SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3958-19

MARK CHERNALIS, ANTHONY CHERNALIS, PHYLLIS CHERNALIS, THE MARKET BASKET, INC., MERRYWOOD ASSOCIATES, LLC, ONE SUNNY HILL ASSOCIATES, LLC, TWO SUNNY HILL ASSOCIATES, LLC, and EVERGREEN PROPERTY MANAGEMENT, LLC,

Plaintiffs-Appellants,

v.

DEBRA TAYLOR, ESQ., a/k/a DEBRA HELEN AZARIAN, ESQ., TAYLOR FINANCIAL GROUP, LLC, MARTIN GOLDSTEIN, GOLDSTEIN, KARLEWICZ AND GOLDSTEIN, LLP, MARC PRESS, ESQ., COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A., DAVID EDELBLUM ESQ., FEINGOLD & EDELBLUM, LLC, and JACK ZAKIM, ESQ.,

Defendants-Respondents,

and

KATES, NUSSMAN, RAPONE,
ELLIS AND FARHI,

Defendant.

Submitted December 7, 2022 – Decided August 17, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-7619-15.

Anthony X. Arturi, LLC, attorneys for appellants (Anthony X. Arturi, on the briefs).

Donnelly Minter & Kelly, LLC, attorneys for respondents Debra Taylor, Esq. and Taylor Financial Group, LLC (David M. Blackwell, of counsel and on the brief).

Goldberg Segalla LLP, attorneys for respondents Martin Goldstein and Goldstein, Karlewicz and Goldstein, LLP (Nicole M. Crowley, of counsel and on the brief).

Pashman Stein Walder Hayden, PC, attorneys for respondents Marc Press, Esq. and Cole, Schotz, Meisel, Forman & Leonard (Roger Plawker and Justin P. Walder, of counsel and on the brief).

Traub Lieberman Straus & Shrewsberry LLP, attorneys for respondents David Edelblum, Esq. and Feingold & Edelblum, LLC (Aileen F. Droughton, of counsel and on the brief; Susan M. Kennedy, on the brief).

Tompkins, McGuire, Wachenfeld & Barry LLP, attorneys for respondent Jack Zakim, Esq. (Brian M. English, of counsel and on the brief).

PER CURIAM

This controversy returns to our court for a second time following a series of Law Division orders dismissing professional negligence claims against several attorneys, an accountant, and their associated firms, all of whom represented plaintiffs Mark and Anthony Chernalis in a complex commercial real estate transaction in 2009. Specifically, plaintiffs appeal from the following orders: (1) a January 27, 2016 order dismissing plaintiffs' claims for professional negligence against defendants Martin Goldstein and Goldstein, Karlewicz & Goldstein, LLP (collectively, "Goldstein"); (2) a July 11, 2019 order dismissing plaintiffs' complaint, with prejudice, as against defendants Debra Taylor, Esq. and Taylor Financial Group (collectively, "Taylor"); (3) a July 11, 2019 order dismissing plaintiffs' complaint, with prejudice, as against defendants Marc Press, Esq. and Cole, Schotz, Meisel, Forman & Leonard, P.A. (collectively, "Press") and defendants David Edelblum, Esq. and Feingold and Edelblum, LLC (collectively, "Edelblum"); (4) a December 20, 2019 order dismissing plaintiffs' complaint, with prejudice, as against defendant Jack Zakim, Esq.; (5) a May 18, 2020 order dismissing plaintiffs' complaint, with

prejudice, as against Goldstein; and (6) a May 18, 2020 order denying plaintiffs' motion for summary judgment. We affirm, substantially for the reasons articulated by Judge Walter F. Skrod in his various well-reasoned opinions.

We will not recite the factual antecedents of plaintiffs' appeal in great detail. Suffice it to say that this matter arises from Taylor's mistakenly overstated interest in a newly formed management entity, which was awarded to her in lieu of a fee for her work for plaintiffs in the 2009 commercial real estate transaction, which allegedly went unnoticed and/or unmentioned by the professional defendants involved. For further context, we incorporate by reference the facts set forth in our prior unpublished opinion. Chernalis v. Taylor, Nos. A-3461-14, A-3550-14 (App. Div. June 7, 2018) (slip op. at 1-15). Important here, however, is the procedural history of the matter, which we now discuss.

On July 27, 2012, plaintiffs filed a complaint against Taylor in the Chancery Division alleging breach of fiduciary duty, breach of contract, conversion, fraud, and unjust enrichment, but not professional malpractice, in relation to the overstatement of her management interest and her insistence on retaining it. Without naming Press and Edelblum as parties, plaintiffs alleged that they failed to inform plaintiffs about the overstatement; plaintiffs did not

mention Goldstein or Zakim. On August 28, 2012, Taylor filed an answer denying the allegations, asserted a counterclaim, and included a third-party complaint against an outside investor.

On March 6, 2013, plaintiffs moved for leave to amend the complaint by adding claims of professional malpractice against Taylor and Goldstein. However, the proposed first amended complaint made no new assertions about Press or Edelblum and was silent as to Zakim. On March 23, 2013, Taylor moved for leave to amend her counterclaim and third-party complaint. Taylor's proposed causes of action were based on post-transaction conduct by plaintiffs and the outside investor in derogation of her participation in income and management.

At the April 8, 2013 hearing before Judge Robert P. Contillo, plaintiffs agreed with the judge that the facts already alleged may describe malpractice as well as breach of fiduciary duty but reasoned that they did not originally plead professional malpractice due to the absence of an affidavit of merit and the hearing that its submission would have prompted. Judge Contillo observed that such professional malpractice claims come with the right to a jury trial, which "would protract the case considerably in terms of affidavits of merit, expert reports[,] and the rest of it," and that amending the complaint by adding them

risked deferring the trial, which was scheduled to begin on July 22, 2013. Plaintiffs stated that they were amenable to the severance of all malpractice claims for trial in the Law Division, and that they were only seeking leave to plead them to avoid preclusion.

First, Judge Contillo denied plaintiffs' motion for leave to add a malpractice claim against Taylor, finding that it substantially overlapped with the existing claims against her and that plaintiffs could have included it from the beginning. In so doing, he focused on how adding a malpractice claim would affect the upcoming trial:

> Again, I might have taken a different view on [the malpractice claim] had it been done from the get-go and had there been a waiver of a jury trial on it, because [Taylor] is going to be answering for a lot of the same conduct and statements under the rubric of fiduciary or financial planner or quarterback, whatever role or whatever her roles were or are found to be. But I'm not going to permit injection of the professional negligence claim against [Taylor] in this action. It should have been brought from the get-go if it was going to be brought here. If it was not going to be brought here, it can be brought elsewhere.

As for Goldstein, the judge then ruled that the proposed claim should have been included in the original complaint because there was no arguable case law bar on claims against accountants. In so doing, the judge applied much of the same reasoning: allowing the amended claim would mean including "a

professional accounting malpractice action that is going to truly complicate the case, delay the case, require a jury trial on that issue of professional negligence if Goldstein wants it, which probably he will."

In the alternative, plaintiffs asked that the malpractice claims against Taylor and Goldstein be severed and sent to the Law Division. However, the judge declined to do so, seeing no need to send the Law Division matters that can be brought on their own. Specifically, the judge reasoned that severing and transferring claims "causes all kinds of administrative problems" for both the Chancery and Law Division staffs, compared to just "stating the claims outright" in a new Law Division action.

Finally, Judge Contillo denied Taylor's cross-motion. In so doing, the judge reasoned that the only relief for which she would need her proposed amendments was the summary dissolution of the management entity, which would inject the issue of corporate valuation into the trial. The judge encouraged Taylor to file a separate action that he would "then . . . adjourn . . . until the day the trial is over."

On April 26, 2013, Judge Contillo entered an order memorializing his rulings. Within that order, the judge specified that he did not reach the question of claim preclusion and had not made "any determination," stating:

> No denial of any party's request to include in this action any claims identified in their proposed amended pleadings shall be construed in any way as any prohibition to that party's right or ability to file or pursue the same or any similar claims in any separate action, nor shall such denial by this [c]ourt be construed as any determination that any claim is precluded from being filed or pursued in any separate action.

The chancery action was then tried over fourteen days, during which plaintiffs, Taylor, Press, Zakim, Edelblum, and Goldstein all testified as to the terms of the transaction. On October 14, 2014, Judge Contillo issued his opinion, wherein he found that Taylor had acted as an attorney for plaintiffs; the other professionals "served discrete functions to [plaintiffs] as the efforts to purchase got underway—lawyers, tax advisors, financial advisors, accounting advisors, estate planners, real estate advisors," while Taylor served "in each of those capacities" due to her uniquely central role in all aspects of the transaction; and that Taylor's interest in the newly formed management entity, which she obtained as payment for her work, was greater than plaintiffs intended.

In addition, the judge found that Taylor breached her duties to plaintiffs "without even colorable compliance" with the stringent documentation and disclosure requirements of the Rules of Professional Conduct ("RPC") 1.5 and 1.8 for attorneys who enter into business ventures with their clients, which made every aspect of Taylor's participation unenforceable. For that tortious conduct,

the judge found that it was no longer appropriate for Taylor to participate in plaintiffs' family business and terminated her equity interest in the management entity and ordered a refund of her separate cash investment. However, Judge Contillo declined to find that Taylor's efforts to retain her overstated interest rose to the level of fraud or other misconduct that would warrant disgorgement of payments that she had received to date or an award of punitive damages.

Following his decision, the judge allowed for additional submissions regarding plaintiffs' claim for attorneys' fees. There, plaintiffs' alleged entitlement to attorneys' fees stemmed from two theories. First, citing Packard-Bamberger v. Collier, 167 N.J. 427, 443 (2001), plaintiffs asserted that Taylor's personal liability to pay attorneys' fees arose from the intentional tortious conduct by a lawyer against a client. Second, plaintiffs claimed an entitlement to the additional attorneys' fees they incurred by also pursuing the trust that Taylor had established in her husband's name, which was intended to receive and hold Taylor's interest in the management entity; in that regard, plaintiffs relied on the third-party exception to the American Rule. See DiMisa v. Acquaviva, 198 N.J. 547 (2009).

Ultimately, in a supplemental opinion, Judge Contillo denied plaintiffs' fee requests. On Taylor's personal liability, the judge deemed the claim

"abandoned" as plaintiffs raised it for the first time in their additional written submission on the subject. For completeness, however, the judge went on to address the claim, finding that he had "no discretionary authority" under Packard to award such fees under the instant circumstances. In that regard, the judge found that Packard did not "mandate" an award of attorneys' fees for RPC violations or for "any and all intentional misconduct by one's attorney" without regard to the degree of intentionality. In addition, the judge recognized that "Taylor was integral to the realization" of plaintiffs' transaction, "which has financially benefitted and likely continue to financially benefit [] plaintiffs for years to come," and that "Taylor has been deprived of any and all compensation for her efforts."

As for plaintiffs' claim for fees under the third-party exception, Judge Contillo found that the trust established by Taylor was "simply an alter ego" where her compensation was to be held. In so ruling, the judge recognized that the trust's "involvement in the case . . . [did] not cause[] any demonstrated extra time, labor[,] or expense to [] plaintiffs."

In April 2015, plaintiffs appealed and Taylor cross appealed. While those appeals were pending, on August 15, 2015, plaintiffs filed the instant action in the Law Division alleging professional negligence and breach of contract against

all defendants, as well as claims for breach of fiduciary duty against Press and Edelblum. In so doing, plaintiffs recounted the overstatement of Taylor's management interest and alleged that all defendants should have noticed and prevented the error prior to closing. Because plaintiff did not recover the attorneys' fees incurred in the prior action,[1] they sought, as damages, to recover those fees from each defendant.

On November 6, 2015, Taylor responded to the complaint with a motion for summary judgment on grounds that included the entire controversy doctrine ("ECD"),[2] res judicata, and collateral estoppel. Press and Edelblum eventually joined in Taylor's motion. On November 15, 2015, Goldstein responded by filing a Rule 4:6-2(e) motion to dismiss in lieu of an answer, asserting—in part—that fee shifting is not permitted against an accountant under Saffer v. Willoughby, 143 N.J. 256 (1996).

[1] After trial, plaintiffs alleged that their attorneys' fees and costs exceeded $1,000,000.

[2] See R. 4:30A.

On January 27, 2016, Judge Keith A. Bachmann granted Goldstein's motion and dismissed plaintiffs' claims for professional negligence.[3] On the "real subject matter" of the motion, which—according to the judge—was plaintiffs' "claim for attorney[s'] fees previously incurred in the chancery action," Judge Bachmann declared that it was "not a viable claim."

Judge Bachmann first explained that the case law exception to the "American Rule" was limited to legal malpractice and had not been extended to "malpractice by accountants." In that regard, the judge recognized that "plaintiffs are not seeking to recovery counsel fees in this action for legal work done in this action." Second, the judge declined to apply the third-party exception, finding that "the acts that precipitated or caused the litigation" in the chancery action were "the acts of . . . Taylor," rather than any conduct attributable to Goldstein. The judge recognized that plaintiffs had already obtained recovery for Taylor's "financial windfall" by proving that it had been generated by her "own misfeasance and/or malfeasance" in the prior action.

On February 5, 2016, Judge Bachmann denied Taylor's motion for summary judgment but dismissed the complaint without prejudice. In his

[3] However, Judge Bachmann found that plaintiffs' claims for breach of contract stood independently from their professional negligence claims against Goldstein.

statement of reasons, the judge observed that "the driving force behind this litigation is the desire of [] plaintiffs to recover the legal fees that they paid to resolve the [c]hancery action," and ruled that neither res judicata nor collateral estoppel precluded the claim. He went on to explain that plaintiffs' theory of recovery in the two actions were "sufficiently distinct": plaintiffs claimed fees in the chancery action "based on proof of a tort" that Taylor intentionally committed, which was different from their newly asserted theory of legal malpractice.

Moreover, Judge Bachmann ruled that Judge Contillo had expressly "preserved the right of [] plaintiffs to make these claims" in his April 26, 2013 order notwithstanding the ECD. In any event, the judge deemed the litigation not "ripe for adjudication," reasoning that plaintiffs' claim for attorneys' fees in the chancery action "may well be resolved" in the pending appeal of it or by Judge Contillo, if instructed to do so on remand.

In a separate order of the same date, Judge Bachmann granted Press's motion for a stay pending the resolution of the ongoing appeal of the chancery action. A third order of the same date granted a stay to Edelblum for the same reason.

On June 7, 2018, we affirmed Judge Contillo's rulings in the chancery action in all respects. Chernalis, slip op. at 17-23. Plaintiffs thus moved to reinstate the complaint, which was granted on August 17, 2018 with the exception of Judge Bachmann's January 27, 2016 dismissal of plaintiffs' claims against Goldstein.

On September 25, 2018, Taylor again submitted a motion for summary judgment in lieu of an answer, asserting many of the same preclusion arguments as raised before. On October 1, 2018, Press moved to dismiss the complaint and Edelblum joined in the motion.

On July 11, 2019, Judge Skrod, who would issue all subsequent orders in this case, granted Taylor's motion for summary judgment. The gravamen of the judge's opinion was that plaintiffs had argued the concept and predicates of legal malpractice in the chancery action's post-trial proceedings on their motion for attorneys' fees and that those arguments were among the bases on which Judge Contillo denied their claim.

Judge Skrod noted that plaintiffs did not, "for unknown tactical reasons," allege legal malpractice against Taylor and that their subsequent request to raise such a claim by motion "was denied . . . for reasons that included untimeliness." Judge Skrod further acknowledged that Judge Contillo held after trial that Taylor

violated the applicable RPCs and had committed an intentional tort, which Judge Contillo remedied by terminating Taylor's interest and participation in future financial benefits related to plaintiffs' business.

In further outlining the matter's posture, Judge Skrod went on to state that, after the previous trial, plaintiffs made an application to have Taylor pay their attorneys' fees, which relied upon DiMisa and Saffer as they relate to legal malpractice claims, "and an attorney's duty to her clients." The judge then described Judge Contillo's grounds for denying the fee motion, stating that "the post-trial relief granted compensated [] plaintiff[s] under the proffered evidence for the intentional (but no malicious) wrong Taylor committed. [Judge Contillo] also stated that Taylor's competent, albeit tortious, conduct, could/would lead to financial gain to [] plaintiffs for years to come." Then, the judge added that this court "affirmed all of the findings and conclusions reached by" Judge Contillo.

Turning his focus to the instant action, Judge Skrod found that "[p]laintiffs' claim for damages in this matter, as to any one or more of the defendants, are plaintiffs' (same) claim for attorneys' fees incurred (and denied) against Taylor in the Chancery Division action," which are "the only subject of this [L]aw [D]ivision matter." In the chancery action, Judge Contillo denied plaintiffs' fee requests under DiMisa, Packard-Bamberger, and Saffer,

notwithstanding plaintiffs' arguments—which specifically relied on those cases—to the contrary. Thus, Judge Skrod concluded that, "in effect, [Judge Contillo], without specifically saying so, reversed his own pretrial decision not to permit a legal malpractice amendment to the chancery complaint, at least as far as the plaintiffs' request for attorney[s'] fees was concerned." Judge Skrod elaborated that it was "of no moment" whether plaintiffs' post-trial motion "theory" made explicit reference to legal malpractice or not, as "the fees were sought against Taylor for Taylor's wrongdoing as the attorney for [] plaintiffs in the" transaction.

Judge Skrod then ruled that the ECD precluded plaintiffs from bringing a malpractice claim against Taylor in the instant action. In so doing, the judge found that plaintiffs had a fair and "reasonable opportunity to alleged malpractice" at the very start of the chancery action, when the parties became "adverse," yet they "tactically chose not to do so." "That the motion to amend the chancery complaint to include a malpractice claim was denied, or that the claim, pretrial, was somehow preserved by [Judge Contillo] for a later time, is of no significance." In that regard, Judge Skrod explained that, in the April 26, 2013 order, Judge Contillo merely "noted that he was not ruling on the merits of such a malpractice claim if subsequently filed," which in no way "authorize[d]

a subsequent suit in which [] plaintiffs can claim the identical damages which were claimed (and denied) post-trial under an intentional tort theory."

Judge Skrod then reached the practical equivalence of plaintiffs' fee requests against Taylor in the prior and current actions. Specifically, the judge declared that, "logically, [] plaintiffs cannot obtain fee shifting relief for a [L]aw [D]ivision negligence/malpractice claim, if they could not obtain the same fee shifting relief, against the same attorney/party, for an earlier [C]hancery [D]ivision intentional tort claim, with the same facts underlying both filed actions."

Turning to the other preclusion doctrines, Judge Skrod first ruled that the law of the case principle, which is discretionary, did not apply because, in the February 5, 2016 order, Judge Bachmann dismissed the action without prejudice and did not reach Taylor's motion for summary judgment. The reasons attached to that order, which were unrelated to the dismissal without prejudice, were dicta, pre-Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, 237 N.J. 91 (2019), and interlocutory. Thereafter, Judge Skrod found that "the facts as outlined smack of res judicata and/or collateral estoppel" and addressed the five elements of the two doctrines, which are identical, in tandem:

> 1) Issue identity – The chancery attorney[s'] fee entitlement or non-entitlment issue is the same in

the [C]hancery and [L]aw [D]ivision matters. The issue was/is plaintiffs' right to attorney[s'] fees in the chancery matter.

2) Issue was litigated – The attorney[s'] fees issue was raised by [] plaintiffs in chancery post-trial motion practice, after [Judge Contillo] determined that there was an attorney/client relationship between Taylor and [] plaintiffs. Plaintiffs raised a DiMasi claim for such fees, and cited Packard-Bamberger and Saffer as support for their claim. Even if plaintiffs' argument was limited to DiMasi, the Saffer argument to support the claim could have and should have been raised[.] Culver [v. Ins. Co. of North America, 115 N.J. 451, 463 (1988)]. Also, if plaintiff[s] state[] that its chancery post-trial motion only dealt with a DiMasi attorney[s'] fee claim, as there was no negligence/malpractice claim against Taylor, th[e]n plaintiff in effect admits those chancery attorney[s'] fees are not related to Taylor's alleged malpractice, but related only to the finding of Taylor's intentional tort. Either way, the same facts of Taylor's responsibility (call it negligence/malpractice or intentional tort) to [] plaintiffs gave rise to [] plaintiffs' attorney[s'] fee claim. Those same facts were litigated, or could have been litigated, against the same attorney (Taylor) in the chancery court. The trial court heard all of the arguments and denied the claim, which denial was affirmed on appeal.

3) Final judgment on the merits of the issue was issued – The court issued a final judgment on the attorney[s'] fee issue. There are no new facts, witnesses[,] or documents in the [L]aw [D]ivision matter on the attorney[s'] fee issue.

4) Issue determination was essential to the earlier action – [P]laintiffs raised the attorney[s'] fee issue by post-trial chancery motion practice.

5) Party privity – [P]laintiffs are the same in both actions.

Ultimately, Judge Skrod opined that "[p]laintiff[s] cannot have a [third] bite at the 'attorney[s'] fee apple,' having already lost on this issue in the Chancery Division and in the Appellate Division. "The facts of this case and its procedural history dictate dismissal as the correct result based upon the equities and fairness. The filing of this [L]aw [D]ivision matter could easily have been avoided with the specific inclusion of an attorney malpractice count in [] plaintiffs' initial 2012 chancery complaint."

That same day, Judge Skrod entered two additional orders that dismissed the complaint with prejudice as against Press and Edelblum. The accompanying opinion substantially repeated that of the one affixed to the order granting Taylor's motion, particularly on res judicata and collateral estoppel.

In addressing the ECD issue, the opinion added that plaintiffs had sufficient knowledge, during the chancery action, of the facts they would later cite in support of their malpractice claims against the other professional defendants. "Here, . . . [the] reasonable opportunity to allege malpractice was the chancery matter, because the potential for disclosure of privileged

communications . . . did not exist between [] plaintiffs" and Press and Edelblum. At that stage, the result of the transaction "was already known and was being challenged by [] plaintiffs." In that regard, Judge Skrod found that "[p]laintiffs have offered no cogent reason for not filing a malpractice claim against" Press or Edelblum in the chancery action, "especially" in light of them both having been "named as a witness, sat for a deposition[,] and testified during that trial." Therefore, the judge found that plaintiffs' claims against Press and Edelblum were barred by the ECD.

Judge Skrod also refashioned his point about the practical equivalence of the fee claims against Taylor in the prior and current actions into a point about the other professional defendants. "Logically, [] plaintiffs cannot obtain fee shifting relief for a [L]aw [D]ivision negligence/malpractice claim" against Press and Edelblum, "if they could not obtain the same fee shifting relief, against Taylor, for her intentional tort[.]"

On October 25, 2019, Zakim also moved for summary judgment. On December 20, 2019, after a hearing on the matter, Judge Skrod granted Zakim's motion and dismissed the complaint against him with prejudice. The judge's reasoning was similar to that for dismissing the complaint against Press and Edelblum, including the element in both actions that the damages claimed

against all defendants was plaintiffs' attorneys' fee in the prior action. Judge Skrod added that the absence of the other professionals "during the genesis and the discovery period in the chancery matter" was purely the result of plaintiffs' "tactical decision" not to implead them. Ultimately, the judge found that a trial in this case would proceed "on the same facts, with the same evidence, with the same damages" and, "from a judicial point of view, that sounds outrageous," because it would give plaintiffs "multiple bites at the same apple."

In February 2020, Goldstein filed a motion for summary judgment seeking to dismiss the remaining claims for breach of contract and recovery of accounting fees for the work Goldstein performed on the transaction, while plaintiffs cross-moved for summary judgment. On May 14, 2020, Judge Skrod entered an order granting Goldstein's motion, along with a separate order denying plaintiffs' cross-motion; the judge issued identical opinions for each order.

Judge Skrod began by adhering to Judge Bachmann's January 27, 2016 denial of plaintiffs' claims against Goldstein, which consisted of professional negligence and recovery of attorneys' fees incurred in the chancery action. Therefore, the "sole relief" sought by plaintiffs was a claim reimbursement of the fee charged by Goldstein for his accounting work in the underlying

transaction.[4] Under these circumstances, Judge Skrod held that plaintiffs' claim was precluded by the ECD and should have been included at the outset of the chancery action.

Specifically, the two opinions addressed the applicability of Hobart Bros. Co. v. National Fire Union Fire Ins. Co., 354 N.J. Super. 229 (App. Div. 2002) to the instant action, a case cited to by plaintiffs to establish the rarity of applying the exception embodied in Rule 4:5-1(b)(2) to preclude claims against new parties pursuant to the ECD.[5] There, the judge recognized Hobart's elimination of mandatory party joinder under the ECD and outlined the factors in Rule 4:5-1(b)(2), as addressed in that case, necessary for precluding plaintiffs' claims against the other professional defendants, which are "inexcusable conduct and substantial prejudice to the non-party." Hobart, 354 N.J. Super. at 242.

First, Judge Skrod ruled that plaintiffs' "tactical decision" not to name the other professional defendants in their first chancery complaint was "inexcusable

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[4] Goldstein's accounting fee totaled approximately $67,500.

[5] Judge Skrod cited Hobart as additional support for his rulings and, on July 22, 2020, supplemented his orders on the motions by Taylor, Press, Edelblum, and Zakim to include that he was relying on his Hobart analysis for those defendants, as well.

under Hobart" because plaintiffs knew that they had grounds to claim malpractice against them when they filed the chancery action and were already adverse to one another for purposes of claim accrual. While it was "certainly possible" that plaintiffs' omission of "known, allegedly culpable, attorney and accounting professional as defendants" in the chancery action reflected their belief that they "would secure an attorney[s'] fee award against Taylor under an intentional tort theory," they "apparently did not consider the possibility that [Judge Contillo] would deny such an [] award despite" their success at trial. Thus, the omission was inexcusable because it led to a duplicative action "seeking the same attorney[s'] fee award that was claimed and denied post trial in the Chancery Division and in the Appellate Division."

Next, Judge Skrod found that the other professional defendants suffered "[s]ubstantial prejudice under Hobart," reasoning that:

> [T]hey were all witnesses in the [c]hancery matter. The witnesses were all deposed. The witnesses all testified at trial. Now[,] a second lawsuit is brought in the Law Division and concerns the same claims, for the same damages, brought against the parties, arising out of the same facts, all of which was known to the plaintiffs prior to the commencement of the Chancery Division matter.

Finally, under Dimitrakopoulos, the judge found that "fairness and equity, under all the circumstances of the tortured history of this case, dictate that dismissal is the correct result." In that regard, Judge Skrod stated:

> The bottom line is that . . . Judge Contillo ruled in favor of [] plaintiffs, fashioned a post-trial remedy for []plaintiffs, inclusive of legal and equitable relief, including the complete forfeiture of Taylor's challenged financial rights under the transaction, as well as the complete forfeiture of Taylor's admitted financial rights under the transaction, all of which were returned/given to [] plaintiffs. Judge Contillo found, as a matter of right and discretion, that such relief compensated plaintiff under a totality of the facts adduced at the [c]hancery trial (same facts as this Law Division case), and denied plaintiff[s'] post-trial request for any attorney[s'] fee award which plaintiffs claimed was necessitated by Taylor's intentional tort. There are no other "non attorney fee" damages claimed in this Law Division matter, except the accounting fee reimbursement discussed in this motion. That isolated claim, minimal in value compared to the millions of dollars which were the subject of the [c]hancery trial, should have been brought, as noted by Judge Contillo, as part of the initial [c]hancery complaint. To rule otherwise in this Law Division matter would be to encourage fragmented, never ending litigation.

This appeal followed. On appeal, plaintiffs raise the following arguments:

> I. THE ECD SHOULD NOT HAVE BEEN APPLIED TO BAR ANY CLAIMS MADE FOR PROFESSIONAL NEGLIGENCE AGAINST EITHER NON-PARTIES TO THE CHANCERY ACTION, OR TAYLOR.

A. Taylor Expressly Waived the Right to Assert ECD Protection.

B. None of the Other Defendants Were Protected by the ECD under Dimitrakopoulos v. Borrus, 237 N.J. 91 (2019).

C. None of the Defendants Satisfied the "Special Exception" for Mandatory Party Joinder Set Forth In Hobart Bros. v. National Union Fire Ins. Co. 354 N.J. Super. 229 (App. Div 2002).

D. Judge Skrod Also Ignored that the ECD is an Equitable Doctrine.

II. IT WAS AN ABUSE OF DISCRETION FOR JUDGE SKROD TO DISREGARD THE PREVIOUS AND OPPOSITE RULING OF JUDGE BACHMANN AS TO COLLATERAL ESTOPPEL AND RES JUDICATA.

III. JUDGE BACHMANN'S RULING WAS CORRECT THAT COLLATERAL ESTOPPEL AND RES JUDICATA DID NOT APPLY TO THE CURRENT PROFESSIONAL NEGLIGENCE CLAIMS THAT WERE NOT ACTUALLY LITIGATED IN THE CHANCERY ACTION, AND SHOULD HAVE BEEN FOLLOWED.

IV. CHERNALIS'S UNREIMBURSED LEGAL FEES FROM THE CHANCERY ACTION ARE ALLOWED COMPENSATORY DAMAGES AGAINST GOLDSTEIN FOR HIS PROFESSIONAL NEGLIGENCE.

V. CHERNALIS'S COMPLAINT STATES A CLAIM FOR PUNITIVE DAMAGES AGAINST PRESS AND EDELBLUM PURSUANT TO THE R. 4:6-2(E) STANDARD.

Having scrutinized the voluminous record and tortured history of this case, and considering the applicable legal principles, we reject plaintiffs' arguments and affirm, substantially for the reasons stated by Judge Skrod. Because his factual findings and legal conclusions are fully set forth above, we will not reiterate them here. We are satisfied that the judge employed the correct legal analysis in concluding that the claims against Taylor are barrd by Rule 4:30A and the claims against the other professional defendants are barred by Rule 4:5-1(b)(2). We add the following comments.

When a party relies on the ECD to move for dismissal or summary judgment, the general standards of application and review for such motions are followed. Dimitrakopoulos, 237 N.J. at 106-08. The decision reached on a Rule 4:6-2(e) motion is reviewed de novo, Id. at 108, "governed by the same standards as applied by the trial court." McVey v. AtlantiCare Med. Sys. Inc., 472 N.J. Super. 278, 286 (App. Div. 2022). Similarly, we review grants of summary judgment "de novo, applying the same standard used by the trial court." Samolyk v. Berthe, 251 N.J. 73, 78 (2022).

The ECD is codified in Rule 4:30A, which—in relevant part—provides that, "[n]on-joinder of claims required to be joined by the [ECD] shall result in the preclusion of the omitted claims to the extent required by the [ECD.]" The purpose of the doctrine is to prevent piecemeal decisions, promote fairness to the parties, and advance the goal of judicial efficiency." Sklodowsky v. Lushis, 417 N.J. Super. 648, 655 (App. Div. 2011). Thus, the ECD "embodies the principle that the adjudication of a legal controversy should occur in one litigation in only one court; accordingly, all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy." Highland Lakes Country Club & Cmty. Ass'n v. Nicastro, 201 N.J. 123, 125 (2009) (quoting Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 15 (1989)).

For purposes of the ECD's application, a "controversy . . . arises from a core set of related factual circumstances [that] may trigger different claims against different parties," and its hallmark is "this commonality of facts, rather than the commonality of issues, parties[,] or remedies[.]" DiTrolio v. Antiles, 142 N.J. 253, 272 (1995). For any omitted claim, the test for relatedness is whether the "parties or persons will, after final judgment is entered [without a determination on the omitted claim], be likely to have to engage in additional

litigation to conclusively dispose of their respective bundles of rights and liabilities that derive from a single transaction or related series of transactions[.]" Id. at 268.

Although the doctrine "seeks to impel litigants to consolidate their claims . . . whenever possible," Dimitrakopoulos, 237 N.J. at 108 (quoting Thornton v. Potamkin Chevrolet, 94 N.J. 1, 5 (1983)), it "remains an equitable doctrine whose application is left to judicial discretion based on the factual circumstances of individual cases." Bank Leumi U.S.A. v. Kloss, 243 N.J. 218, 227 (2020) (quoting Dimitrakopoulos, 237 N.J. at 114). In that regard, "a court should not preclude a claim under the [ECD] if such a remedy would be unfair in the totality of the circumstances and would not promote the doctrine's objectives of conclusive determinations, party fairness, and judicial economy and efficiency." Dimitrakopoulos, 237 N.J. at 119. The doctrine's purpose is to prevent parties from purposely withholding claims for strategic reasons; it "'is not intended to be a trap for the unwary.'" Hobart, 354 N.J. Super. at 241 (quoting Joel v. Morrocco, 147 N.J. 546, 554 (1997)).

While Rule 4:30A applies to "non-joinder of claims," Rule 4:5-1(b)(2) "address[es] joinder of parties." Kent Motor Cars, Inc. v. Reynolds & Reynolds Co., 207 N.J. 428, 444 (2011). The purpose of Rule 4:5-1(b)(2) "is to implement

the philosophy of the [ECD]." Pressler & Verniero, Current N.J. Court Rules, cmt 2.1 on R. 4:5-1 (2023) (citations omitted).

Specifically, Rule 4:5-1(b)(2) requires each party to include the following within its first pleading:

> a certification as to whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding, or whether any other action or arbitration proceeding is contemplated; and, if so, the certification shall identify such actions and all parties thereto. Further, each party shall disclose in the certification the names of any non-party who should be joined in the action pursuant to R. 4:28 or who is subject to joinder pursuant to R. 4:29-1(b) because of potential liability to any party on the basis of the same transactional facts. Each party shall have a continuing obligation during the course of the litigation to file and serve on all other parties and with the court an amended certification if there is a change in the facts stated in the original certification. The court may require notice of the action to be given to any non-party whose name is disclosed in accordance with this rule or may compel joinder pursuant to R. 4:29-1(b).
>
> [R. 4:5-1(b)(2).]

"The Rule demands only disclosure, explicitly leaving it to the court to decide whether to require that notice of the action be given to any non-party identified or to compel that party's joinder." Kent Motor Cars, Inc., 207 N.J. at 445. The Rule continues:

> If a party fails to comply with its obligations under this rule, the court may impose an appropriate sanction including dismissal of a successive action against a party whose existence was not disclosed or the imposition on the non-complying party of litigation expenses that could have been avoided by compliance with this rule. A successive action shall not, however, be dismissed for failure of compliance with this rule unless the failure of compliance was inexcusable and the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action.
>
> [R. 4:5-1(b)(2) (emphasis added).]

Thus, Rule 4:5-1(b)(2) set a high enforcement threshold by disallowing dismissal of newly named parties in a successive action unless the court finds that the late assertion was: (1) "inexcusable"; and (2) that "the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action." In its consideration of these factors, courts must undertake an analysis of whether the failure to name the parties "should be characterized as inexcusable," and of whether the "claims of prejudice" by the new parties are "valid." Hobart, 354 N.J. Super. at 242. A reviewing court will usually "decline to answer those questions in the first instance." Ibid.

As to the first factor, the analysis of whether the failed disclosure was inexcusable should include determinations of what "impelled" it and whether

that course of action was reasonable under the circumstances. Id. at 243. For instance, a failure would be inexcusable if a party "purposely withheld claims from an earlier suit for strategic reasons or to obtain 'two bites at the apple.'" Id. at 241 (quoting Hillsborough Twp. Bd. of Educ. v. Faridy Thorne Frayta, 321 N.J. Super. 275, 284 (App. Div. 1999)). Turning to the second factor, a new party would be substantially prejudiced if it would face greater difficulty in defending against the new claim in the subsequent action as compared to defending against it in the first action. Kent Motor Cars, Inc., 207 N.J. at 448-49.

We have observed that the two factors in Rule 4:5-1(b)(2) are not independent of each other or the larger equitable determination about preclusion: "the factors of inexcusable conduct and substantial prejudice are, in a sense, inter-related. They are different points along a graded spectrum, but it is the final result they produce which must be weighed in deciding whether fairness requires that a party be precluded from presenting its claim." Hobart, 354 N.J. Super. at 244. In fact, it has been recognized that "the existence of substantial prejudice will often serve to render the underlying conduct inexcusable." Center for Pro. Advancement v. Mazzie, 347 F. Supp. 2d 150, 156 (D.N.J. 2004).

Guided by these legal principles, we affirm Judge Skrod's holding that "fairness and equity, under all the circumstances of the tortured history of this case, dictate that dismissal is the correct result." As a preliminary matter, we agree that Judge Contillo's April 26, 2013 order did not immunize plaintiffs against preclusion of the malpractice claims; to the contrary, he merely refrained from giving any opinion on the viability of such claims if later filed.

Concerning plaintiffs' claims for attorneys' fees against Taylor, Judge Skrod correctly found Rule 4:30A barred the issue, as it was actually litigated and decided against plaintiffs in the chancery action, and we affirmed that decision in all respects. Chernalis, slip op. at 17-23. We also find ample support in the record to support Judge Skrod's finding that the claims against the other professional defendants are barred by Rule 4:5-1(b)(2). In that regard, we agree that plaintiffs made a "tactical decision" not to raise their known malpractice claims in the chancery action based on their miscalculation that Taylor's intentional acts alone warranted a fee award. Plaintiffs' purposeful withholding of the malpractice claims to get a second bite at the apple is the type of inexcusable non-joinder that satisfies party preclusion under Rule 4:5-1(b)(2). In addition, we agree that all defendants would be severely prejudiced by being forced to relitigate the same factual issues under the guise of a different legal

theory. Therefore, we conclude that the judge's analysis and application of the ECD is legally unassailable and certainly did not exceed the bounds of his judicial discretion. See Kent Motor Cars, Inc., 207 N.J. at 446.

To the extent that we have not address plaintiffs' additional arguments, we find that they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.