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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

FAROUK ABADIR, HOSNY GABRIEL,
RICARDO RAMOS, ALFREDO RIVAS,
MICHAEL VEGA and HUNTINGTON
ANESTHESIOLOGY GROUP, INC.,

Plaintiffs,

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ADELL CHANDLER
CIRCUIT CLERK
CABELL WV

v.

CIVIL ACTION NO. 08-C-0980
(F. Jane Husted, Judge)

MARK H. DELLINGER and
BOWLES RICE MCDAVID
GRAFF & LOVE LLP,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Pending before the Court in this legal malpractice civil action is a Motion to Dismiss filed on behalf of defendants Mark H. Dellinger ("Mr. Dellinger") and the law firm of Bowles Rice McDavid Graff & Love LLP (jointly, "defendants"), pursuant to Rule 12(b)(6), W.Va. R. Civ. P. On Wednesday, October 21, 2009, the Motion came on for hearing pursuant to prior notice, at which time the Court heard oral arguments in support of the Motion by counsel for defendants, David D. Johnson, III, and in opposition to the Motion by William D. Levine, counsel for plaintiffs Farouk Abadir, Hosny Gabriel, Ricardo Ramos, Alfredo Rivas, Michael Vega (sometimes referred to collectively in this Order as "the HAGI doctors") and Huntington Anesthesia Group, Inc. ("HAGI") (collectively, "plaintiffs").

The Court has now carefully considered the Motion, defendants' Memorandum of Law in support of the Motion, plaintiffs' Memorandum in opposition to the Motion, defendants' Reply in further support of the Motion, and the oral arguments of counsel. For the reasons which follow, the Court will grant the Motion and dismiss plaintiffs' claims against defendants, with

prejudice, for failure to state a claim upon which relief can be granted.¹

The Legal Standard Applicable to this Motion to Dismiss

It is axiomatic that “[w]hen considering a Motion to Dismiss under Rule 12(b)(6), the factual allegations of the complaint must be taken as true and all reasonable inferences must be viewed in favor of the plaintiff.” *Battles v. Anne Arundel County Board of Education*, 904 F.Supp. 471, 474 (D.Md. 1995), *aff’d*, 95 F.3d 41 (4th Cir. 1996) (Table Opinion), citing *Martin Marietta Corp. v. International Telecommunications Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1992).² Further, “[a] complaint should not be dismissed unless it appears that the plaintiff can prove no set of facts in support of the claims which would entitle the plaintiff to relief.” *Battles*, 904 F. Supp. at 474 (internal citation omitted). *Also see, Chapman v. Kane Transf. Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977). Nonetheless, a court “is not bound to accept conclusory allegations concerning the legal effect of events set out in the complaint if the conclusions do not reasonably follow from the plaintiff’s description of what happened.” *Battles*, 904 F. Supp. at 474 (internal citation omitted). Similarly, “[t]he presence . . . of a few conclusory legal terms does not insulate a complaint from dismissal under

¹The discussion of the facts and applicable law which follows is required because “[a] circuit court’s order granting dismissal should set out factual findings sufficient to permit meaningful appellate review. Findings of fact include facts which the circuit court finds relevant, determinative of the issues, and undisputed.” *Forshey v. Jackson*, 222 W.Va. 743, 749, 671 S.E.2d 748, 754, n. 10 (2008) (addressing the required contents of an order dismissing a complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), W.Va. R. Civ. P., internal citations omitted). The Court has concluded that defendants’ arguments, including the recitation of facts and the legal arguments contained in defendants’ Memorandum and Reply, are well founded and supported by the record. The Court will therefore adopt those arguments and incorporate them in this Order.

²Because the West Virginia Rules of Civil Procedure are virtually identical to the federal rules, the Supreme Court of Appeals and this Court give great weight to federal cases such as these in determining the meaning and proper application of our rules. *See, e.g., Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758, n.6 (1994).

Rule 12(b)(6) when the facts alleged in the complaint cannot support [the claim].” *Young v. City of Mount Ranier*, 238 F.3d 567, 577 (4th Cir. 2001); and, “more is required from the complaint than ‘legal conclusions masquerading as factual conclusions.’” *Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 387 (5th Cir. 2001) (internal citation omitted).³

Although motions to dismiss for failure to state a claim are disfavored by the courts due to the strong policy in favor of resolving disputes on their merits, Rule 12(b)(6) exists for a very good reason: “The purpose of the rule is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity.” *Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993). *Also see, Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (1996), and *Collia v. McJunkin*, 178 W.Va. 158, 358 S.E.2d 242, *cert. denied*, 484 U.S. 944, 108 S.Ct. 330, 98 L.Ed.2d 357 (1987). Where a Rule 12(b)(6) movant satisfies the express requirements of the rule, his motion *must* be granted. *Horton v. Marovich*, 925 F. Supp. 540 (N.D. Ill. 1996). Indeed, a court is empowered to invoke Rule 12(b)(6) *sua sponte* if the court perceives a fatal deficiency in the legal theory relied on by a plaintiff. *Pyle v. Hatley*, 239 F.Supp.2d 970 (C.D.Cal. 2002).

In considering a motion under Rule 12(b)(6), W.Va. R. Civ. P., a court normally confines its analysis to the four corners of the complaint. However, inasmuch as the present Motion asserts that plaintiffs are collaterally estopped from pursuing their claims due to the holdings by the Supreme Court of Appeals in *Messer v. Huntington Anesthesia Group, Inc.*, 222 W.Va. 410, 664 S.E.2d 751 (2008) (referred to subsequently as “*Messer*”), this Court’s consideration of defendants’

³ Nor is it ever sufficient for a plaintiff to simply dress his opinions and conclusions up as factual averments. *See, e.g., Delatorre v. Minner*, 238 F. Supp.2d 1280, 1284-85 (D.Kan. 2002).

Motion must also - of necessity - include an analysis of the *Messer* opinion in order to identify those issues which were litigated and decided in *Messer*, which plaintiffs now seek to relitigate in this civil action. Syl. Pt. 2, *Conley v. Spillers*, 171 W.Va. 584, 301 S.E.2d 216 (1983).

Moreover, this Court's consideration of the *Messer* opinion - a matter arguably extraneous to the Complaint - does not require that this Motion to Dismiss pursuant to Rule 12(b)(6) be converted to one for summary judgment under Rule 56, in accordance with Rule 12(b). This is so because the appeal in which the *Messer* decision was rendered is expressly referred to in paragraphs 19 and 20 of the Complaint in the present case, and because *Messer* is integral to the Complaint. *Phillips v. LCI International, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999).

It is widely accepted that a trial court, in considering a Rule 12(b)(6) motion, may consider matters extraneous to the Complaint, of which judicial notice may be taken, including prior case decisions, as well as matters which were known to and considered by the plaintiff when filing his complaint, without converting the motion to one for summary judgment. *See, e.g., Forshey v. Jackson*, 222 W.Va. at 747-49, 671 S.E.2d at 752-54 (“[I]n ruling upon a motion to dismiss under Rule 12(b)(6), a court may consider, in addition to the pleadings, documents annexed to it, and other materials fairly incorporated within it. This sometimes includes documents referred to in the Complaint but not annexed to it. Further, Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice.” Internal citations and quotation marks omitted.); *Phifer v. The City of New York*, No. 99 Civ. 4422, 2003 WL 1878418, *2 (S.D.N.Y., April 15, 2003); and *The Late Charles Alan Wright and Arthur R. Miller*, 5C Fed. Prac. & Proc. Civ.3d § 1366.⁴

⁴As noted in *Phifer*: “In particular, in considering a collateral estoppel defense on a 12(b)(6) motion, the court shall dismiss if ‘it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff’s claims are barred as a matter of law.’” *Id* (internal

Statement Of The Case

The Court makes the following findings based upon the express averments in plaintiffs' Complaint, and upon the established findings by the Supreme Court of Appeals in *Messer*. HAGI is a West Virginia corporation, the physician-employees of which, at times material to the Complaint, practiced the specialty of anesthesiology. Complaint, ¶ 1. In 2002, the plaintiff doctors, along with non-parties, doctors Mark Newfeld, Grant Shy and Stanislas Striz, were employed by HAGI. *Id.*, ¶¶ 2 and 4. In 2002, HAGI and its physician-employees were sued by Ms. Theresa Messer ("Ms. Messer"), a former HAGI employee, and they retained Mr. Dellinger to defend them against her claims. *Id.*, ¶¶ 3 - 4.⁵

The Complaint alleges that "[i]n May 2006, Mr. Dellinger agreed with Counsel for Ms. Messer to mediate the existing controversy." Complaint, ¶ 6. Although not alleged in the Complaint, it was undisputed in the underlying case that Dr. Ramos first sent an e/mail message to Mr. Dellinger in February or March of 2006 "indicating that the doctors wanted to initiate settlement of the case and stating a figure for an initial settlement offer." *Messer*, 664 S.E.2d at 744, n. 4. Only thereafter, at a status conference convened in the Messer litigation on April 13, 2006, did counsel for the parties agree to participate in mediation. *Id.*, 664 S.E.2d at 744. The mediation took place on May 18, 2006. *Id.*

Although the details of what actually transpired surrounding the mediation have been disputed (664 S.E.2d at 744), it is not disputed that Dr. Gabriel, then the president of HAGI, participated in mediation in person, and that when he was required to go to the hospital during the

citation omitted) (applying collateral estoppel based on factual determinations made by a family court and recited in an appellate court opinion).

⁵Drs. Newfeld, Shy and Striz left HAGI in 2004, as a result of differences and disputes which had arisen between them and the other HAGI doctors. *See* the Complaint, ¶ 5. *Also see*, *Messer*, 664 S.E.2d at 754.

mediation, Dr. Ramos filled in for him. *Id.*, 664 S.E.2d at 744, and n. 5. *Also see* the Complaint, page 2, ¶ 9. All of the HAGI doctors had been notified in a letter from Mr. Dellinger of the time and place of mediation, and of their right to attend if they wished to do so. *Id.*, 664 S.E.2d at 754, n. 6.⁶

As alleged in the Complaint, “[a]t the conclusion of that mediation a written document was prepared which provided that, contingent upon the approval of all defendants, the matter would be settled by the payment to Ms. Messer of \$225,000. The document further provided that if the unanimous approval of all defendants was not given within 21 days, there would be no settlement.” *See* the Complaint, page 3, ¶ 10. *Also see Messer*, 664 S.E.2d at 754-55, reciting the same facts, and noting that the handwritten agreement specified that it would be replaced by a typewritten document which would include a full and complete release to be prepared by Mr. Dellinger, and that the handwritten agreement was signed at mediation by Ms. Messer and her counsel, and by Dr. Gabriel, president of HAGI, and Mr. Dellinger. *Id.*

Plaintiffs allege in their Complaint that “Mr. Dellinger never communicated with Michael Vega, Farouk Abadir, or Alfredo Rivas after the mediation had concluded but prior to him advising Ms. Messer’s counsel that the matter had been settled.” Complaint, page 3, ¶ 12. However, this Court need not accept that allegation at face value pursuant to Rule 12(b)(6), inasmuch as the Supreme Court of Appeals found in *Messer* that “[i]t was established at the August 21 hearing [a hearing on Ms. Messer’s motion to enforce her settlement with defendants in the underlying case] that Mr. Dellinger sent a letter to Dr. Abadir, Dr. Vega and Dr. Rivas on June 2, 2006” *Messer*, 664

⁶Drs. Newfeld, Shy and Striz, who had previously left HAGI and retained separate counsel to advise them with respect to their dispute with the remaining HAGI doctors, notified Mr. Dellinger through their counsel that they did not object to any settlement, but that they would not attend the mediation and, relying on an agreement they understood they had reached with the remaining HAGI doctors, that they would pay nothing towards any settlement. 664 S.E.2d at 754, n. 6.

S.E.2d at 755. In that letter, Mr. Dellinger “outlined the issues facing HAGI and the doctors, and the need to communicate with [Ms. Messer] about whether or not settlement was acceptable.” *Id.*

The Complaint alleges - in essence - that the individual HAGI doctors had differing views of the tentative settlement with Ms. Messer, with some flatly opposed to settling, and others conditionally willing to approve a settlement. *See* the Complaint, page 3, ¶ 13. The Complaint further alleges that “Mr. Dellinger had no *conversations* with any of his clients about the proposed settlement other than with Dr. Ramos.” *Id.*, ¶ 15 (emphasis added). Mr. Dellinger concedes that this is true, and states that his communication with the other HAGI doctors concerning the tentative mediation agreement was via his letter of June 2, 2006, referred to above.

Plaintiffs allege in their Complaint that “Ricardo Ramos advised Mr. Dellinger that the proposed settlement had not been approved by all defendants to the Messer litigation. Dr. Ramos, however, advised Mr. Dellinger that he thought all parties might be able to reach an agreement if more time was available.” Complaint, page 3, ¶ 14. Juxtaposed against that allegation is the finding by the Supreme Court of Appeals in *Messer*, based upon Mr. Dellinger’s testimony during the Circuit Court hearing on August 21, 2006, that Dr. Ramos had informed Mr. Dellinger by telephone on June 5, 2006, that Mr. Dellinger’s letter of June 2nd to all HAGI physicians had been discussed by the doctors during a sometimes heated meeting on June 3rd, and that “ultimately all of the individuals agreed to the settlement and that [Mr. Dellinger] was authorized to communicate that to the other side.” *Messer*, 664 S.E.2d at 755.

It is undisputed that after Mr. Dellinger notified Ms. Messer’s counsel that HAGI and the doctors had agreed to the mediated settlement, and after he subsequently notified the doctors that Ms. Messer had signed a release, and that it was necessary to arrange for payment of the sum agreed to in the mediation settlement agreement, the doctors belatedly told Mr. Dellinger that they would not

go forward with the settlement. *See* the Complaint, page 4, ¶ 18, and *Messer*, 664 S.E.2d at 756-57.⁷ Ms. Messer’s counsel thereafter moved in the Circuit Court to enforce the settlement agreement; HAGI and the doctors opposed the motion; and - as previously noted - a hearing on the motion was convened on August 21, 2006. *See Messer*, 664 S.E.2d at 757. Following the hearing, the Circuit Court (former Judge John L. Cummings, now retired) denied the motion to enforce the settlement, finding that Mr. Dellinger had not been authorized by HAGI and the doctors to settle with Ms. Messer. *See* the Complaint, page 4, ¶ 19, and *Messer*, 664 S.E.2d at 757. HAGI and the doctors later moved for summary judgment against Ms. Messer on the merits, and their motions were granted. Ms. Messer then petitioned for leave to appeal.

The Complaint avers that on appeal, “[t]he Supreme Court reversed the Circuit Court decision on the settlement ruling that an attorney who had appeared in court representing all defendants, was presumed to have had the authority to settle a case.” Complaint, page 4, ¶ 19. This statement, as far as it goes, is certainly correct, but plaintiffs omit the better part of the findings and conclusions by the Supreme Court of Appeals in *Messer*, including the factual findings and the central conclusion that are fatal to plaintiffs’ present legal malpractice claim against Mr. Dellinger.

In the *Messer* opinion, the Court’s recognition of “the strong presumption of authority raised by Mr. Dellinger being the recognized attorney for all named defendants [and] the heightened burden [HAGI and the doctors] bore in order to rebut the presumption” (*Messer*, 664 S.E.2d at 760) was only the point of beginning for the Supreme Court of Appeals in deciding to reverse the Circuit

⁷Mr. Dellinger then withdrew as counsel of record for HAGI and the doctors. *See Messer*, 664 S.E.2d at 757. Attorney Thomas E. Scarr undertook the representation of doctors Newfeld, Shy and Striz, while HAGI and the remaining doctors were represented by their present counsel, William D. Levine.

Court's denial of Ms. Messer's motion to enforce the settlement.⁸ In order to evaluate whether HAGI and the doctors had successfully rebutted the strong presumption of Mr. Dellinger's authority to settle, the Supreme Court of Appeals undertook, step-by-step, a meticulous examination of the facts which were of record and available to the trial court, including the considerable evidence adduced at the hearing of August 21, 2006, on Ms. Messer's motion to enforce the settlement.

After devoting in excess of four full pages of its opinion to a discussion of the record, the Supreme Court of Appeals summarized its analysis with the following findings:

After close examination of the record before us in light of this legal standard, we are obliged to conclude that [HAGI and the doctors] failed to meet their burden of clearly showing a want of authority in this case.

* * *

The record also supports the conclusion that Dr. Ramos served as the conduit of information if not the spokesperson between the doctors who retained affiliation with HAGI and Mr. Dellinger. Before the case was ordered to mediation, Dr. Ramos had sent an e-mail to Mr. Dellinger saying that the doctors wanted to initiate settlement and he proposed an initial settlement offer. He attended the mediation, organized a meeting with the doctors about the terms of the handwritten mediation agreement, kept Dr. Gabriel apprised of settlement developments even while Dr. Gabriel was traveling abroad, routinely communicated information regarding the settlement to Mr. Dellinger by phone and e-mail, and fielded questions from the HAGI doctors. In like fashion, the HAGI doctors recognized him as their spokesperson by contacting him directly when they had concerns with the settlement agreement. An example of this recognition is Dr. Abadir's testimony that while he understood that Mr. Dellinger was the attorney in the case, he called Dr. Ramos with the concerns he had about the division of responsibility for payment of the figure stated in the settlement agreement. Actually, the only other individual who directly contacted Mr. Dellinger was Dr. Gabriel, who represented

⁸On appeal, Ms. Messer actually raised three asserted errors by the trial court. However, the Supreme Court of Appeals found it necessary to address only one: "We will limit our discussion in this case to the sole issue of the settlement agreement because our review of the record, briefs and arguments of counsel and the relevant law reveals that *the court-annexed mediation resulted in a valid and enforceable settlement agreement.*" *Messer*, 664 S.E.2d at 754 (emphasis added).

HAGI as its president. Moreover, none of the HAGI affiliated doctors contacted Mr. Dellinger immediately upon receipt of the June 6 letter announcing the doctors' acceptance of the settlement to, at the very least, question Mr. Dellinger's authority to make such a move on their behalf. It was not until near midnight on June 14 that Dr. Gabriel sent an e-mail to Mr. Dellinger telling him that the HAGI doctors were opposing the settlement. *Viewed as a whole, the statements and conduct of the doctors form clear supportive evidence that Mr. Dellinger's reliance on Dr. Ramos' representations was reasonable under the circumstances.*

Messer, 664 S.E.2d at 760 (emphasis added).⁹

In the present civil action, plaintiffs sought to undo the findings of the Supreme Court of Appeals in its *Messer* opinion. The gravamen of plaintiffs' present legal malpractice Complaint is the averment that Mr. Dellinger lacked authority from HAGI and the doctors to bind them to a settlement with Ms. Messer. *See* the Complaint, page 4, ¶¶ 16, 17 and 22. The same issue was at the heart of their opposition to the motion to enforce the settlement in the underlying action and their subsequent appeal in *Messer*: "Appellees maintain that . . . Mr. Dellinger never had been authorized to make the representation that all of the doctors had approved the settlement agreement." *Messer*, 664 S.E.2d at 759. The Supreme Court of Appeals clearly rejected that proposition in *Messer*, and this Court has concluded that plaintiffs are therefore estopped from relitigating the issue now in this malpractice action.

The Doctrine Of Collateral Estoppel

The doctrine of collateral estoppel is firmly established as an integral part of the law

⁹The Supreme Court of Appeals noted the dispute between Dr. Ramos and Mr. Dellinger concerning what Dr. Ramos had reported to Mr. Dellinger by telephone on June 5, 2006, concerning the position of the HAGI doctors with respect to the settlement. 664 S.E.2d at 760. However, the Court credited Mr. Dellinger's testimony on this point, finding that his testimony was corroborated by other record evidence. *Id.*, 664 S.E.2d at 760-61. The Court also noted Dr. Ramos's own admission under oath that his memory of the relevant period was impaired by cardiac surgery which he underwent at the time. *Id.*, 664 S.E.2d at 756, 761.

of this state. The Supreme Court of Appeals has explained that “[c]ollateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit *even though there may be a difference in the cause of action between the parties of the first and second suit.*” *State ex rel. Leach v. Schlaegel*, 191 W.Va. 538, 540, 447 S.E.2d 1, 3 (1994) (emphasis added, quoting from *Conley v. Spillers*, 171 W.Va. 584, 301 S.E.2d 216 (1983), Syl. Pt. 2). Similarly, in *McCord v. Bailey*, the United States Court of Appeals for the D.C. Circuit explained:

Collateral estoppel ‘prohibits parties who have litigated one cause of action from relitigating in a second and different cause of action matters of fact which were, or necessarily must have been, determined in the first litigation.’ (Internal citations omitted.) Like *res judicata*, collateral estoppel promotes judicial efficiency.

McCord v. Bailey, 636 F.2d 606, 608 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983, 101 S.Ct. 2314, 68 L.Ed.2d 839 (1981).

Moreover, the doctrine of collateral estoppel has routinely been applied to foreclose legal malpractice actions where the allegations relied on to support the malpractice claim have already been resolved against the malpractice plaintiff in prior litigation. *See, e.g., Walden v. Hoke*, 189 W.Va. 222, 429 S.E.2d 504 (1993). Courts from numerous other jurisdictions have reached the same result when applying the doctrine of collateral estoppel in legal malpractice cases. *See, e.g., Gray v. Weinstein*, 2004 WL 3130552 (Conn. Super. Ct., December 22, 2004), *aff’d*, 955 A.2d 1246 (Conn. App. 2008); *Purdy v. Zeldes*, 337 F.3d 253 (2nd Cir. 2003) (applying the federal doctrine of collateral estoppel); *Zeidwig v. Ward*, 548 So.2d 209 (Fla. 1989); *Knoblauch v. Kenyon*, 163 Mich. App. 712, 415 N.W.2d 286 (1987); *Johnson v. Raban*, 702 S.W.2d 134 (Mo. Ct. App. 1985); *State ex rel. O’Blennis v. Adolf*, 691 S.W.2d 498 (Mo. Ct. App. 1985); and *McCord v. Bailey*, *supra*, quoted from with approval and relied on by the Supreme Court of Appeals in *Walden v. Hoke*, 189 W.Va. at 226-

27, 429 S.E.2d at 508-09.¹⁰

The criteria which must be satisfied in order for collateral estoppel to apply have been expressed in different terms by various courts. However, the practical effect remains the same no matter how the test is articulated. In *State ex rel. O'Blennis v. Adolf*, the Missouri Court of Appeals stated the following test for determining whether collateral estoppel would be available: "(1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; [and] (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit." 691 S.W.2d at 501. Similarly, in *Purdy v. Zeldes*, involving federal collateral estoppel law, the Second Circuit stated that "collateral estoppel applies when '(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.'" 337 F.3d at 258 (internal citation omitted).

Collateral estoppel may be used "offensively" or "defensively". Where - as in the present case - the doctrine is applied defensively, it is not necessary that the defendant who raises the doctrine as a defense have been a party to the prior litigation in which the issue in question was first

¹⁰The cases cited here from other jurisdictions all involved allegations of legal malpractice occurring in the defendant-attorney's representation of the malpractice plaintiff in a previous criminal proceeding. Nonetheless, application of the doctrine of collateral estoppel to foreclose a malpractice claim in that setting is no different from the doctrine's application in a malpractice action such as the present one, which arises from a previous civil action. This fact is clearly demonstrated by the reliance of our Supreme Court of Appeals in *Walden v. Hoke* - a malpractice case arising from a prior civil case - upon *McCord v. Bailey* - a malpractice case which arose from a prior criminal case relating to the so-called "Watergate" scandal.

litigated:

Because it is the defendants who raise collateral estoppel to bar plaintiff's relitigation of the malpractice issues, we need not be concerned that the defendants were neither parties nor privies to the [prior proceeding]. In Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-29, 91 S.Ct. 1434, 1442-43, 28 L.Ed.2d 788 (1971), the Court held that "defensive use" of a prior judgment - that is, a defendant's assertion of collateral estoppel to prevent a plaintiff's litigation of issues the plaintiff previously litigated and lost - was permissible even though the defendant was not himself bound by the prior judgment.

McCord v. Bailey, 636 F.2d at 609, n. 1. This rule appears to be universally applied with respect to the defensive application of collateral estoppel, as distinguished from *res judicata*. See, e.g., *Walden v. Hoke*, 429 S.E.2d at 508 (holding that "the principles of collateral estoppel do not require that the parties in the separate suits be identical . . ."); *Zeidwig v. Ward*, 548 So.2d at 209; and *Gray v. Weinstein*, 2004 WL 3130552, *4.¹¹

¹¹Interestingly, plaintiffs in this case previously attempted to join Mr. Dellinger as a party to the underlying *Messer* employment action. After the Supreme Court of Appeals issued its opinion in *Messer* and ordered the Circuit Court to enforce the settlement agreement, plaintiffs' present counsel filed in the Circuit Court the "Motion Of Huntington Anesthesia Group, Inc., Farouk Abadir, Hosney Gabriel, Ricardo Ramos, Alfredo Rivas, And Michael Vega That The Court Make Mark H. Dellinger A Party To These Proceedings Or, Alternatively, For Leave To File Third Party Complaint Against Mr. Dellinger" (subsequently, "Motion to Join"). HAGI and these five doctors wanted to pursue against Mr. Dellinger in the *Messer* case the very same malpractice claim which they now seek to prosecute against him in the present action. A response was filed on Mr. Dellinger's behalf in opposition to the Motion to Join, pointing out that, in light of the *Messer* opinion, the relief which HAGI and the doctors wanted to pursue would be prohibited by the doctrine of "the law of the case", as stated in *Bass v. Rose*, 216 W.Va. 587, 590, 609 S.E.2d 848, 851 (2004) ("The general rule is that when a question has been definitely determined by [the Supreme Court of Appeals] its decision is conclusive on parties, privies and courts . . . and it is regarded as the law of the case."). HAGI and the doctors later voluntarily abandoned the Motion to Join in favor of pursuing the present action. However, the doctrine of collateral estoppel is as fatal to the present claims as was the law of the case doctrine to plaintiffs' putative malpractice claim in the underlying action.

Application Of The Doctrine Of Collateral Estoppel To This Case

In the underlying employment action, Ms. Messer moved the Circuit Court to enforce her settlement agreement with HAGI and the doctors. HAGI and the doctors who are plaintiffs in the present action vigorously opposed that motion, arguing that Mr. Dellinger had bound them to the mediated settlement agreement with no authority from his clients to do so. The issue of whether HAGI and the doctors had or had not authorized Mr. Dellinger to agree to the settlement on their behalf, and the issue of whether Mr. Dellinger could safely rely on Dr. Ramos to serve as spokesman for HAGI and the other doctors, were fully briefed on behalf of all interested parties. Thereafter, the Circuit Court convened a day-long evidentiary hearing in order to receive sworn testimony from Mr. Dellinger and from any of the HAGI physicians who cared to testify. Their testimony over the course of the day dealt almost exclusively with facts surrounding Mr. Dellinger's representation of HAGI and the doctors, the mediation, and communications by Mr. Dellinger with the doctors both by letters and by telephone concerning the settlement negotiations. At the hearing, the Circuit Court also heard extensive oral arguments from counsel on these issues.

On September 21, 2006, the Circuit Court entered an Order denying Ms. Messer's motion to enforce her settlement. The Circuit Court's Order was sharply critical of Mr. Dellinger due to the Court's conclusion that he had agreed to the settlement without obtaining authorization from his clients, and the Circuit Court even ordered Mr. Dellinger to pay Ms. Messer's legal fees incurred in connection with trying to enforce the settlement. In so holding, the Circuit Court credited the testimony of the HAGI doctors over the testimony of Mr. Dellinger during the evidentiary hearing convened on August 21, 2006.

Ms. Messer then appealed from the Order of September 21, 2006. On appeal, HAGI and the doctors were represented by their current counsel, who fully briefed the issue of Mr.

Dellinger's alleged lack of authority to settle with Ms. Messer. The Supreme Court of Appeals carefully considered the record from the Circuit Court, including the testimony and exhibits from the August 21, 2006, evidentiary hearing, and reversed the holding by the Circuit Court. In so ruling, the Supreme Court of Appeals found and concluded that Mr. Dellinger's reliance on settlement authorization from Dr. Ramos on behalf of HAGI and the doctors "was reasonable under the circumstances." *Messer*, 664 S.E.2d at 760. The Court further held that HAGI and the doctors "failed to meet their burden of clearly showing a want of authority in this case." *Id.* Moreover, although the Court noted the conflicting testimony of Dr. Ramos and Mr. Dellinger with respect to the issue of settlement authorization, the Court found that Mr. Dellinger's testimony was corroborated by independent evidence. *Id.*, at 760-61.

The Supreme Court of Appeals remanded the case to the Circuit Court "for entry of an order enforcing the settlement agreement and awarding appropriate attorney's fees with respect to [plaintiff's] efforts to enforce the settlement agreement" *Messer*, 664 S.E.2d at 761. However, the Court, having concluded that Mr. Dellinger acted with authority from his clients in binding them to the settlement, imposed the award of attorney's fees - not against Mr. Dellinger, as the Circuit Court had done - but against HAGI and the doctors, themselves, based on their "attempt to rescind a valid and enforceable settlement agreement." *Id.* (internal citation omitted).

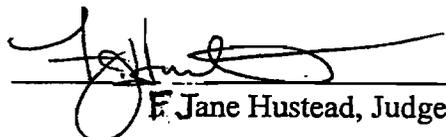
Now, in the present legal malpractice action, HAGI and the doctors again assert that "[n]one of the Plaintiffs hereto authorized Mr. Dellinger to settle on their behalf nor had any of them authorized Dr. Ramos to be their spokesman." Complaint, page 4, ¶ 16. These allegations are the cornerstone of the Complaint. *See* the Complaint, page 5, ¶ 23. However, the issue of Mr. Dellinger's authorization to settle, and the subsidiary issue of his entitlement to rely on Dr. Ramos as spokesman for HAGI and the other doctors, were fully litigated in the underlying action, both at the trial court

level and in the Supreme Court of Appeals. It could not seriously be contended that HAGI and the doctors did not have a "full and fair opportunity to litigate" these issues in the underlying action. *Conley v. Spillers*, 171 W.Va. 584, 588, 301 S.E.2d 216, 220 (1983). Nor could it reasonably be argued that these issues were not determined on their merits by the Supreme Court of Appeals. The criteria for applying the doctrine of collateral estoppel are therefore satisfied, and plaintiffs' claims against these defendants must be dismissed.

Accordingly, it is hereby **ORDERED** that defendants' Motion to Dismiss is granted, and that plaintiffs' claims against defendants are dismissed, with prejudice. The objections and exceptions to the Court's findings, conclusions and rulings are duly noted and preserved.

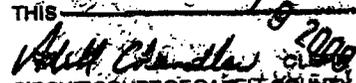
The Clerk is directed to forward certified copies of this Order to counsel of record, and to remove this civil action from the Court's docket.

ENTERED this 18th day of November, 2009.



F. Jane Husted, Judge

ENTERED Circuit Court ^{Civil} ~~Adoption~~ Order Book
No. _____ Page _____ this

STATE OF WEST VIRGINIA
COUNTY OF CASSELL
I, ADRIEL CHANDLER, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON _____ GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS _____ 2009

CIRCUIT COURT OF CASSELL COUNTY WEST VIRGINIA

CERTIFICATE OF SERVICE

William D. Levine, does hereby certify that the foregoing **Docketing Statement** was served upon counsel of record on February 10, 2010 by depositing a copy in the United States Mail, postage prepaid addressed to the following :

David D. Johnson, III
Winter Johnson & Hill PLLC
PO Box 2187
Charleston, WV 25328



William D. Levine