STATE OF MICHIGAN

COURT OF APPEALS

ODD CHRISTIAN REME, JARLE ANDREASSEN, ANDORA OG ERICK AUGLAND, THOMAS OG ANNA AUSTBOE, BJORN BENTSEN, BENGT BERHEIM, THERESA JACQUELINE CANAVAN, RONALD F. DEANE, MARIT KARIN DYRSTAD, ODDVAR ENGELSGJERD, KARL KR. ERIKSEN, GUNNAR FAGERMO, FRANK E. FREDRIKSEN, BRENDA GRAHAM, MARIA OG LASZLO HAJEK, INGRID MARGRETHE, BENGT HAMMER, HAKON JARL HANSEN, MARGOT YTTEROY HANSEN, GRETE ODDBJORG HANSSEN, CATHERINE HARRIS, MALVIN HAUGE, SIGNE HELGELAND, ANDERS HELLIKSEN, BENTE HOFSTAD, ASTRID HOLGERSEN, PAUL JAMES HUNTER, NICOLA JACQUELINE HUNTER, ANNY SYNNOVEHALAND, AUD KARIN IVERSEN, JAN OTTO JAHNSEN, SIGVE KLUNGLAND, ANNE KARIN KRAKO, KJELL JOHAN KULLESEID, KARE MAGNE KVALE, INGEBJORG LARSEN, LISBETH LEHTINEN, LEIKNY OG ERLING LEKNES, INGUN LAULAND, MARY JOSEPHINE MCGRADY, BODIL MELKEVIK, EDMUN A. MONGSTAD, JOHANNES MUNDHEIM, LEIF MYKLAND, ROLF OLAUSSEN, BJORG OLSEN, TOR YNGVE OLSEN, ANNE-KARIN OLSEN, OSKAR OLSEN, TORILL PEDERSEN, LEONARD PHILLIPS, ELLEN H. RAMSDAL, MORRIS REME, DAGNY OG MORRIS REME, PAUL ROYSLAND, REIDAR GUDMUND SELVIG, EVA JORUNN SKAANES, ANNE-LISE SKOGLI, KIRSTEN M. A. SKOGOY, ARNHILD OG OLE G SKOMEDAL, GERRY ATLE STIGEN, TORDIS STRANDVOLL, TORILL IRENE STUMO, ADOLF SUNDT, KARE SVENDSBO, BERIT SODERLUND, ALF G

UNPUBLISHED
September 2, 1997

TARALDLIEN, DOREEN and JOHN TEGOWSKI, FINN BAKKE THORSEN, AUD MARIT TORSTEINBU, MARTHA TRAA, VEGARD VERMUNDSEN, JAN VESTRE, MARTHA VIKEN, GERD WAALE, ASE WIBERG, MARIT WINGE, and PAUL R. WITTER,

Plaintiffs-Appellees,

v

No. 192257
Wayne Circuit Court
LC No. 90-005360-NM

LEONARD C. JAQUES, Attorney at Law, and JAQUES ADMIRALTY LAW FIRM, P.C.,

Defendants-Appellants.

ON REMAND

Before: Smolenski, P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

Pursuant to our Supreme Court's order of remand for consideration of this legal malpractice case as on leave granted,[1] defendants Leonard C. Jaques and Jaques Admiralty Law Firm, P.C., appeal from the trial court's order denying defendants' motion for summary disposition. We affirm.

Plaintiffs, at least one of which has American citizenship, are individuals or representatives of individuals who were aboard the Alexander L. Kielland when it capsized in the Norwegian sector of the North Sea in March, 1980, killing over one-hundred of the approximately two-hundred persons on board. The Kielland was a Norwegian-owned and Norwegian-flagged semi-submersible drilling rig that had been chartered for use as an accommodation platform, i.e., a sort of floating hotel, by Phillips Petroleum Company Norway (Phillips Norway). Phillips Norway is a Delaware corporation, and at that time its board of directors made decisions in Oklahoma, while its day-to-day operations were conducted in Norway.

Plaintiffs retained defendants to represent them with respect to any claims arising out of the Kielland's capsizing. Defendants filed suit on plaintiffs' behalf against, among others, Phillips Norway in the United States District Court for the Northern District of Ohio.[2] However, the district court subsequently granted Phillips Norway's motion to dismiss on the ground that the court did not have personal jurisdiction over Phillips Norway.[3] The United States Court of Appeals for the Sixth Circuit affirmed the district court,[4] and subsequently denied plaintiffs' petition for rehearing.[5] The United States Supreme Court denied plaintiffs' petitions for certiorari.[6]

Defendants then filed suit on plaintiffs' behalf against, among others, Phillips Norway in Delaware Superior Court, asserting tort claims under American federal law, including the Jones Act, 46 USC § 688, and Norwegian law. *Miller v Phillips Petroleum Co Norway*, 529 A2d 263 (Del Sup Ct, 1987) (*Miller I*).[7] Phillips Norway moved for summary judgment on the grounds of lack of subject matter jurisdiction and the doctrine of *forum non conveniens*. *Id*. at 266. The Delaware Superior Court dismissed the case. *Id*. at 269-271. The court concluded that Norwegian law, not American federal law, applied to plaintiffs' case. In arriving at this conclusion, the court utilized the *Lauritzen*[8]-*Rhoditis*[9] choice-of-law test that is applied by American courts for determining whether American federal law applies to maritime tort claims premised on American federal law, such as claims under the Jones Act. *Id*. at 266-269.[10] This test involves evaluating eight factors[11] for the purpose of determining the substantiality of the contacts between the facts of the case and the United States. *Id*. at 266. Because it concluded that Norwegian law applied to plaintiffs' case, the district court, therefore, held that it did not have subject matter jurisdiction to hear plaintiffs' case. *Id*. at 269. The court also held that dismissal of plaintiffs' claims was appropriate under the doctrine of *forum non conveniens*. *Id*. at 270-271. Plaintiffs appealed, arguing that the court did have subject matter jurisdiction over plaintiffs' case and that the case should not have been dismissed on the ground of *forum non conveniens*.[12]

The Delaware Supreme Court affirmed the lower court, albeit on slightly different grounds. See, generally, *Miller v Phillips Petroleum Co Norway*, 537 A2d 190, 201 (Del, 1988) (*Miller II*). In its opinion, the Delaware Supreme Court first addressed the issue whether the lower court had subject matter jurisdiction of plaintiffs' suit. *Id*. at 193-195. The Delaware Supreme Court held that the lower court had subject matter jurisdiction of the controversy because plaintiffs had properly asserted claims under American federal law. *Id* at 194. The Delaware Supreme Court stated that the lower court had, therefore, improperly grounded its dismissal of plaintiffs' American federal law claims on a lack of subject matter jurisdiction. *Id*. at 195.

The Delaware Supreme Court next considered the issue whether the lower court had properly concluded that American federal law did not apply to the capsizing of the Kielland. *Id*. The Delaware Supreme Court reviewed de novo the application of the *Lauritzen-Rhoditis* choice-of-law factors to the facts of plaintiffs' case and held that Norwegian law, not American federal law, governed the capsizing of the Kielland. *Id*. at 195-201. The Delaware Supreme Court stated that plaintiffs' American federal law claims were therefore properly dismissed on the ground that plaintiffs had failed to state a claim under American federal law upon which relief could be granted. *Id*. at 192, 201.

Finally, the Delaware Supreme Court considered the issue whether the lower court abused its discretion in dismissing plaintiffs' case on the alternative and independent ground of *forum non conveniens*:

> We have concluded that plaintiffs' American federal law claims should have been dismissed for failing to state a cause of action, leaving only their alternative claims under Norwegian law to be considered. However, assuming *arguendo* that American federal law applied to plaintiffs' claims, it was still empowered to exercise its discretion to dismiss the suit under the doctrine of *forum non conveniens*.

* * *

> In dismissing plaintiffs' Norwegian law claims the Superior Court recognized and applied the proper *forum non conveniens* considerations to the facts in this case. . . . Those facts would remain unchanged even if American federal law did apply to the plaintiffs' claims. We find no abuse of discretion in granting the defendant's motion for dismissal on *forum non conveniens* grounds. [*Id*. at 201-202.]

Plaintiffs then filed this legal malpractice action against defendants. Plaintiffs asserted in their complaint that defendants owed them the duty to represent them as would an admiralty law specialist of ordinary skill and judgment, and that defendants breached this duty by failing to choose the proper forum for filing plaintiffs' claims.[13] As developed through the course of this law suit, plaintiffs have argued that defendants should have filed their case against Phillips Norway in Oklahoma. Plaintiffs also asserted in their complaint that they would have prevailed had defendants taken appropriate steps to represent plaintiffs in the American courts, and that defendants negligence caused plaintiffs to lose their claims.

Defendants moved for summary disposition on the ground of collateral estoppel. The trial court granted the motion on another ground not relevant to this appeal. Plaintiffs appealed, and this Court reversed and remanded.[14] On remand, defendants renewed their motion for summary disposition, in part, on the ground of collateral estoppel. The trial court was not persuaded by defendants' collateral estoppel argument, and denied the motion. Defendants appeal. Proceedings in the lower court have been stayed pending our resolution of the collateral estoppel issue.

On appeal, defendants argue that the trial court erroneously rejected their collateral estoppel argument. Defendants contend that "in light of the decision of the Delaware Supreme Court, Plaintiffs are collaterally estopped from proving any negligence by Defendants in their representation of Plaintiffs." More specifically, defendants strenuously argue that the issues decided by the Delaware Supreme Court are identical to the issues involved in this case:

> The ultimate issue to be decided in this suit, as it was in Plaintiffs' Delaware Suit, is the availability of an American forum for the pursuit of any claims by Plaintiffs arising out of the sinking of the "Kielland." Plaintiffs can sustain their claims of professional negligence against Defendants here only if they can prove that Plaintiffs' underlying suit could have been filed and maintained in an American Forum. If not, Plaintiffs cannot prove their claims of professional negligence.
>
> The question of the availability of an American forum was both actually and necessarily litigated in the Delaware proceedings. The ultimate result of Plaintiff's Delaware suit, pursued through the Delaware Supreme Court, was that there was no American forum where Plaintiffs could press their claims. As a matter of law then, Plaintiffs are unable to prove any negligence by Defendants relating to the latters' handling of Plaintiffs' rights and claims arising out of the sinking of the "Kielland."

> The Delaware Supreme Court in [*Miller II*] unequivocally ruled that Plaintiffs were unable to pursue any viable claims predicated upon American federal law, and that, as to Plaintiffs' remaining claims under Norwegian law, application of the doctrine of forum non conveniens mandated their dismissal. Those substantive rulings by the Delaware Supreme Court made it such that Plaintiffs are unable to prove any professional negligence by Defendants.

This Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) (claim is barred). *Smith v YMCA of Benton Harbor/St Joseph*, 216 Mich App 552, 554; 550 NW2d 262 (1996). The motion need not be supported by documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). However, where the motion is supported by such evidence, it must be considered. *Id*. We will accept the contents of the complaint as true unless specifically contradicted by the documentary evidence. *Id*. at 434, n 6. A motion under this court rule should be granted only if no factual development could provide a basis for recovery. *Smith, supra*.

Whether a party is collaterally estopped from disputing an issue addressed or admitted in prior proceedings is a legal question that we review de novo. *Horn v Dep't of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996). As explained in *Detroit v Quall*, 434 Mich 340; 454 NW2d 374 (1990):

> Appropriate resolution of the collateral estoppel question turns . . . upon a finding that in the prior proceeding the issue of fact or law was actually litigated and actually determined by a valid and final judgment, and that the determination was essential to the final judgment. 1 Restatement Judgments, 2d, § 27, p 250. Among other requirements courts have set out in order that collateral estoppel may apply are the following:
>
> "The issue to be concluded must be the same as that involved in the prior action. In the prior action, the issue must have been raised and litigated, and actually adjudged. The issue must have been material and relevant to the disposition of the prior action. The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. [1b Moore, Federal Practice, ¶ 0.443[1], p 759.]"

Defendants rely on *Alterman v Provizer*, 195 Mich App 422; 491 NW2d 868 (1992), and *Knoblauch v Kenyon*, 163 Mich App 712; 415 NW2d 286 (1987), as support for their collateral estoppel argument. In *Knoblauch*, the defendant-attorney had represented the plaintiff in a prior criminal proceeding, during which a judicial determination was made that the plaintiff had received the effective assistance of counsel. *Id*. at 713-714. The plaintiff then brought a civil malpractice claim against the defendant-attorney asserting essentially the same grounds as those asserted in the criminal proceeding. *Id*. This Court held the plaintiff was collaterally estopped from raising the issue of the

adequacy of the defendant-attorney's representation in the prior criminal proceeding. *Id*. at 715, 725; see also *Schulmm v O'Hagan*, 173 Mich App 345; 433 NW2d 839 (1988).

In *Alterman*, the defendant-attorney had previously represented the plaintiff in a federal civil suit that resulted in a settlement. *Id*. at 423. Thereafter, the plaintiff, through other counsel, moved to set aside the settlement on the ground that he had not been mentally competent when he had entered into the settlement. *Id*. The federal court denied the motion. *Id*. The plaintiff then brought a malpractice action against the defendant-attorney. *Id*. This Court held that the plaintiff was collaterally estopped from relitigating the issue whether the defendant-attorney had negligently allowed the plaintiff to settle a previous lawsuit while he was mentally incompetent because the issue of the plaintiff's competency had been fully and fairly litigated in the prior proceeding. *Id*. at 427.

In the prior litigation involved in this case, the Delaware Supreme Court was faced with a conflict-of-law issue, i.e., whether American federal law or Norwegian law applied to plaintiffs' claims premised on American law. The court was also faced with a *forum non conveniens* issue, i.e., whether the trial court abused its discretion in declining to exercise jurisdiction over plaintiffs' case. The issue plaintiffs seek to litigate in this case is whether defendants were professionally negligent in failing to file plaintiffs' case in Oklahoma. This issue certainly may involve the subissues whether American federal law or Norwegian law applies and whether the doctrine of *forum non conveniens* applies. However, these subissues will be decided in the context of how an Oklahoma court would have decided these issues. Unlike *Knoblauch* and *Alterman*, the issue of how an Oklahoma court would have decided the choice-of-law and *forum non conveniens* issues was not decided by the Delaware Supreme Court. Thus, because the issues decided by in the prior litigation are not the same as the issues raised in this case,[15] we conclude that collateral estoppel does not bar plaintiffs' claims. Cf. *Bullock v Huster (On Remand)*, 218 Mich App 400, 405; 554 NW2d 47 (1996).

Rather, we believe that defendants raise an issue related to proximate cause.[16] In a suit for legal malpractice, the plaintiff must prove (1) the existence of an attorney-client relationship; (2) negligent legal representation; (3) that the negligence was a proximate cause of plaintiff's injury, and (4) that fact and extent of the injury alleged. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994). With respect to the cause-in-fact aspect of proximate cause, the plaintiff must establish that but for the attorney's negligence the plaintiff would have been successful in the underlying suit. *Id*. at 586. In other words, the plaintiff must prove two cases within a single proceeding *Id*. See also *Coleman v Gurwin*, 443 Mich 59, 64; 503 NW2d 435 (1994). This is known as the "suit within a suit" concept. *Coleman, supra*. The "suit within a suit" concept is not universally applicable. *Reinhart, supra* at 587. Rather, it "has vitality only in a limited number of situations, such as where an attorney's negligence prevents the client from bringing a cause of action . . . ." *Coleman, supra*.

Thus, in this case, we assume without deciding[17] that plaintiffs will have to establish that, but for defendants' negligence in failing to file plaintiffs' case in Oklahoma, an Oklahoma court would have heard plaintiffs' claims.[18] As indicated previously, this may involve the issues whether an Oklahoma court would have decided that American federal law or Norwegian law applied to plaintiffs' case, and

whether an Oklahoma court would have concluded that it should not exercise jurisdiction under the doctrine of *forum non conveniens*.

With respect to the choice of law issue, we cannot help but note that the Delaware Supreme Court indicated that the Jones Act is to have a uniform application throughout the county unaffected by local view of common law rules. *Miller II, supra* at 195. Thus, if applicable, it may be determined that an Oklahoma court's analysis of the eight *Lauritzen-Rhoditis* choice of law factors would yield the same result as the Delaware Supreme Court's application of those factors, i.e., that plaintiffs failed to state an American federal law cause of action because Norwegian law applies. If so, then plaintiffs would be unable to establish the cause-in-fact element of their case, i.e., that but for defendants' negligence an Oklahoma court would have heard plaintiffs' case. Likewise, it may be determined that an Oklahoma court would have held that it would decline to exercise jurisdiction over plaintiffs' case under the doctrine of *forum non conveniens*. Again, plaintiffs would then be unable to establish the element of cause-in-fact.

However, where a choice of law issue is involved, the forum state's rules relative to conflict of laws apply. *Jones v State Farm Mut Automobile Ins Co*, 202 Mich App 393, 397-398; 509 NW2d 829 (1993). In this case, the issue of Oklahoma's rules relative to conflict of laws has not been properly or adequately raised, briefed or argued. Likewise, the issue of Oklahoma's law of *forum non conveniens* has not been properly or adequately raised, briefed or argued. Thus, we decline to consider whether the trial court's grant of summary disposition may be affirmed on the alternative ground of lack of proximate cause.

In summary, collateral estoppel does not apply in this case to bar plaintiffs' claims because the issues to be decided in this case are not the same as the issues actually and necessarily decided by the Delaware Supreme Court. Rather, it appears that defendants argument actually pertain to the issue of proximate cause. We decline to decide the issue of proximate cause because this issue has not been properly or adequately raised, argued or briefed.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Kelly
/s/ Roman S. Gribbs

[1] *Reme v Jaques*, 450 Mich 1001 (1996).

[2] See, generally, *All Alexander L. Kielland Litigants v Phillips Petroleum Co, Inc*, unpublished memorandum opinion of the United Stated District Court for the Northern District of Ohio, filed February 14, 1983 (Case Nos. C82-31, C82-196 through 243, C82-581 through 604, C82-605 through 632, C82-633 through 695, C82-1260 through 1262).

[3] *Id*. at 17.

[4] See, generally, *All Alexander L. Kielland Litigants v Phillips Petroleum Co, Inc*, 745 F2d 55 (CA 6, 1984).

[5] *All Alexander L Kielland Litigants v Phillips Petroleum Co, Inc*, unpublished order of the United States Court of Appeals for the Sixth Circuit, entered September 17, 1984 (Docket No. 83-3206).

[6] *All Alexander L. Kielland Litigants v Phillips Petroleum Co*, 471 US 1055; 105 S Ct 2116; 85 L Ed 2d 481 (1985).

[7] See also *Miller v Phillips Petroleum Co Norway*, 537 A2d 190, 193 (Del, 1988) (*Miller II*).

[8] *Lauritzen v Larsen*, 345 US 571; 73 S Ct 921; 97 L Ed 1254 (1953).

[9] *Hellenic Lines Ltd v Rhoditis*, 398 US 306; 90 S Ct 1731; 26 L Ed 2d 252 (1970).

[10] See also, *Fitzgerald v Texaco, Inc*, 521 F2d 448, 453 (CA2, 1975).

[11] These factors are (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the inaccessibility of the foreign forum; (7) the law of the forum; (8) the shipowner's base of operations. *Miller I, supra* at 266.

[12] See *Miller II, supra* at 192.

[13] Plaintiffs also claim that defendants failed to advise the American plaintiffs that their claims were substantially more likely to be cognizable in an American court, failed to disclose to all parties the conflict of interest between the American plaintiffs and the non-American plaintiffs, failed to advise plaintiffs of the decision of the Delaware Supreme Court in time to perfect an appeal to the United States Supreme Court, failed to advise plaintiffs of the time period for perfecting an appeal to the United States Supreme Court, and failed to keep plaintiffs fully and adequately informed of the progress of their claims.

[14] *Reme v Jacques*, unpublished opinion per curiam of the Court of Appeals, issued June 1, 1994 (Docket No. 143919). We note that this Court, unfortunately, misspelled Jaques in the caption of this opinion.

[15] Because we conclude that the issues are not the same, we need not address defendants' arguments with respect to mutuality and the identity of the parties. See, generally, *Alterman, supra* at 424; *Knoblauch, supra* at 720.

[16] Indeed, on the last two or three pages of defendants' brief, defendants' reasoning for why this Court should reverse the trial court's grant of summary disposition evolves into an argument based on proximate cause.

[17] Because we do not wish to establish any law of the case with respect to the issue of proximate cause, we make clear that we do not decide that the "suit within a suit" concept is applicable to this case. Rather, we engage in this discussion only to illustrate our belief that defendants' arguments more properly relate to the issue of proximate cause, rather than the issue of collateral estoppel.

[18] We express no opinion concerning whether this is an issue of law for the court or an issue of fact for the jury. See *Reinhart, supra* at 588, 592.