

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PINNACLE UNDERWRITING, a/k/a PINNACLE  
UNDERWRITING MANAGEMENT  
ASSOCIATION, LTD.,

UNPUBLISHED  
May 31, 2005

Plaintiff-Appellant,

v

JOHN F. GOETZ, JR., LOUIS PORTER,  
and COOK, GOETZ, ROGERS & LUKEY, P.C.,

No. 260400  
Oakland Circuit Court  
LC No. 2003-053963-CK

Defendants-Appellees.

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Before: Murphy, P.J., and White and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's orders granting defendants' motion for summary disposition. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant Cook, Goetz, Rogers & Lukey, P.C. (hereinafter "Cook Goetz"), provided legal services for plaintiff for several years. This case arises from a dispute over funds Cook Goetz retained pursuant to an escrow agreement.

In an earlier Oakland Circuit Court action, plaintiff defended against a cross-claim of Cook Goetz by asserting a breach of ethics in the latter's drafting of, and performance under, the escrow agreement. Plaintiff failed to respond to that claim and was defaulted in the matter. While that case was still pending, plaintiff commenced the instant action, but the trial court granted summary disposition pursuant to MCR 2.116(C)(6) ("Another action has been initiated between the same parties involving the same claim.") and 2.603(A)(3) ("Once the default of a party has been entered, that party may not proceed with the action until the default has been set aside . . .").

Plaintiff argues that the trial court erred by dismissing this case because the two cases did not involve the same parties or claims. We disagree.

The splitting of claims into separate actions is highly disfavored. See MCR 2.203(A)(1) (a pleader “must join every claim that the pleader has against [the] opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action” unless jurisdictional impediments mandate a different course); MCR 2.205(A) (“persons having such interest in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests”).

Plaintiff emphasizes that the individual defendants in this case were not named in the earlier action, and further points out that the instant case involves claims of breach of the escrow agreement, malpractice, and conversion, plus a request for declaratory relief, whereas the earlier action asserted only breach of the escrow agreement. Plaintiff further insists that the malpractice claims against the individual defendants stemmed primarily from their conduct in connection with the earlier case.

As an initial matter, we note that plaintiff does not ask for reinstatement of just the malpractice claims, narrowly limited to defendants’ conduct in connection with the earlier case, but instead defends its position where its pleadings are heavily weighted with allegations and theories connected with the escrow agreement. We further note that in plaintiff’s appellate brief, in the context of a discussion regarding prior negotiations between the parties, plaintiff states that it offered to “dismiss the three *overlapping* claims (breach of contract, conversion and declaratory judgment)[.]” (Emphasis added). Additionally, plaintiff filed a motion seeking leave to amend its complaint to dismiss the breach of contract, conversion, and declaratory judgment claims. The motion stated that the three claims were the subject of, and being litigated in, the earlier action. The motion was never addressed because the trial court granted defendants’ motion for summary disposition. We view this as a concession that those three claims were already raised and being addressed in the earlier court action and thus properly dismissed here, leaving the legal malpractice claim for our resolution. We do not deem a few general allegations of attorney misconduct, which could conceivably stem from activity unrelated to the escrow dispute but which are unaccompanied by recitations of facts clearly establishing such situational independence, sufficient to revive a whole cause of action whose obvious emphasis is on the escrow dispute. Furthermore, plaintiff, at the behest of the trial judge in the instant action,<sup>1</sup> filed a motion for leave to amend its pleadings in the earlier action, seeking to add a legal malpractice claim. The motion was denied; however, that ruling does not negate the order dismissing the action before us today. Plaintiff was free to challenge the denial of the motion for leave to amend as part of the first litigation.

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<sup>1</sup> The order dismissing the action provides, in part, “The Court further finds, after consultation with the Honorable Michael Warren, that should Plaintiff want to allege any additional causes of action, such a motion seeking leave to amend should be brought before Judge Warren in the case pending before him.”

Plaintiff further protests that its claim against Cook Goetz in the earlier case narrowly focused on an ethics theory, presented as an affirmative defense to a claim for fees. However, an action for malpractice is indivisible, and may not be “employed . . . as an affirmative defense and later as foundation” for a separate cause of action. *Leslie v Mollica*, 236 Mich 610, 614; 211 NW 267 (1926). Plaintiff cites no authority for the proposition that broadening a malpractice claim already asserted gives it new life for purposes of new litigation. A party may choose between asserting malpractice as a defense to a claim for fees and launching a separate malpractice action for damages, but may not do both. See *id.* at 618.

Plaintiff’s attempts to distinguish between the law firm and its two members whose activities engendered plaintiff’s theories of liability are inapt. Any potential liability of Cook Goetz is fully a function of the individual defendants’ conduct, and, because the individual defendants operated within the firm, their and the firm’s liabilities fully overlap. Moreover, we see no reason why plaintiff could not have joined the individual attorneys in the earlier action.

Dismissal pursuant to MCR 2.116(C)(6) does not require perfect identity of parties or issues. The rule applies where a second action is “based on the same or substantially the same cause of action.” *J D Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986), quoting *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 666-667; 341 NW2d 783 (1983); see also *Fast Air, Inc v Knight*, 235 Mich App 541, 545 n 1; 599 NW2d 489 (1999). Complete identity of the parties is not a necessity. *J D Candler, supra* at 598. In this case, the trial court correctly recognized the substantial identity between parties and claims in the two actions, and thus properly dismissed the case before him in deference to the one commenced earlier.

Plaintiff additionally argues that the trial court decided the motion for summary disposition without affording plaintiff an opportunity to respond to it. However, plaintiff did not include any such procedural issue within its statement of the questions involved, thus failing to present it for appellate consideration. MCR 7.212(C)(5); *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995).<sup>2</sup>

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<sup>2</sup> The record reflects that defendants’ motion for summary disposition was filed in February 2004 and that plaintiff did not file a response to the motion, but rather plaintiff filed its motion seeking leave to amend the complaint to dismiss the three overlapping counts. The motion for leave was filed in July 2004, and it indicated that a July 2004 motion filed by defendants, which requested that the court set a briefing schedule and hearing date on the motion for summary disposition, was moot because plaintiff wished to dismiss the three counts. However, plaintiff indicated that it still sought to pursue the legal malpractice claim, calling into question the mootness argument. Subsequently, and without a hearing and without oral argument, the trial court entered the order summarily dismissing the action. Plaintiff’s motion for reconsideration was entertained and denied by the court. While it is true that a response need not be filed until seven days before a hearing, MCR 2.116(G)(1)(a)(ii), under these circumstances, assuming that the issue was properly presented, we cannot conclude that plaintiff was “denied” an opportunity to be heard (continued...)

Affirmed.

/s/ William B. Murphy  
/s/ Michael R. Smolenski

I concur in the result only.

/s/ Helene N. White

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(...continued)

by the court. Moreover, a review of plaintiff's motion for reconsideration reflects that plaintiff made no argument that the court committed a procedural error in entering the order of dismissal without input from plaintiff.