# Perseverance and the Doctrine of Collateral Estoppel

By David M. Saperstein

Have you ever wanted something with all your heart, but had it dangle just out of reach? You try and try again, and each time brings a new failure.

Elizabeth Blackwell applied to, and was rejected by, 29 different medical schools, before being accepted to Hobart College by mistake. She became the first woman to receive a M.D. degree from an American medical school, graduated first in her class, and established the first medical college for women.

Harland Davis Sanders submitted his fried chicken recipe to 1,009 restaurants before finding a buyer and becoming Colonel Sanders. Thomas Edison may have invented the light bulb, but he famously quipped that he first discovered 1,000 ways not to build one.

J.K. Rowling's *Harry Potter* script was rejected by all 12 major publishers, before a small publishing house accepted it and ran a small batch of 1,000 copies.

***Doctrine of Collateral Estoppel***

This is the point where I'm supposed to give a personal example of achieving success after repeated failures. But this isn't that blog.

Under Michigan law, you do not get 29 bites at the apple in litigation. In fact, you don't even get two. You only get one chance – after that, you're done.

Because legal malpractice litigation often arises out of underlying litigation, the doctrine of collateral estoppel can be particularly useful in defending legal malpractice claims. "Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Barrow v. Pritchard*, 235 Mich. App. 478, 480, 597 N.W.2d 853 (1999).

### *First Element – Final Judgment*

For the doctrine to apply, there must have been a valid, final judgment in the underlying case. Thus, a default judgment can be used to support the doctrine. *Braxton v. Litchalk*, 55 Mich. App. 708, 714-717; 223 N.W.2d 316 (1974). However, a dismissal without prejudice might not. *Roberts v. City of Troy*, 170 Mich. App. 567, 578-579, 429 N.W.2d 206 (1988) (beware that the reasoning of this opinion in regard to collateral estoppel is thin).

### *Second Element – Determination of Issue*

The most difficult element in determining whether collateral estoppel bars a claim is whether the issue in the first case was “actually and necessarily determined.” Michigan cases have held that a guilty plea prohibits an adult from contesting the elements of that crime in subsequent litigation. *State Farm Fire and Cas. Co. v. Johnson*, 187 Mich. App. 264, 266, 466 N.W.2d 287 (1990). Even a finding of probable cause at a contested hearing should foreclose relitigation of that finding in a subsequent hearing. *Smith v. Thornburg*, 136 F.3d 1070 (6th Cir. 1998).

On the other hand, in *Van Pembrook v. Zero Mfg. Co.*, 146 Mich. App. 87, 102-103, 380 N.W.2d 60 (1985), the Court held that the doctrine of collateral estoppel does not apply to consent judgments, reasoning that the issues were not determined by the Court, but instead settled by the parties:

A consent judgment reflects primarily the agreement of the parties. The action of the trial judge in signing a judgment based thereon is ministerial only. The parties have not litigated the matters put in issue, they have settled. The trial judge has not determined the matters put in issue, he has merely put his stamp of approval on the parties’ agreement disposing of those matters. But a judgment can be given collateral estoppel effect only as to those issues which were actually and necessarily adjudicated. It follows that because the issues involved in the settled case were not actually adjudicated, one of the prerequisites to giving a judgment collateral estoppel effect is not satisfied.

Similarly, a no contest plea will not support application of the doctrine of collateral estoppel. *Lichon v. American Universal Ins. Co.*, 435 Mich. 408, 429, 459 N.W.2d 288 (1990).

***Third Element (Sometimes) – Mutuality***

The element of mutuality means that neither party may use a prior judgment as an estoppel against the other unless both parties were bound by the judgment. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-327 (1979). However, this element of the collateral estoppel doctrine is not always required.

Both Michigan and federal Courts distinguish between the offensive use of collateral estoppel (where a plaintiff is seeking to estop a defendant from relitigating issues which the defendant previously litigated and lost against a third party) and its defensive use (where the defendant is seeking to estop a plaintiff who has previously litigated and lost against a third party). The Michigan Supreme Court held that collateral estoppel may be used defensively against a party that has already had a full and fair opportunity to litigate the issue. *Monat v. State Farm Ins. Co.*, 469 Mich. 679, 677 N.W.2d 843 (2004). In those instances, mutuality is not necessary to preclude a party to relitigate an issue already decided. *Id.*

As to defensive use of collateral estoppel, the United States Supreme Court noted that “[p]ermitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise fashion for fashioning rules of procedure.” *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328 (1979).

One frequently invoked example of the defensive use of collateral estoppel is when a legal malpractice Plaintiff was the criminal defendant in the underlying case. Michigan Courts hold that “the legal standards for ineffective assistance of counsel in criminal proceedings and for legal malpractice in civil proceedings are equivalent for purposes of application of the doctrine of collateral estoppel.” *Barrow v. Pritchard*, 235 Mich. App. 478, 481, 597 N.W.2d 853 (1999); *Knoblauch v. Kenyon*, 163 Mich. App. 712, 716, 415 N.W.2d 286 (1987). Consequently, “once a full and fair determination has been made that a plaintiff received the effective assistance of counsel, ‘the plaintiff has had his day in court and is now collaterally estopped from again raising the same issue’ in the form of

a claim of legal malpractice." *Barrow, supra* at 481.

On the other hand, mutuality will be required when the doctrine is used offensively. For example, a legal malpractice Plaintiff may attempt to bind a lawyer to the positions that the lawyer advocated on behalf of the client in the underlying case (e.g. "you told me the case was worth a million bucks"). The Michigan Supreme Court has rejected such attempts, holding that a lawyer "may not be punished … for [their] advocacy." *Charles Reinhart Co. v. Winiemko*, 444 Mich. 579, 587 n 16, 513 N.W.2d 773 (1994). In collateral estoppel terms, because the lawyer was not a party to the underlying suit, the element of mutuality has not been satisfied.

***Application***

Recently, we obtained summary disposition on behalf of a lawyer client who had defended the Plaintiff in the underlying criminal proceeding. In the underlying case, the lawyers' efforts had succeeded in producing an acquittal of the most serious criminal charges, but the Plaintiff was convicted of lesser included offenses. After the conviction, the Plaintiff retained new counsel. Successor counsel moved for a new trial on the basis of alleged errors by the first lawyer. When that failed, successor counsel appealed. When that also failed, the Plaintiff brought a legal malpractice action.

We argued that this presented a classic case where the defensive use of collateral estoppel barred a claim of legal malpractice, because the underlying court had already rejected the claim that the lawyer had acted inappropriately. The trial court agreed, holding that, "all of Plaintiff's allegations in the malpractice complaint can properly be considered variations of the same claims that Plaintiff made against Defendants in the criminal proceedings."

***Conclusion***

Perseverance and overcoming adversity are usually admirable traits, just not in litigation. The doctrine of collateral estoppel ensures that once an issue has been decided by a court as part of a final judgment, the losing party may not re-raise that issue in a subsequent suit. This doctrine moves litigation toward a pursuit of justice, and away from the aura of the gambling table.

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