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Tebbens v. Levin & Conde: Successful Attorneys' Fee Petition Bars Subsequent Legal Malpractice Action on the Basis of *Res Judicata*

On April 25, 2018, the Illinois Appellate Court, First District, filed a very well-reasoned and detailed opinion finding that a prior ruling in favor of the plaintiff's attorneys on an attorneys' fee petition served as a prior final judgment on the merits to bar a legal malpractice action. *Tebbens v. Levin & Conde*, 2018 IL App (1st) 170777.

Underlying Facts and Circuit Court Proceedings

In *Tebbens*, the plaintiff, Robert Tebbens, hired the law firm of Levin & Conde to handle his divorce case. Tebbens was a fireman with the Chicago Fire Department, which provided him pension benefits before he was married and at times during his marriage. *Tebbens*, 2018 IL App (1st) 170777, ¶ 6. At issue in both the divorce case and the malpractice action was whether his attorney properly handled the allocation of plaintiff's pension benefits funds as marital or non-marital property. *Id*. ¶¶ 7-11. The plaintiff hired new counsel during the divorce proceeding to file a motion for clarification and to appeal an adverse ruling regarding the division of the pension. *Id*. ¶¶ 9-12. Likewise, the legal malpractice claim was based on the attorney's alleged failure to protect the plaintiff's interests in his pension benefits. *Id*. ¶ 13.

In the malpractice action, the defendant filed a combined motion to dismiss based on sections 2-615 and 2-619 of the Illinois Code of Civil Procedure. *Id*. ¶ 14. Under section 2-619, the defendant asserted that the claims were barred by *res judicata*, as the same core facts in the malpractice complaint were previously litigated and rejected by the court in resolving the fee petition. *Id.* The Circuit Court of Cook County granted the motion to dismiss in a brief ruling, stating: "Defendants' Motion to Dismiss Plaintiffs third amended complaint is granted for reasons stated in open court (due to the elements of *res judicata* having been met)." *Id*. The plaintiff appealed the ruling and the denial of a motion to reconsider. *Id*. ¶¶ 15-16.

Appellate Court Findings

On appeal, plaintiff failed to produce a transcript of the hearings, failed to prepare any bystander's reports, and also failed to submit an agreed statement of facts. *Id*. 19 n.4, ¶ 22. The first district noted that "[w]hen [the appellate court is] presented with an insufficient record, [it] will indulge every reasonable presumption in favor of the judgment appealed from," and "[a]ny doubts or deficiencies arising from an incomplete record will be construed against the appellant." *Id*. ¶ 19 n.4 (citing *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (1st Dist. 2006) and *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)).

While the first district was concerned with the deficient record and noted it at several points, it is not clear that a full record would have assisted the plaintiff since the court did have enough information to understand the details of the issues litigated in the fee petition and the claims made in the malpractice action. The lack of a full record may be a point that distinguishes the first district's analysis from later cases, but it was clear the court had a substantial basis for its ruling.

The first district recited the elements of *res judicata* as "(1) a final judgment on the merits, (2) an identity of the parties or their privies, and (3) an identity of [the issues in the] cause[s] of action." *Tebbens*, 2018 IL App (1st) 170777, 24 ¶(citing numerous cases). As to whether there was an identity of the parties, the court noted that it was undisputed that the attorney and the client were both parties to the fee petition. *Id*. ¶ 26. Interestingly, the appellate court cited both the statute and case authority for the proposition that an attorney who files a fee petition becomes a party to the action and that an attorney is in privity with his law firm. *Id*. (citing 750 ILCS 5/508(c) and *Purmal v. Robert N. Wadington & Assocs.*, 354 Ill. App. 3d 715, 722-23 (1st Dist. 2004)). In other words, not only did the court find that there was an identity of parties to the action, it found that the attorney was a party to the fee petition against his own client.

As to the requirement of a final judgment on the merits, the court recognized that "[a] final judgment is one that fixes absolutely and finally the rights of the parties in the lawsuit." *Tebbens*, 2018 IL App (1st) 170777, ¶ 27 (quoting *In re Adoption of Ginnell*, 316 Ill. App. 3d 789, 793 (2d Dist. 2000)). The main issue with regard to finality was whether the ruling on the fee petition was a final judgment. Neither side sought a finding pursuant to Illinois Supreme Court Rule 304(a), nor did the court issue one.

Indeed, at the time the court ruled on the fee petition, there was a split in appellate districts as to whether a Rule 304(a) finding was required when the fee judgment was unrelated to any other matters still pending in the divorce. *Id*. ¶ 29. This issue appears to have been resolved in 2017 by *In re Marriage of Teymour*, 2017 IL App (1st) 161091. *Tebbens*, 2018 IL App (1st) 170777, ¶ 29. Nevertheless, the first district found that at the time the fee judgment was entered, the fee petition ruling was a final judgment on the merits and therefore immediately appealable under Rule 301. *Id*. ¶ 29. For future cases, it would seem essential that the attorney move for a Rule 304(a) finding after successfully litigating a contested fee petition.

The final issue is whether there is a sufficient identity of the causes of action for purposes of preclusion under the doctrine of *res judicata*. The first district noted that Illinois law applies the "transactional test" to determine whether there is an identity of cause of action. *Id*. ¶ 33 (citing *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 310-11 (1998)). The transactional test does not require precise identity of claims; just that the claims arise from a single group of operative facts, regardless of whether different theories of relief are asserted. *Tebbens*, 2018 IL App (1st) 170777, ¶ 33. "Claims may be considered part of the same cause of action 'even if there is not a substantial overlap in evidence, so long as they arise from the same transaction." *Id*. (quoting *River Park*, 184 Ill. 2d at 311). The claim is viewed in "factual terms . . regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff." *Tebbens*, 2018 IL App (1st) 170777, ¶ 33 (citing *River Park*, 184 Ill. 2d at 309) (internal quotation marks omitted).

The appellate court found that the plaintiff raised the attorneys' handling of the pension issue when contesting the fee petition. *Tebbens*, 2018 IL App (1st) 170777, ¶ 35. In objecting to the fee petition, the plaintiff argued that the attorney should not be awarded the full amount because the motion to amend the marital settlement agreement was unsuccessful, the plaintiff had to hire new counsel due to the unsatisfactory outcome, and his new counsel had to incur the expense of a separate motion for clarification. *Id*. ¶ 40.

Prior appellate court authorities have held both in favor and against a *res judicata* effect related to fee petitions based on varied facts. The first district distinguished the adverse authorities and found that the plaintiff's malpractice claim was based upon the same concepts the trial court rejected when he contested the attorney's fee petition. *Id.* Finally, the court considered all six exceptions to the doctrine of *res judicata* recognized in Illinois. *Id*. ¶ 42. After conducting a detailed analysis on each one of the exceptions, the court found that *res judicata* applied and the affirmed the ruling of the circuit court. *Id*. ¶¶ 44-49.

Practical Takeaways

Not only does this case provide clear guidance to family attorneys handling difficult clients, it also highlights an additional point to consider in any case involving a fee petition. Certainly one must always consider the issues of identity of the parties, the finality of any determination on a fee petition, and whether the issues in a fee petition raise other issues in the case (or issues that may be raised later).

As recognized in *Tebbens*, *res judicata* is an equitable doctrine designed to encourage judicial economy by preventing a multiplicity of lawsuits between the same parties where the facts and issues are the same. *Id*. ¶ 23 (citing *Arvia v. Madigan*, 209 Ill. 2d 520, 533 (2004)). If issues can be eliminated early or causes of action can be dismissed because the issues were previously litigated in a contested fee petition, defense counsel should explore those points at the initial motion to dismiss phase of a malpractice case.

About the Author

John F. Watson is a partner with *Craig & Craig, LLC* in the Mattoon office. Mr. Watson graduated with a Bachelor of Science in Mechanical Engineering from Bradley University in 1990 and received his J. D., with Honors, from The John Marshall Law School in 1993. During law school, Mr. Watson served as an Associate Editor for *The John Marshall Law Review*. Mr. Watson's fields of practice include general civil litigation, medical malpractice defense, municipal liability defense, insurance coverage and insurance law, intellectual property and criminal defense litigation.

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