceable. On this point, he argued that the contract does not meet the requirements set forth in *Brownell v Garber*, 199 Mich App 519; 503 NW2d 81 (1993) and *Bessman v Weiss*, 11 Mich App 528; 161 NW2d 599 (1968) and, therefore, does not allege a cause of action upon which relief can be granted. MCR 2.116(C)(8).

In response, the Plaintiffs claim that Plaintiff Donald Bleich can maintain an action against these Defendants for breach of contract and fraud in the inducement because the Defendant Fisher “expressly conditioned his agreement to represent David Bleich in the criminal case pending against him upon payment of a \$10,000 fee by Donald Bleich, and had in fact accepted payment of that fee before entering into his agreement with David.” In support of their position they cite *Schlumm v O'Hagan*, 173 Mich App 345; 433 NW2d 839 (1987) in which the Court of Appeals held that a criminal defendant and his family could bring a legal malpractice action against the criminal defendant’s attorney based on breach of contract and fraudulent misrepresentation, insofar as their claims allege injuries other than the criminal defendant’s incarceration. In other words, the Plaintiffs allege not only that there was a contract between Defendant Fisher and Plaintiff David Bleich, but also that there was a contractual relationship between Defendant Fisher and Plaintiff Donald Bleich regarding the payment of fees for services. The Plaintiff Donald Bleich is not alleging a claim for breach of contract because of legal malpractice, but rather he is alleging a claim for fraud that induced him to enter into a contract which the Defendants breached because he paid for services that his son did not receive.

In response to the argument that the alleged contract is not specific enough to be enforceable, the Plaintiff Donald Bleich refers the Court to the First Amended Complaint in which he alleges that the Defendant Joseph Fisher promised that his services would be above the level required by the standard of care and that he would obtain a specific result.

Having reviewed the First Amended Complaint, the Court finds that the Plaintiff Donald Bleich has stated a claim for breach of contract and fraud in the inducement upon which relief might be granted. The Defendants’ motion for summary disposition must at this time be denied. MCR 2.116(C)(8). In addition, there are obvious factual issues regarding whether the Plaintiff Donald Bleich had a contractual relationship with the Defendant(s), what the terms of that contract were and

whether any false representations were made to the Plaintiff Donald Bleich that induced him to retain Defendant Fisher to represent his son. Therefore, a motion for summary disposition pursuant to MCR 2.116(C)(10) must at this time likewise be denied.

PLAINTIFF DAVID BLEICH'S LEGAL MALPRACTICE CLAIM

In order to establish a cause of action for legal malpractice, the plaintiff has the burden of establishing the following elements: (1) the existence of an attorney-client relationship (the duty); (2) negligence in the legal representation of the plaintiff (the breach); (3) that the negligence was a proximate cause of an injury (causation); and (4) the fact and extent of the injury alleged (damage). *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). The Defendant Fisher admits that he had an attorney-client relationship with Plaintiff David Bleich. He denies, however, that he was negligent or that his actions or inactions were the proximate cause of the Plaintiff's injury.

Negligence

Defendant Fisher claims that he could not have committed malpractice as a matter of law because the Plaintiff David Bleich's sentence could have been properly enhanced by his 1981 conviction for a drug-related offense. Defendant Fisher submits an affidavit by Judge McCormick who states: "On November 17, 1981, a guilty plea was entered against David Bleich, and a conviction recorded for the offense of use of marijuana." Therefore, the Plaintiff David Bleich's claim for legal malpractice must be dismissed. MCR 2.116(C)(10).

The Plaintiff asserts, however, that the prosecution could not have proven the prior conviction and, therefore, stipulated to the re-sentencing when the lack of proof of the prior conviction was brought to its attention. The Plaintiff claims that Defendant Fisher "failed to exercise reasonable skill, care and diligence in representing the interest of David Bleich [and/or] . . . failed to investigate and raise the existing adequate legal defense to sentencing enhancement sought by the prosecution against David Bleich." This allegation of malpractice depends upon whether the prosecution could prove at the time of Plaintiff David Bleich's sentencing that he had previously been convicted of a drug-related offense. According to the affidavit of the attorney who represented David Bleich in his post-conviction proceedings, he was "unable to obtain any

documentary proof that the guilty plea [in the 1981 case] had ever been accepted.” It is undisputed that ultimately Plaintiff David Bleich was resentenced because the prosecution stipulated that there had been “an error initially in the enhancement and . . . we have a stipulation that all parties have agreed that without that, the statutory sentence should have been ten to twenty.” There is no showing as to whether the stipulation was due to an inability to prove the conviction, a reward for cooperation or an exercise of reasonable prosecutorial discretion given the facts. Certainly, Judge McCormick’s affidavit establishes an ability to prove the conviction if the People had wished to do so.

The question presented is whether it was malpractice for Defendant Fisher not to assert a legal defense to the use of the 1981 conviction for enhancement purposes. In the absence of expert testimony and at this stage of the proceedings, a genuine issue of material fact for the jury to decide remains. Granting the Defendants’ motion for summary disposition pursuant to MCR 2.116(C)(10) would be premature.

Proximate Cause

Defendant Fisher also argued that his actions or inactions were not the proximate cause of the Plaintiff David Bleich’s injuries. In *Pontiac School District v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612-615; 563 NW2d 693 (1997), the Court of Appeals reviewed the state of the law in Michigan regarding legal malpractice. The Court said:

In [*Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994)], the Court observed that ‘[o]ften the most troublesome element of a legal malpractice action is proximate cause,’ noting:

As in any tort action, to prove proximate cause a plaintiff in a legal malpractice action must establish that the defendant’s action was a cause in fact of the claimed injury. *Id.*

In a footnote, the Court further observed:

Causation in fact is one aspect of, and distinguishable from, legal or proximate cause.... The question of fact as to whether the defendant’s conduct was a cause of the plaintiff’s injury must be separated from the question as to whether the defendant should be legally responsible

for the plaintiff's injury.... Legal cause is often stated in terms of foreseeability. *Id.*, n 13.

The Court also noted that a jury cannot rely on 'speculation and conjecture' in finding a defendant liable. *Id.* at 587; 513 NW2d 773.

In *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994), the Court observed that '[a] plaintiff must adequately establish cause in fact in order for legal cause or proximate cause to become a relevant issue.' See also *Dedes v Asch*, 446 Mich 99, 106; n 2; 521 NW2d 488 (1994). In *Skinner*, the Court relied upon *Kaminski v Grand Trunk W.R. Co*, 347 Mich 417, 421-422; 79 NW2d 899 (1956), which adopted the following test of conjecture when there were alternative theories of causation requiring a 'rule of conjectural choice between equally plausible inferences':

As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

* * * * *

If, however, plaintiff has proven sufficient facts to justify a verdict upon one theory, the fact that there may be one or more other seemingly rational explanations of the episode in no manner precludes a recovery or invalidates the verdict. These are mere matters of argument to be presented to the jury. [Citations omitted.]

After noting that *Kaminski* 'highlighted the basic legal distinction between a reasonable inference and impermissible conjecture with regard to causal proof,' the *Skinner* Court stated:

As *Kaminski* explains, at a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Skinner, supra* at 164-165; 516 NW2d 475.

The Court also noted that it has consistently applied this standard of factual causation in negligence cases:

The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 416, n 18; 443 NW2d 340 [1989]), quoting Prosser & Keeton, Torts (5th ed.), § 41, p. 269. *Skinner, supra* at 165; 516 NW2d 475.

After thoroughly reviewing the pleadings in this case, the Court concludes that the Plaintiff plead specific statements of proximate cause. The Court cannot say as a matter of law that the Defendant Fisher's actions or inactions were not the proximate cause of the Plaintiff's injuries². It is possible for a jury to infer from evidence that might be presented by the Plaintiff that the Defendant Fisher's asserted legal malpractice (i.e., his failure to investigate and assert a valid legal defense to the enhancement) was a cause in fact of the Plaintiff's damages (i.e., enhanced sentence). The Plaintiff must, however, be prepared at trial to present substantial evidence from which a jury may conclude that more likely than not, but for Defendant Fisher's conduct, the Plaintiff's injuries would not have occurred.

²The Court understands the injury to be those fees incurred to hire counsel to pursue the motion to re-sentence. The Defendant was an acknowledged drug dealer with a prior conviction and his "distress" of going to prison is not compensable under any theory described to the Court.

Case Within a Case

Defendant Fisher's final argument is that the malpractice claim is barred by the case within a case doctrine. Defendant Fisher cites no authority for this proposition, but argues that the Plaintiff must prevail in the underlying criminal action in order to prevail in the malpractice action. The Plaintiff, on the other hand, cites relevant Michigan case law which establishes that the plaintiff in a legal malpractice action need not have completely prevailed in the prior criminal action to sue the defense attorney for malpractice. *Gebhardt v O'Rourke*, 444 Mich 535, 552; 510 NW2d 900 (1994) and *Schlumm v O'Hagan*, 173 Mich App 345, 360; 433 NW2d 839 (1987). Plaintiffs have cited the controlling authority and the Court must reject this argument.

Offensive Collateral Estoppel

Defendant Fisher argues that the Complaint rests upon an erroneous belief that the Defendant Fisher should have discovered that the Plaintiff David Bleich's 1981 conviction was not a conviction for the purposes of enhancement and that this Court is not bound by the stipulation of the parties' to that effect. He argues that the 1981 conviction was a conviction for enhancement purposes and, therefore, that the Plaintiff's malpractice claim must fail.

In response, the Plaintiff asserts that Defendant Fisher misunderstands the gravamen of the malpractice claim and what actually transpired in the underlying criminal case. In the underlying criminal case, the parties entered into a stipulation which states that, "based upon the discovery of new evidence, [the parties] hereby stipulate and agree to remand the above matter for re-sentencing." The Judge issued an Order to Remand. At the re-sentencing, Plaintiff David Bleich's new counsel stated: "There was an error initially in the enhancement and I think we have a stipulation that all parties have agreed that without that, the statutory sentence should have been ten to twenty." The Court acknowledged that that statement was agreed upon and that the Court had entered an Order to that effect. Thus, the Plaintiff asserts that the malpractice claim is not based upon Defendant Fisher's failure to discover that the 1981 conviction was not a conviction for enhancement purposes, but rather is based upon Defendant Fisher's failure to investigate the enhancement charge and assert a viable legal defense to it.

Alternatively stated, knowing that the conviction existed and that the trial judge was alive and available to document it, did the Defendant fail to assert a viable or a frivolous defense. Given the prosecutor's response, hindsight suggests the Defendant would have been successful even if the defense might have been frivolous. However, without testimony from the Defendant and both parties' experts, it is premature to rule upon this issue as a matter of law.

The Plaintiff argues that the Defendant is collaterally estopped from relitigating the issue of whether Plaintiff David Bleich's sentence could properly have been enhanced by the 1981 conviction because of the final order of the Court on the issue in the underlying criminal case. The Plaintiff cites *People v Gates*, 434 Mich 146, 154 n 7; 452 NW2d 627 (1990); *Dearborn Heights School Dist No. 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 124; 592 NW2d 408 (1998); and *Barrow v Pritchard*, 235 Mich App 478; 597 NW2d 853 (1999) as authority for his position.

The doctrine of collateral estoppel precludes relitigation of an issue in a different, subsequent action between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. See *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990); 1 Restatement Judgments, 2d, § 27, p 250. The doctrine is intended to relieve parties of multiple litigation, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *Detroit v Qualls*, 434 Mich 340, 357, n 30; 454 NW2d 374 (1990), citing *Allen v McCurry*, 449 US 90, 94; 101 S Ct 411, 66 L Ed 2d 308 (1980). Collateral estoppel bars relitigation of issues where the parties had a full and fair opportunity to litigate those issues in an earlier action. *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994).

Michigan has rejected the use of offensive non-mutual collateral estoppel. See *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37; 191 NW2d 313 (1971); *Stolaruk Corp v Dep't of Transportation*, 114 Mich App 357; 319 NW2d 581 (1982). But, in *Knoblauch v Kenyon*, 163 Mich App 712; 415 NW2d 286 (1987) the Court pointed out the *Howell* Court rejected non-mutual offensive estoppel in the civil case to civil case context only. The *Knoblauch* Court allowed the use of non-mutual defensive estoppel in the criminal case to civil case context, holding that where a full and fair determination has been made in a previous criminal action that the client received the

effective assistance of counsel, the defendant-attorney in a subsequent civil malpractice action brought by the same client may defensively assert collateral estoppel as a bar.

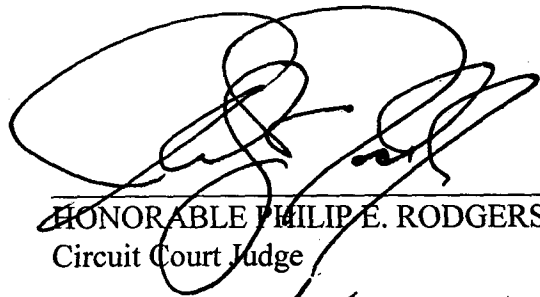
In the instant case, the question presented is whether the Plaintiff can use offensive non-mutual collateral estoppel in the criminal case to civil case context to preclude Defendant Fisher from relitigating the issue of whether his 1981 conviction could have been used to enhance his conviction. This is an issue of first impression. The Plaintiff invites this Court to decide whether to allow non-mutual offensive estoppel in the criminal to civil context of this case. The Court finds the use of non-mutual offensive estoppel in this case to be inappropriate. The issues are whether Defendant Fisher investigated the 1981 conviction and whether there was a viable and non-frivolous legal defense to its use for enhancement purposes and whether the failure to assert such a defense violated the standard of care.

CONCLUSION

For the many reasons stated herein, the Defendants' Motion for Summary Disposition is denied without prejudice. Any party may file a motion for partial or complete summary disposition at the close of discovery.

IT IS SO ORDERED.

This Decision and Order does **not** resolve the last pending claim or close the case.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

11/2/00