

STATE OF MICHIGAN
COURT OF APPEALS

VALLORY BUNDAY,

Plaintiff-Appellant,

v

FREEMAN HAEHNEL and HAEHNEL &
PHELAN,

Defendants-Appellees.

UNPUBLISHED

February 9, 2010

No. 288994

Kent Circuit Court

LC No. 07-011447-NM

Before: Talbot, P.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Plaintiff, Vallory Bunday, appeals as of right the grant of summary disposition in favor of defendants, Freeman M. Haehnel and his firm, Haehnel & Phelan, pursuant to MCR 2.116(I)(2), in this action for legal malpractice. We reverse and remand.

This case arises from issues pertaining to the adequacy of legal representation by defendants of plaintiff in her prior divorce complaint. Plaintiff was married to her former husband, Bryan Bunday (hereinafter referred to as “Bunday”), approximately 31 years.¹ The parties separated in September 2005. During the term of the marriage, in 2001, Bunday received approximately \$1,198,407.37 from his mother’s estate and an additional \$500,000 from his maternal grandfather’s estate, or approximately \$1.7 million dollars in an inheritance. These monies were initially placed into a Smith Barney account established in 1996-1997, in the name of both parties as joint tenants with rights of survivorship.² Monies remained in this account until sometime in 2003, when the parties met with an estate planner, through Miller Canfield, and established two separate trusts.³

¹ Plaintiff and her former husband were married on June 29, 1974. A judgment of divorce was entered May 15, 2006.

² The November 2001 statement for this account indicates a beginning balance of \$143,801.29 and a month-end balance of \$954,020.60. On December 31, 2002, the account had an approximate balance of \$988,000.

³ It appears that the funds in the Smith Barney account were transferred to a Merrill Lynch
(continued...)

With reference to the divorce action, plaintiff contends she met with defendants only twice and that Bunday was present for both meetings, which defendants denied. However, during a deposition defendants acknowledged they did not maintain any record of these meetings as they were not delineated for billing purposes because plaintiff was charged only a \$500 flat fee for defendants' services, in addition to filing fees. While Bunday testified that he provided copies of the account pertaining to the inheritance to defendants, no documents or writings were provided from defendants' legal file regarding any assets or liabilities pertaining to plaintiff and Bunday other than (a) a divorce information sheet developed at the initial interview indicating in the "property" section that "clients will determine property settlement" with no entries to identify or delineate any assets or liabilities and (b) miscellaneous e-mails from Bryan Bunday pertaining to quit claim deeds for the real properties.

On May 15, 2006, a five-page "pro confesso" judgment of divorce was entered. In addition to a few specific property provisions, each party retained their own "pension, annuity, or retirement benefits" as their separate property, with Bunday receiving "the Bryan G. Bunday Trust in its entirety with the Plaintiff reserving no interest in said trust." The transcript of the pro confesso hearing does not evidence any questioning by defendants pertaining to plaintiff's satisfaction with the legal services rendered or any specific averments regarding discussions by plaintiff and defendants about the extent or value of the marital estate or the inheritance monies and her possible entitlement and/or waiver thereto. Plaintiff acknowledged she was to receive, as her total property settlement, a lump sum payment of \$250,000, of which \$204,224 had been received for use in purchasing a condominium in her name only. Plaintiff also acknowledged she was to receive approximately \$33,000 for payoff of her vehicle, the Mercedes Benz, upon the sale of the lake property. Plaintiff also waived any alimony obligation by Bunday. It was reiterated that plaintiff's and Bunday's joint 2005 federal and state tax obligations would be paid by Bunday "out of the trust he has received pursuant to this property settlement." There was no attribution of fault regarding the breakdown of the marital relationship.

Approximately one year after entry of the judgment of divorce, plaintiff retained alternative counsel to pursue a motion seeking to set aside the judgment of divorce.⁴ Plaintiff sought to set aside the property settlement in accordance with MCR 2.612(C)(1)(a), (c), and (f), primarily asserting fraud by Bunday, mutual mistake, plaintiff's emotional/mental inability to make rational decisions and the inequity of the judgment. A hearing was conducted on July 13, 2007.

The trial court issued a written opinion on July 27, 2007, denying plaintiff's motion to set aside the judgment. With regard to MCR 2.612(C)(1)(a), the trial court denied the motion, finding that there was no demonstration of mutual mistake, noting that "[I]f Plaintiff's attorney failed to address the issue, that is an issue between her and her attorney." The trial court also denied plaintiff's motion pursuant to MCR 2.612(C)(1)(c) based on her allegations of fraud by

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account titled to the Bryan Bunday trust. All the parties' real property, including the marital home, a lake cottage and vacant lot were placed in trust in the name of plaintiff.

⁴ Because Bunday had remarried, plaintiff sought only to set aside the property settlement of the judgment.

Bunday. Based on its finding that relief was not available pursuant to MCR 2.612(C)(1)(a) and (c), the trial court determined that MCR 2.612(C)(1)(f) was not applicable. Finding the plaintiff's testimony to be less credible than Bunday's, it did not find plaintiff to have been either incompetent or so emotionally distraught during the proceedings that it would require setting aside the judgment. In addition, the trial court stated, "The Plaintiff has not shown that the judgment of divorce was unfair; in particular she has not shown that the inheritance received by the Defendant was no longer separate property because of it being commingled with marital assets." Although the trial court determined that "the Plaintiff has not shown that the judgment is not equitable," it further indicated, "that it is really not the issue even if it were shown."

Consequently, plaintiff initiated the legal malpractice action that is the subject of this appeal. Plaintiff's claim of legal malpractice was based, in relevant part, on the alleged breach of duties by defendants to protect and advise plaintiff of her legal rights and what would constitute an equitable distribution of assets based on the value of the marital estate. Defendants substantially denied all of the allegations contained in plaintiff's complaint and raised several affirmative defenses, which included, assertions that Bunday's inheritance monies constituted separate property and, therefore, plaintiff could not demonstrate damages. In addition, defendants sought to allocate fault to Bunday based on his misrepresentations to plaintiff.

Plaintiff filed a motion for partial summary disposition pursuant to MCR 2.116(C)(7) and (C)(10), seeking to strike defendants' affirmative defense to attribute fraudulent acts to Bunday based on the trial court's ruling in her previous motion to set aside the divorce judgment. Specifically, plaintiff contended that such a defense or argument was barred by collateral estoppel. Defendants asserted it was improper for plaintiff to offensively use the doctrine of collateral estoppel because they were not parties to the underlying action. Defendants argued that plaintiff could not assert entitlement to certain assets based on her failure to demonstrate that entitlement in the underlying action. Defendants further asserted the defensive use of collateral estoppel precluding plaintiff's argument of emotional turmoil and the inequity or the judgment based on commingling of assets. Defendants contended it was appropriate to permit them to put forth evidence of Bunday's fraud or misconduct in order to permit a jury to determine an apportionment of damages, should liability be imposed. Finally, defendants contended that the ruling of the judge in the divorce action that plaintiff failed to demonstrate Bunday's inheritance was not separate property or commingled should also preclude plaintiff's attempt to reassert this issue in the context of her legal malpractice action.

At the initial court hearing, conducted August 15, 2008, the trial court granted plaintiff's motion and granted the parties additional time to submit pleadings to address defendants' motions for relief pursuant to MCR 2.116(C)(10) and (I)(2). The trial court did not enter an order reflecting this ruling. However, on October 6, 2008, the trial court issued an opinion and order granting defendants' motion pursuant to MCR 2.116(I)(2), denying plaintiff's motion and dismissing the case. The trial court ruled that collateral estoppel did not preclude defendants from raising an issue regarding the allocation of fault to Bunday, thereby denying plaintiff's motion for partial summary disposition. In addition, the trial court found that the issue of whether the inheritance monies were commingled was raised in the pleadings to set aside the judgment. Plaintiff filed a motion for reconsideration, which was denied by the trial court and this appeal ensued.

On appeal, the parties' arguments hinge on the applicability of the doctrine of collateral estoppel. Specifically defendants contend that the issue of commingling of assets and, thus, the determination of the value of the marital estate, was necessarily decided in the prior action to set aside the settlement provisions of the judgment of divorce based on the trial court finding the absence of fraud, mistake and inequity in the judgment of divorce. As such, defendants assert the trial court correctly dismissed plaintiff's legal malpractice action because she was collaterally estopped from relitigating the issue of commingling of assets and/or the value of the assets comprising the marital estate and could not, therefore, establish the existence of any damages resulting from the alleged malpractice. We note that defendants, on appeal, rely primarily on their assertion that plaintiff is unable to demonstrate an injury resulting from any malpractice rather than focusing on a denial of malpractice.

The trial court granted defendants' request for summary disposition and dismissed the action based on MCR 2.116(I)(2). This court reviews de novo a trial court's ruling on a motion for summary disposition. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 686; 762 NW2d 529 (2008). Summary disposition may be granted to an opposing party pursuant to MCR 2.116(I)(2) if the trial "court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000). The applicability of collateral estoppel also comprises a question of law that is reviewed de novo. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

The purpose underlying the doctrine of collateral estoppel is "to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication . . ." *Monat v State Farm Ins Co*, 469 Mich 679, 692-693; 677 NW2d 843 (2004) (citations omitted). Collateral estoppel is defined as "the binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based." Black's Law Dictionary (8th ed). Collateral estoppel, or issue preclusion, is generally applicable when three elements are met:

- (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment;
- (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and
- (3) there must be mutuality of estoppel. [*Monat, supra* at 682-684, quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988).]

The third element, mutuality of estoppel:

requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privity to a party, in the previous action. In other words, "[t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." [*Id.* at 684-685 (internal quotation marks and citations omitted).]

As asserted by defendants, exceptions to the mutuality requirement exist, including the defensive use of collateral estoppel in an action for legal malpractice. *Knoblauch v Kenyon*, 163 Mich App 712, 725; 415 NW2d 286 (1987); see also *Monat*, *supra* at 688.

In accordance with this Court's previous ruling in *VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988), "[c]ollateral estoppel conclusively bars only issues 'actually litigated' in the first action." "A question has not been actually litigated until put into issue by the pleadings, submitted to the trier of fact for determination, and thereafter determined." *Id.* In order to find that an issue has been necessarily determined in the first action, it must have been essential to the resulting judgment. *Eaton Co Rd Commr's v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994). In addition, the ultimate issue in the subsequent case must be the same as in the first proceeding. *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990). Specifically, for the doctrine of collateral estoppel to be applicable, the ultimate issue to be determined in the subsequent action "must be identical, and not merely similar" to the issue involved in the initial action. *Eaton Co Rd Commr's*, *supra* at 376.

The issue of commingling of funds from Bunday's inheritance and a determination of the value of the marital estate was never fully litigated in the previous proceedings involving the divorce judgment. In addition, the issues raised in the motion to set aside the judgment of divorce are not identical to those raised in the action for legal malpractice. Consequently, defendants should be precluded from hiding behind the doctrine of collateral estoppel to avoid a hearing on their alleged malpractice.

In the motion to set aside the divorce judgment, plaintiff alleged primarily that her level of emotional distress precluded her ability to reason and think clearly, that Bunday was overreaching in selecting her attorney and being involved in all of her meetings with counsel, that the parties were mistaken regarding "what constituted a fair property settlement," that Bunday engaged in fraud by representing to plaintiff they would evenly divide their assets and that the judgment was inequitable or unconscionable given the length of the marriage and the distribution of assets. The supporting brief only refers to "commingling" of assets to assert, as a factual premise, the value of the marital estate. In response, Bunday predictably asserted the inheritance constituted separate property.

At the hearing, there was no testimony regarding what assets comprised the marital estate at the time of the divorce. While both attorneys made statements pertaining to their respective positions regarding whether the inheritance was commingled, there was no documentary evidence or testimony provided to elaborate on this factual dispute or to demonstrate the use or treatment of the funds obtained through the inheritance other than Bunday's acknowledgement that the inheritance monies were initially placed in an established joint account and that their separation into a trust account in his name only was at the direction of estate planning attorneys. Isolated references touching upon Bunday's inheritance cannot be construed to comprise "actual litigation." As a result, we find that the issue of commingling and the value of the marital estate were not actually litigated based on the definition of that term in *VanDeventer*, *supra* at 463. In effect, defendants are trying to "back door" the issue by arguing that in making its ruling, the court in the post-divorce action must have necessarily made this determination. As such, defendants' position on appeal asserts not only the existence of a "case within a case" but also an "issue within an issue." However, there is nothing in the woefully minimal records provided pertaining to the post-divorce proceedings to substantiate this assertion.

In addition, in ruling on the post-divorce motion, the trial court found an absence of mistake and fraud. These determinations were not based on the value of the marital estate, on the commingling of assets or on any acts or omissions attributable to defendants as constituting malpractice. The trial court rejected plaintiff's claim of mistake, because it was not mutual. Her claim of fraud was also rejected because the trial court found no evidence that Bunday concealed or misrepresented any facts to the court. Although the court ruled that plaintiff failed to demonstrate that the judgment of divorce was unfair or that the inheritance had been commingled, this was considered by the court to be a "fact" involved as part of its "other considerations" and not an actual legal ruling. "In issue preclusion, it is the prior judgment that matters, not the court's opinion explicating the judgment." *Yamaha Corp of America v United States*, 961 F2d 245, 254 (CA DC, 1992). The motion to set aside the judgment focused almost exclusively on the actions and behavior of Bunday in allegedly misleading or controlling plaintiff and her allegedly fragile emotional/mental condition. The actual value of the marital estate was not litigated or addressed in any meaningful fashion. Hence, the availability of collateral estoppel to defendants is significantly limited as "[t]he doctrine . . . does not apply to questions which might have been (but were not) litigated in the original action." *Schlumm v Terrence J O'Hagan, PC*, 173 Mich App 345, 357; 433 NW2d 839 (1988) (citation omitted).

The absence of any documentation, evidence of work performed or counseling by defendants to plaintiff in an effort to provide meaningful, or at least minimal, legal representation in the underlying divorce action is glaring. While this Court cannot conclude that any or all of Bunday's inheritance was commingled and, thereby, comprised part of the marital estate subject to distribution, plaintiff should have the opportunity to litigate this issue as part of her claim of malpractice.

Based on our determination that the trial court erred in dismissing plaintiff's complaint on the basis of collateral estoppel, we need not address plaintiff's issue on appeal pertaining to alternative theories to prove proximate causation in her action for legal malpractice.

Finally, we decline to address plaintiff's final issue on appeal regarding the alleged error of the trial court in changing its oral ruling of August 15, 2008 in the written opinion dated October 6, 2008. Plaintiff cites no case law or provides any explanation or sufficient legal basis in asserting this as an issue. As such, the issue is deemed abandoned. MCR 7.212(C)(7), *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003); *Yee v Shiawassee Co Bd of Commr's*, 251 Mich App 379, 406; 651 NW2d 756 (2002). "A party may not state their position and then leave it to this Court to search for authority in support of that position." *Badiee v Brighton Area Schools*, 265 Mich App 343, 379; 695 NW2d 521 (2005), citing *Conlin v Scio Twp*, 262 Mich App 379, 384; 686 NW2d 16 (2004).

Reversed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Donald S. Owens