

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD MACK,

Plaintiff-Appellee/Cross-Appellant,

v

DAVID R. FARNEY and DAVID R. FARNEY,
P.C., jointly and severally,

Defendants-Appellees/Cross-
Appellees,

and

PLUNKETT & COONEY, P.C.,

Defendant-Appellant/Cross-Appellee.

Before: Young, Jr., P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

Defendant Plunkett & Cooney appeals by leave granted from an order of the lower court denying its motion for partial summary disposition pursuant to MCR 2.116(C)(10). Plaintiff cross appeals from an order of the lower court granting defendant Farney's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse both orders.

I. FACTS

This is a legal malpractice case stemming from a 1992 gas explosion that occurred in Detroit while city employees were attempting to repair a water main leak. At the time, plaintiff was a city employee working at the site of the explosion. Damon Peoples, an individual who suffered injuries as a result of the explosion, brought a negligence suit in Wayne Circuit Court against the city and its employees, including plaintiff.¹ The city retained Plunkett & Cooney to defend it and its employees in *Peoples* and other cases arising from the explosion. On behalf of plaintiff and the other third-party plaintiffs in *Peoples*, Plunkett & Cooney filed a complaint against Michigan Consolidated Gas Company

requesting contribution pursuant to MCL 600.2925(a) *et seq.*; MSA 27A.2925(a) *et seq.* Plunkett & Cooney asserted that because Michigan Consolidated Gas Company was negligent in failing to comply with certain “Miss Dig” provisions, Michigan Consolidated Gas Company was responsible to the third-party plaintiffs for any damages to which Peoples was entitled.

Michigan Consolidated Gas Company subsequently procured a stipulated dismissal of the claims against it. The pertinent provision of the dismissal ordered that “all Cross-claims and Third-party Claim by the CITY OF DETROIT, RICHARD MACK, ROBERT BROWN, GREGORY HOOPER, and ERNEST CORNELIUS against MICHIGAN CONSOLIDATED GAS COMPANY are dismissed with prejudice and without costs and without attorney’s fees as to any of these parties.”² At some point in time not specified in the record, plaintiff retained attorney Farney to represent him in filing a worker’s compensation claim against the city. Plaintiff apparently discussed with Farney the possibility of also filing a personal injury suit against Michigan Consolidated Gas Company. In correspondence dated May 11, 1995, Farney informed plaintiff that he could not sue Michigan Consolidated Gas Company “under any circumstance” because of the res judicata effect of the earlier dismissal Plunkett & Cooney stipulated to in *Peoples*. Plaintiff never filed a personal injury suit against Michigan Consolidated Gas Company.

Plaintiff brought this legal malpractice case based upon his lost cause of action against Michigan Consolidated Gas Company for personal injuries. Plaintiff proffers one of two alternative theories of liability: (1) either Plunkett & Cooney compromised plaintiff’s personal injury action in the manner in which it settled the contribution claim; or (2) if Plunkett & Cooney did not compromise plaintiff’s subsequent suit, then attorney Farney gave plaintiff mistaken advice that compromised the suit. Both Farney and Plunkett & Cooney moved for summary disposition pursuant to MCR 2.116(C)(10), although Plunkett & Cooney’s motion requested only partial summary disposition because the firm did not seek dismissal of plaintiff’s remaining allegations of malpractice against it.³ The lower court found that the legal effect of the previous dismissal barred plaintiff from filing his personal injury case by operation of res judicata and declined to find that MCR 2.203(A)(2) waived the defense of res judicata based on Michigan Consolidated Gas Company’s failure to object to plaintiff’s nonjoinder of other claims. Consequently, the court denied Plunkett & Cooney’s motion for partial summary disposition and granted Farney’s motion for summary disposition.

II. ISSUE

This appeal raises the question of whether an order dismissing a contribution claim will be given res judicata effect and bar the contribution third-party plaintiff’s subsequent personal injury suit against the third-party defendant, or whether the third-party defendant’s failure to object to the nonjoinder of claims arising out of the same occurrence means that the judgment in the first action merged only the claim of contribution and not the claim of personal injury.

III. ANALYSIS

Application of the doctrine of res judicata is a question of law that this Court reviews de novo. *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 216; 561 NW2d 854 (1997).

The grant or denial of a motion for summary disposition is reviewed under the same standard. *Id.* In deciding a motion pursuant to MCR 2.116(C)(10), the trial court views affidavits and other documentary evidence in the light most favorable to the nonmoving party. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 397; 572 NW2d 210 (1997). Summary disposition is properly granted when, “[e]xcept as to the amount of damages, there is no genuine issue of material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” MCR 2.116(C)(10).

A

In general, res judicata precludes relitigation of the same claim while collateral estoppel precludes relitigation of the same issue. *McCoy v Cooke*, 165 Mich App 662, 666; 419 NW2d 44 (1988), citing 1 Restatement Judgments, 2d, §§ 24, 27, pp 196, 250. “The preclusion doctrines serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims.” *Nummer v Treasury Dep’t*, 448 Mich 534, 541; 533 NW2d 250 (1995). “By putting an end to litigation, the preclusion doctrines eliminate costly repetition, conserve judicial resources, and ease fears of prolonged litigation.” *Id.* Specifically, for res judicata to apply, a defendant must establish that (1) the former suit was decided on the merits, (2) the issues in the second action were or could have been resolved in the former action, and (3) both actions involved the same parties or their privies. *Energy Reserves, supra* at 215-216.

For purposes of determining legal malpractice in this case, the former suit is plaintiff’s third-party complaint in *Peoples* against Michigan Consolidated Gas Company and the second suit is plaintiff’s lost personal injury action against Michigan Consolidated Gas Company. Neither party disputes the third element required for application of the doctrine of res judicata, that both actions involve the same parties. Additionally, because the voluntary dismissal with prejudice in the former suit is a determination on the merits, see *Brownridge v Michigan Mutual Ins Co*, 115 Mich App 745, 748; 321 NW2d 798 (1982), neither party disputes the first required element. The only remaining element is the second, whether the issues in the second action were or could have been resolved in the former action.

Michigan broadly applies the doctrine of res judicata to bar not only claims actually litigated in the first proceeding but also claims arising out of the same transaction that a plaintiff could have brought but did not. *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160; 294 NW2d 165 (1980); *Jones v State Farm Mut Automobile Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993). Similarly, the compulsory joinder rule requires that “[i]n a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that 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.” MCR 2.203(A)(1). The court rule codifies the decisional rule against splitting a cause of action, which is grounded on the same general policy considerations of res judicata. *Rogers v Colonial Federal Savings & Loan Ass’n*, 405 Mich 607, 618; 275 NW2d 499 (1979); *Rinaldi v Rinaldi*, 122 Mich App 391, 397; 333 NW2d 61 (1983). To the extent the rule encompasses or mitigates res judicata, it must control.⁴ *Rogers, supra*.

Therefore, we must determine whether plaintiff, having brought a third-party contribution complaint against Michigan Consolidated Gas Company, was then required to join his claim for damages from personal injuries in order to comply with the compulsory joinder rule and avoid broad application of the doctrine of res judicata against him.⁵ The crux of this analysis is whether plaintiff's personal injury claim constituted a compulsory or permissive claim under MCR 2.203. Plunkett & Cooney argues that plaintiff's personal injury claim was merely a permissive claim, which he "could" have but was not required to join in the *Peoples* lawsuit.

Compulsory claims arise out of the transaction or occurrence that is the subject matter of the action whereas permissive claims are claims that a pleader has against an opposing party that are joined as either independent or alternate claims in the action. MCR 2.203(A)(1); MCR 2.203(B). This Court has previously stated that "actions arise from the same transaction or occurrence only if each arises from the identical events leading to the other or others. For instance, several actions separately brought by various passengers of a train which derailed would arise out of one occurrence or transaction." *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 669; 341 NW2d 783 (1983), quoting *Armco Steel Corp v Dep't of Treasury*, 111 Mich App 426, 437; 315 NW2d 158 (1981), aff'd 419 Mich 582; 358 NW2d 839 (1984). More recently, in *Jones, supra* at 401, this Court stated that the test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is "whether the same facts or evidence are essential to the maintenance of the two actions." The test is not whether the grounds asserted for relief are the same. *Id.*

As the parties have duly recognized, *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389; 573 NW2d 336 (1997) is instructive precedent for applying the doctrine because of the similarity of facts between it and this case. *Limbach, supra* at 391, concerned two lawsuits that arose following an automobile accident. The first suit was a negligence action brought by the first driver against the road commission, and the second suit was an action brought by the second driver against the first driver and the road commission. *Id.* In the second suit, the first driver filed a cross-claim for indemnification against the commission, incorporating by reference her negligence claim against the commission. *Id.* The second driver subsequently settled his claims against both the first driver and the commission, leaving the first driver's cross-claim against the commission as the only remaining claim in the second suit, which she agreed to voluntarily dismiss with prejudice. *Id.* Counsel for the first driver, fearing that the language of the stipulation would have a res judicata effect in the first suit, moved to vacate or modify the dismissal, but the trial court denied this motion. *Id.* Once the dismissal was entered, the commission filed a motion for summary disposition in the first suit on the grounds of res judicata, arguing that the dismissal with prejudice barred the first driver from pursuing her claims against the commission. *Id.* at 391-392. The lower court agreed with the argument and granted the commission summary disposition. *Id.* at 392.

Upon review, this Court affirmed both lower courts' orders. This Court first noted that the panel in *Brownridge, supra*, held that a voluntary dismissal with prejudice acts as an adjudication on the merits for res judicata purposes. *Limbach, supra* at 395. Thus, this Court in *Limbach* found that there was "no doubt" that the first driver's voluntary dismissal of her cross-claim for indemnification

against the commission precluded her from raising that claim against the commission again. *Id.* at 395-396. Citing *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995), this Court also stated that Michigan cases have construed res judicata as applying both to claims actually raised in the prior action and to “every claim arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not.” *Id.* at 396. Therefore, this Court concluded that the voluntary dismissal of the first driver’s cross-claim against the commission in the second suit acted as res judicata with respect to all claims that could have been raised in the first suit, including her claim against the commission. *Id.*

Plunkett & Cooney attempts to factually distinguish this case from *Limbach* by pointing out that the dismissal in *Limbach* incorporated by reference the driver’s remaining claim against the commission, whereas the dismissal in the former suit in this case did not specifically refer to a future claim by plaintiff against Michigan Consolidated Gas Company.⁶ We are not persuaded that this is a definitive fact in determining whether a subsequent action was or could have been resolved in a former action. Moreover, we find it noteworthy that the panel in *Limbach* did not explicitly rely on the reference in the dismissal in its analysis but instead relied on Michigan’s broad application of the doctrine of res judicata, i.e., that the doctrine applies both to claims actually raised in the prior action and to every claim “arising out of the same transaction” which the parties, exercising reasonable diligence, could have raised but did not.

The grounds asserted for relief in plaintiff’s contribution action and his personal injury action are clearly not the same; however, the same facts and evidence are essential to the maintenance of the two actions. Both actions arose from the identical event, the 1992 gas explosion, and both actions would have required plaintiff to present the same facts or evidence of Michigan Consolidated Gas Company’s negligence in the event. Specifically, in the contribution action, plaintiff sought to show that Michigan Consolidated Gas Company was responsible to him for any damages to which Peoples was entitled because of Michigan Consolidated Gas Company’s negligence. Likewise, to support a personal injury claim, plaintiff would have been required to show that Michigan Consolidated Gas Company was responsible to him for any injuries proximately caused by Michigan Consolidated Gas Company’s negligence. In short, the court would have been required to determine whether Michigan Consolidated Gas Company acted negligently, which is the gravamen of a personal injury suit. Therefore, the two claims arise out of the same transaction or occurrence. Once plaintiff raised the third-party contribution claim against Michigan Consolidated Gas Company, he was then required to join his claim for damages from personal injuries.

Plunkett & Cooney proffers a policy argument against application of the doctrine of res judicata, namely, that the suit would have been “cluttered” and therefore contrary to the purposes of applying the doctrine. We are not persuaded by the parade of horrors Plunkett & Cooney presents. If courts declined to apply res judicata because of the fear that litigation would become “cluttered,” then the doctrine would lose all meaning. In any event, we point out that courts have authority to order separate trials “for convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy.” MCR 2.505(B). See MCR 2.203(F); MCR 2.204(A)(4).⁷

Consequently, it appears that plaintiff failed to comply with the compulsory joinder rule and that Michigan Consolidated Gas Company would have had the defense of res judicata available to it in a personal injury action brought by plaintiff because the personal injury claim should have been brought with plaintiff's contribution claim. However, our inquiry does not end here because Plunkett & Cooney argues in the alternative that in light of Michigan Consolidated Gas Company's failure to object to plaintiff's nonjoinder of other required claims, i.e., the personal injury claim, Michigan Consolidated Gas Company waived the requirements of the joinder rules in the second action and res judicata could not apply to bar the subsequent action.

B

As previously stated, MCR 2.203(A)(1), the court subrule governing compulsory joinder, requires the pleader to raise each "claim" that the pleader has against an opponent or lose the claim. MCR 2.203(A)(2) states an exception to subrule (1). The exception provides that by not objecting to the "failure to join claims required to be joined," the defendant in the first action waives the requirements of the compulsory joinder rules in the second action. Accordingly, the judgment in the first action merges only the claims actually litigated by the parties in the first action, not "every claim arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not." *Sprague, supra*.

Here, Plunkett & Cooney argues in the alternative that because Michigan Consolidated Gas Company did not object to plaintiff's failure to join other required claims, i.e., the personal injury claim, Michigan Consolidated Gas Company waived the requirements of the joinder rules in the second action and res judicata could not apply to bar the subsequent action. Thus, Plunkett & Cooney posits that the judgment in the first action merged only the claim of contribution and not the claim of personal injury. Accordingly, Plunkett & Cooney argues that the dismissal in *Peoples* did not cause plaintiff to lose his personal injury suit against Michigan Consolidated Gas Company.

The lower court refused to find that a party is required to object to its opponent's nonjoinder of other claims; however, the court's position was erroneous because the plain language of the rule requires precisely this action. It is clear that "a defendant who fails to object to a plaintiff's nonjoinder waives the use of the defense of splitting the cause of action in a subsequent suit based on additional claims." *Jones, supra* at 403. See generally *Hughes v Medical Ancillary Svcs Inc*, 88 Mich App 395; 277 NW2d 335 (1979). Therefore, assuming that Michigan Consolidated Gas Company did not make such an objection, Plunkett & Cooney's argument that Michigan Consolidated Gas Company waived its res judicata defense is sound. See, e.g., *United Services Automobile Ass'n v Nothelfer*, 195 Mich App 87; 489 NW2d 150 (1992).

Plaintiff raises some questions about the discovery process in this case, but neither party has proffered conclusive evidence about an objection or acquiescence by Michigan Consolidated Gas Company. The burdens of proof each party bears regarding a motion for summary disposition were stated in *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). 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. *Id.* at 362. 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. *Id.* Finally, if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, then the motion is properly granted. *Id.* at 363.

Thus, Plunkett & Cooney initially bore the burden of supporting its position. Here, Plunkett & Cooney states that it satisfied this requirement by attaching to its motion the affidavit of counsel asserting that to the best of his “present information and knowledge” the statements within the motion were true and accurate. The motion included the statement that “Michigan Consolidated Gas Company never objected to Mr. Mack’s failure to join his own personal injury claim against it in the *Peoples’* matter.” Therefore, Plunkett & Cooney argues that in light of the attestation by its attorney, the burden of proof now rests on plaintiff.

In contrast, plaintiff states that Plunkett & Cooney’s reliance upon the affidavit of an attorney who was not even of counsel in the *Peoples* case is ill-judged. More importantly, plaintiff argues that the affidavit does not satisfy Plunkett & Cooney’s burden of proof because it necessarily depends upon the attorney’s credibility and therefore cannot be accepted by the court as proof that there exists “no genuine issue as to any material fact,” the standard for granting summary disposition pursuant to MCR 2.116(C)(10). See, e.g., *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 365; 480 NW2d 275 (1991) (“where the truth of a material factual assertion of a moving party’s affidavit depends on the affiant’s credibility, there exists a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted”).

We agree with plaintiff that Plunkett & Cooney could have more effectively supported its position that Michigan Consolidated Gas Company had not made an objection to plaintiff’s nonjoinder; however, we are also cognizant that Plunkett & Cooney was in the unenviable position of having to prove a negative. We are persuaded that the affidavit, albeit imperfect, nonetheless shifted the burden of proof to plaintiff. Consequently, by failing to come forward with evidence of an objection, plaintiff failed to establish the existence of a material factual dispute.

Further, Plunkett & Cooney was entitled to partial judgment as a matter of law. The elements of a legal malpractice action in Michigan are: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). Plaintiff could presumably prove the existence of an attorney-client relationship. Additionally, plaintiff could presumably show that Plunkett & Cooney acted negligently in settling plaintiff’s contribution claim in the manner in which it did. However, in light of the waiver exception to compulsory joinder, plaintiff could not meet the third element of a malpractice action against Plunkett & Cooney, that the negligence was a proximate cause of his injury.

A 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 v*

Square D Co, 445 Mich 153, 164-165; 516 NW2d 475 (1994). Michigan Consolidated Gas Company's earlier failure to object to the nonjoinder of plaintiff's claims arising out of the same transaction means that the judgment in the first action merged only the claim of contribution and not the claim of personal injury. Therefore, plaintiff cannot show that his cause of action was lost because of the res judicata effect of the dismissal. See *Charles Reinhart Co v Winiemko*, 444 Mich 579, 592; 513 NW2d 773 (1994) (holding that whether the underlying appeal would have succeeded is an issue for the court in a legal malpractice case, not the jury, because it is resolved by legal principle).

Accordingly, we conclude that the lower court improperly denied Plunkett & Cooney's motion for partial summary disposition. We also conclude that the lower court improperly granted Farney's motion for summary disposition pursuant to MCR 2.116(C)(10) because his advice to plaintiff that that he could not sue Michigan Consolidated Gas Company "under any circumstance" was mistaken where Michigan Consolidated Gas Company waived its res judicata defense.

IV. CONCLUSION

We reverse the orders of the lower court granting Farney's motion for summary disposition and denying Plunkett & Cooney's motion for partial summary disposition. We remand this case to the lower court for further proceedings on plaintiff's remaining claims and do not retain jurisdiction.

/s/ William B. Murphy

/s/ Joel P. Hoekstra

Judge Young not participating.

¹ According to Farney, plaintiff was also named as a defendant in seven other actions brought by persons suffering either property or personal injuries. Plaintiff filed third-party complaints against Michigan Consolidated Gas Company in each of the actions and reached a stipulated dismissal in at least one other case.

² Michigan Consolidated Gas Company filed a cross-claim against the city, alleging that the city was responsible for Peoples' injuries. This cross-claim was also dismissed as part of the parties' stipulated dismissal.

³ The remaining malpractice allegations that plaintiff made against Plunkett & Cooney include the failure to limit the scope or objectives of its representation of plaintiff; the failure to maintain proper, ongoing communications with plaintiff; the failure to obtain plaintiff's informed consent to enter the stipulated dismissal order; the representation of plaintiff while simultaneously representing other parties to the same transaction who had a conflict of interest with plaintiff; and the failure to investigate or litigate plaintiff's personal injury claim against Michigan Consolidated Gas Company.

⁴ Our Supreme Court noted that the court rule has no impact on the narrow rule of res judicata, i.e., matters actually litigated. *Rogers v Colonial Federal Savings & Loan Ass'n*, 405 Mich 607, 618 n 4; 275 NW2d 499 (1979).

⁵ It is important to discern that the issue is not whether plaintiff's contribution claim constitutes a compulsory or permissive claim under MCR 2.203. Rather, it is because the contribution claim was raised that the issue becomes whether there were any other claims arising out of the transaction or occurrence that was the subject matter of the action that should have been joined with it. Similarly, in *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389; 573 NW2d 336 (1997), the cross-claim of the first driver against the commission was not compulsory but once raised beget the question of joining all other cross-claims arising out of the same transaction or occurrence.

⁶ Plunkett & Cooney also attempt to factually distinguish *Limbach* from this case based on the differences between contribution and indemnification, namely, that contribution is a cause of action created by statute. However, our focus is not on the contribution claim and its special characteristics, if any. Rather, as previously stated, the issue we must decide is whether plaintiff was required to join his claim for damages from personal injuries once he brought the contribution complaint against Michigan Consolidated Gas Company.

⁷ Moreover, as our discussion of waiver will reveal, the harshness of Michigan's broad application of res judicata is mitigated by the provision in our court rules providing for waiver in subsequent actions where the nonjoinder was unobjected to in the former action. See generally *Hughes v Medical Ancillary Svcs Inc*, 88 Mich App 395; 277 NW2d 335 (1979).