

UTILIZING THE DOCTRINE OF COLLATERAL ESTOPPEL TO DEFEAT LEGAL MALPRACTICE CLAIMS

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I. INTRODUCTION

Collateral estoppel precludes the re-litigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action. Importantly, issue preclusion serves as a potential shield that can be used as an absolute defense to a broad array of legal malpractice actions. Two recent Ohio decisions demonstrate the broad applicability of the doctrine with respect to this particular area of civil litigation, and exemplify how issue preclusion can be deployed in litigation to dispose of an action favorably and efficiently, oftentimes without having to undergo the time, effort, and expense of fully litigating a dispute through trial.

II. OVERVIEW OF THE DOCTRINE OF COLLATERAL ESTOPPEL

A fundamental precept of common law adjudication is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies. The doctrine of res judicata involves both claim preclusion (historically called res judicata or estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel). A valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.

The doctrine of issue preclusion holds that a fact or a point that was actually and directly at issue in the previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different. The United States Supreme Court has grounded the doctrine of collateral estoppel in concerns of judicial economy and efficiency. Collateral estoppel is said to serve the dual purpose of protecting litigants from the burden of re-litigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. Further, collateral estoppel relieves parties of the costs and vexation of multiple lawsuits, conserves judicial resources, and encourages reliance on adjudication by preventing inconsistent decisions.

There are two types of collateral estoppel or issue preclusion. Offensive use of collateral estoppel occurs when the plaintiff seeks to prevent the defendant from re-litigating a fact or issue that the defendant has previously litigated unsuccessfully in another action. Defensive use of collateral estoppel occurs when the defendant seeks to prevent the plaintiff from re-litigating a fact or issue that the plaintiff has previously litigated unsuccessfully in another action. In other words, defensive use of collateral estoppel seeks to use a prior judgment as a shield, not a sword.

The Ohio Supreme Court has set forth three requirements for application of collateral estoppel. The doctrine of collateral estoppel applies when the fact or issue: (1) was actually and directly litigated in the prior action; (2) was passed upon and determined by a court of competent

jurisdiction; and (3) when the party against whom collateral estoppel is asserted was a party in privity to the prior action.

The essential test in determining whether the doctrine of collateral estoppel is to be applied is whether the party against whom the prior judgment is being asserted had full representation and a “full and fair opportunity to litigate that issue in the first action.” In order for the doctrine of collateral estoppel to operate, privity or mutuality of parties must exist as to the previous and current lawsuits. In other words, for the doctrine of issue preclusion to apply, a party against whom preclusion is asserted must be identical to or in privity with a party in the former action. “Privity” is defined in Black’s Law Dictionary as the connection or relationship between two parties, each having a legally recognized interest in the same subject matter. However, Ohio courts have recognized that what constitutes privity in the context of collateral estoppel is somewhat amorphous. Under the current relaxed concept of privity that Ohio courts apply for purposes of collateral estoppel, a broad definition is applied to determine whether the relationship between the parties is close enough to invoke the doctrine of issue preclusion. For purposes of issue preclusion, an interest in the result and active participation in an original lawsuit may establish privity. Individuals who raise identical legal claims and seek identical rather than individually tailored results may also be in privity. A mutuality of interest, including an identity of desired result, might also support a finding of privity.

In addition, before issue preclusion will apply, the fact or issue sought to be precluded from re-litigation must have been actually and directly litigated and determined by a court of competent jurisdiction. Issue preclusion does not apply to other matters that might have been litigated but were not, and a party may not invoke collateral estoppel without showing that precisely the same issue was litigated in the prior action.

III. RECENT APPLICATIONS OF ISSUE PRECLUSION IN OHIO

In *Woodrow v. Heintschel*, 194 Ohio App.3d 391 (6th Dist. 2011), an Ohio appellate court held that it was proper to apply collateral estoppel to prevent re-litigation of the causation aspect of a legal malpractice claim. In *Woodrow*, the plaintiffs argued that the attorney’s negligence in failing to notify them of his withdrawal led to their default judgment. In attempting to reinstate their case, however, the court held a Civil Rule 60(B) hearing, where the court determined that a judge had actually granted the attorney leave to withdraw prior to the default, but the court staff had failed to send a notice to the plaintiffs. The court in *Woodrow* concluded that as a matter of law, the judge at the Rule 60(B) hearing had determined that the duty to notify the pro se plaintiffs fell on the court, and thus the court—not the attorney—caused the default. Thus, the court found that it was appropriate to apply collateral estoppel to prevent the re-litigation of the causation issue in the malpractice claim.

Similarly, in *Schwartz v. Fleisher*, 2014 Ohio Misc. Lexis 115 (Hamilton C.P. 2014), the court invoked collateral estoppel to bar a legal malpractice claim grounded on a prior guilty plea and admission of misconduct in a prior criminal matter. Robert Schwartz, a lawyer at the time, was accused of misappropriating funds, and pled guilty to one count of mail fraud and one count of filing a false tax return. In doing so, he signed a **p**Plea **a**Agreement and **s**SStatement of **f**Facts admitting his misconduct. He also confirmed the accuracy and truth of his admission of guilt in

open court in a subsequent hearing regarding his guilty plea. Thereafter, he filed a complaint for legal malpractice, alleging that his prior attorneys committed malpractice while representing him in the federal criminal case. The court found that the former lawyer's claims were barred by collateral estoppel and that issue preclusion could be invoked to preclude Schwartz from re-litigating his guilt. In doing so, the court highlighted the fact that Schwartz "missed the point" when he argued that collateral estoppel was inapplicable because the issue of his guilt was not actually litigated. In his case, Schwartz had the opportunity to litigate that issue, but he elected instead to plead guilty. Accordingly, the defendant attorneys were entitled to summary judgment on their former client's legal malpractice claim.

IV. CONCLUSION

As the above cases illustrate, the equitable doctrine of collateral estoppel can be applied to prevent a party from re-litigating an issue that has been decided in a prior action. Importantly, issue preclusion can be applied specifically in a wide range of legal malpractice actions. The defense is extremely vital in legal malpractice litigation because successful assertion of the defense can completely dispose of and resolve a legal malpractice lawsuit at a very early stage of a lawsuit, resulting in the complete avoidance of otherwise complex and costly litigation. As such, defense attorneys should always be on the lookout for prior court determinations on the quality of legal services rendered in the underlying action. Likewise, defense practitioners should also seek to uncover any prior rulings on the matters and disputes at issue in the malpractice action. Accordingly, the pleadings, motions, and orders from the underlying litigation must be scrutinized carefully in order to determine not only the strength of the malpractice claim, but also whether the doctrine of collateral estoppel can be applied as an affirmative defense to the action. Utilized properly, issue preclusion can be employed to completely derail and extinguish otherwise meritorious legal malpractice actions under a broad variety of circumstances.