STATE OF MICHIGAN

COURT OF APPEALS

JACKOB TRAKHTENBERG, Plaintiff-Appellant,	UNPUBLISHED November 7, 2013
v	No. 285247 Oakland Circuit Court
DEBORAH H. MCKELVY, Defendant-Appellee.	LC No. 2008-088401-NM

ON REMAND

Before: MURRAY, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

In *Trakhtenberg v McKelvy*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2009 (Docket No. 285247) ("*Trakhtenberg v McKelvy I*"), this panel affirmed the grant of summary disposition to defendant in this legal malpractice case under MCR 2.116(C)(8) and (10) based on the attorney judgment rule; it declined to address whether summary disposition of the claim was also proper based on collateral estoppel. Thereafter, the Supreme Court found in *People v Trakhtenberg*, 493 Mich 38; 826 NW2d 136 (2012) ("*People v Trakhtenberg III*"), that the ineffective-assistance-of-counsel claim in the criminal proceeding was not cross-collaterally estopped by resolution of the civil legal malpractice claim because plaintiff did not have a full and fair opportunity to litigate that claim. The Supreme Court further held that plaintiff was entitled to a new trial based on the ineffective assistance of counsel provided by defendant. After having held plaintiff's application for leave in *Trakhtenberg v McKelvy I* in abeyance pending a decision in *People v Trakhtenberg III*, see *Trakhtenberg v McKelvy*, 780 NW2d 828 (2010) ("*Trakhtenberg v McKelvy II*"), the Supreme Court then issued an order on March 27, 2013, stating:

> [W]e REVERSE the Oakland Circuit Court's ruling that the defendant was entitled to summary disposition of the plaintiff's legal malpractice claim on a collateral estoppel theory. We further VACATE the judgment of the Court of Appeals and we REMAND this case to the Court of Appeals for reconsideration in light of our decision in *People v Trakhtenberg* [*III*]. [*Trakhtenberg v McKelvy*, 493 Mich 946; 828 NW2d 18 (2013) ("*Trakhtenberg v McKelvy III*").]

On remand we hold that plaintiff has stated a claim for legal malpractice and that summary disposition was improper because a genuine issue of material fact exists with respect to whether defendant breached a duty of care owed to plaintiff. Accordingly, we reverse the trial court's order and remand this matter for further proceedings consistent with the opinions of this Court and our Supreme Court.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was convicted of three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a),[1] for twice touching the genitals of his daughter and once having her touch his genitals. Plaintiff testified at the criminal trial that at the insistence of his ex-wife, hereinafter "Tetarly," he applied ointment to his daughter's genitals to treat a yeast infection. Plaintiff denied that his daughter touched his genitals. See *People v Trakhtenberg III*, 493 Mich at 43-44. On direct examination, Tetarly denied asking plaintiff to treat the yeast infections with ointment, *id.* at 43, and on rebuttal, she testified that the child was not using ointment at the relevant time and again denied that she had asked plaintiff to apply ointment. See *People v Trakhtenberg I*, slip op at 1.

Following plaintiff's conviction, this Court held that plaintiff failed to establish a claim of ineffective assistance of counsel for failure to impeach Tetarly with evidence of bias, stating:

> The evidence submitted on appeal related to incidents between defendant [herein plaintiff] and Tetarly that occurred during an apparently acrimonious divorce more than four years before the charges of sexual abuse arose and there is no evidence that Tetarly was still bitter over those events. Even assuming that an inference of bias could be inferred from the events that occurred during the divorce,[2] there is nothing in the record to suggest that defendant [herein plaintiff] advised his attorney about those events and defense counsel "cannot be found ineffective for failing to pursue information that his client neglected to tell him." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). [*People v Trakhtenberg I*, slip op at 2.]

Tetarly filed a civil action on behalf of the victim against plaintiff on February 6, 2006. A jury ultimately returned a verdict of no cause of action. See *People v Trakhtenberg II*, slip op at 2.

Plaintiff then filed the legal malpractice action that is the subject of this appeal. The trial court granted summary disposition based on collateral estoppel, concluding that the unsuccessful

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[1] Plaintiff represents that, following *People v Trakhtenberg III*, the prosecutor elected to forego re-prosecution and dismissed the charges.

[2] A police report indicated that Tetarly had tried to hit plaintiff with her car and she was arrested on domestic violence charges for assaulting plaintiff while he was driving. See *People v Trakhtenberg III*, 493 Mich at 44.

assertion of the ineffective assistance of counsel claim in the criminal case barred plaintiff from relitigating the same claim in a legal malpractice case. See *Trakhtenberg v McKelvy I*, slip op at 4. Moreover, the trial court found that the claim was barred by the attorney-judgment rule discussed in *Simko v Blake*, 448 Mich 648; 532 NW2d 842 (1995). See *Trakhtenberg v McKelvy I*, slip op at 4. As previously indicated, in *Trakhtenberg v McKelvy I*, this panel affirmed the grant of summary disposition based on the attorney-judgment rule and declined to address collateral estoppel.

On December 16, 2008, while the malpractice case was pending in this Court, plaintiff filed a motion for relief from judgment in the trial court pursuant to MCR 6.500 *et seq.*, arguing that he was entitled to a new trial. See *People v Trakhtenberg II*, slip op at 2. Based primarily on the testimony from the civil trial that resulted in a verdict of no cause of action, plaintiff argued that there was newly discovered evidence and that counsel was ineffective for failing to call witnesses. Specifically, plaintiff's teenage son had testified that the victim said she missed plaintiff, that he had told the victim it was wrong for her to go into plaintiff's bedroom, and that plaintiff would yell at the victim and tell her to return to her room when she asked if she could come into his bedroom at night. Moreover, the victim had testified that she did not like plaintiff, that Tetarly told her that plaintiff had married and had a child only to gain custody of the teenage son, and that both Tetarly and plaintiff had applied the ointment to her vaginal area and then that plaintiff had never applied ointment. Additionally, the forensic interviewer testified that the victim said she touched plaintiff's "private area" twice but denied that plaintiff had ever touched her vagina, that at a police officer's direction Tetarly asked the victim whether plaintiff had ever touched her "with his fingers" and she responded affirmatively, that the officer interviewed the victim and asked leading questions, and that the officer could have testified at the criminal trial regarding "the proper forensic interviewing technique, including protecting a child from taint and suggestibility," and that "improper interrogation techniques can distort a child's recollection and undermine the reliability of her statements." Also, it was established that polygraph examination results were favorable to plaintiff. See *id.*, slip op at 2-3.

The trial court denied the relief from judgment motion, concluding the outcome of the trial would not have been different since the victim did not change her core testimony. *Id.* at 3. This Court denied leave to appeal, *People v Trakhtenberg*, unpublished order of the Court of Appeals, entered March 20, 2009 (Docket No. 290336), but the Supreme Court remanded for consideration as on leave granted and directed that the case be remanded "for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine whether the defendant [herein plaintiff] was deprived of his right to the effective assistance of counsel and whether the defendant [herein plaintiff] is entitled to a new trial based on newly discovered evidence." *People v Trakhtenberg*, 485 Mich 1132; 779 NW2d 823 (2010).

On remand, pursuant to this Court's subsequent order, *People v Trakhtenberg*, unpublished order of the Court of Appeals, entered May 19, 2010 (Docket No. 290336), a *Ginther* hearing was held. This Court summarized the evidence at this hearing in *People v Trakhtenberg II*, slip op at 3-6, as follows:

> Tetarly testified that the victim, then 13 years old, was writing a book about what had happened to her and desired to have it published. Tetarly recalled that when the victim told her that defendant [herein plaintiff] had placed her hand

on his genital area, Tetarly believed that the victim was confused. Tetarly told the victim that [he] probably just wanted to warm up her hands by placing them between his thighs. The victim became angry and asked Tetarly why she always tried to excuse [his] conduct. Tetarly claimed that she called Child Protective Services within 30 hours after the victim's disclosure. She also claimed that, four days later, the victim disclosed that [he] had touched her vagina.

Tetarly testified that Hesskel was three years old when she moved in with defendant [herein plaintiff]. According to Tetarly, on one occasion when she and Hesskel were alone, he told Tetarly that he wanted to show her how he kisses his mother. He said that his mother would lie on her back and he would "climb on top of her and [they] do wiggle [sic]." Hesskel also told her that he kissed his mother "on the titties" and the "pee-pee." Defendant [herein plaintiff] and his ex-wife, Hesskel's mother, were involved in a custody dispute at that time and his ex-wife's visitation was suspended as a result of Hesskel's disclosures. Defendant [herein plaintiff] was ultimately awarded custody.

Tetarly did not recall a detective telephoning her and telling her to ask the victim if defendant [herein plaintiff] had ever touched her vagina. She did recall, however, calling a detective and telling him that the victim had indicated that [he] touched her at least twice on her vagina. Tetarly claimed that the victim overheard her say that the only reason that [he] married her and impregnated her was so that he could gain custody of Hesskel. Tetarly denied making that statement directly to the victim. Tetarly maintained that the victim did not have a yeast infection around the time that the victim said defendant [herein plaintiff] had touched her vagina. Tetarly denied giving [him] ointment to apply to the victim's vaginal area.

Amy Allen, who testified at [the] civil, but not criminal, trial testified at the *Ginther* hearing. The parties stipulated to Allen's qualifications as an expert in forensically interviewing children. Allen testified regarding the Michigan Forensic Interviewing Protocol, which includes preventing the "taint" of a child because of poor or leading questions. Allen was not aware that the victim had discussed the allegations with her youth pastor before Allen interviewed her.[3] Allen asserted that it would have been useful to know this fact when she interviewed the victim. She interviewed the victim in March 2005, and the victim disclosed that she had touched defendant's [plaintiff's] "privates" on two occasions. She did not disclose that [he] had inappropriately touched her. After her interview with the victim, Allen became aware that the victim claimed that [he] had touched her vagina. Before the *Ginther* hearing, defendant's [plaintiff's]

[3] Tetarly had disclosed for the first time at the *Ginther* hearing that "before reporting the complainant's allegations of abuse to authorities, she brought the complainant to a youth pastor." *People v Trakhtenberg III*, 493 Mich at 45.

attorney told Allen that this disclosure was made when Tetarly asked the victim directly whether defendant [herein plaintiff] had touched her vagina with his fingers. Allen testified that this method of questioning did not conform to the correct protocol and is the least preferred way to question a child. Allen indicated that some children initially disclose limited information about sexual molestation and thereafter disclose more details about the molestation.

Defendant [herein plaintiff], who was 73 years old at the time of the *Ginther* hearing, testified that he accumulated substantial wealth before he retired. After divorcing his second wife, there was a custody dispute over Hesskel and he was awarded custody. Eventually, problems developed between [him] and Tetarly and they divorced. [He] claimed that he told his attorney, Deborah McKelvy, that Hesskel had yelled at the victim to go back to her bedroom when she wanted to go to defendant's [plaintiff's] bedroom. [He] also claimed to have told McKelvy that Hesskel was sitting in the car when Tetarly asked [him] to apply the ointment to the victim's vagina to treat a yeast infection. [He] gave McKelvy more than 800 pages of documents to review and told her that Tetarly had accused Hesskel's mother of molesting him, similar to her allegations against [him] regarding the victim. McKelvy did not offer any of the 800 pages as evidence in [the] criminal trial. [He] gave McKelvy a list of questions to ask Hesskel, but she never talked to Hesskel outside of court. Further, [he] discussed with McKelvy the people he wanted to call as witnesses,[4] but McKelvy did not present any witnesses other than [him]. [He] further claimed that McKelvy did not allow him to testify regarding the animosity between he and Tetarly and his belief that Tetarly fabricated the allegations to obtain his money.

William Lansat also testified at the *Ginther* hearing. He was appointed to represent defendant [herein plaintiff] in the proceedings to terminate his parental rights based on the victim's accusations. Defendant [herein plaintiff] discussed with Lansat the witnesses that he wanted to testify in his criminal trial, including Hesskel, Tetarly, and Care House employees. Lansat instructed him to talk to McKelvy. Lansat told McKelvy that she could have copies of whatever documents were contained in his file regarding the termination case, and she accepted his offer. Lansat maintained that if he had gone to trial in the termination proceeding, he would have called Tetarly, Hesskel, and Care House employees to testify.[5]

Jerome Sabbota, an expert in criminal defense, also testified at the *Ginther* hearing. He testified that in cases involving Care House, he requests all records pertaining to the Care House interview. He also testified that he would have called Allen to testify, cross-examined the victim about going into [the] bedroom,

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[4] The witnesses he requested included Allen. See *People v Trakhtenberg III*, 493 Mich at 46.

[5] Allen was a Care House employee.

cross-examined Tetarly, and, at a minimum, interviewed Hesskel. Regarding the uncertainty of the conduct that pertained to each charge, Sabbota testified that he would have filed a bill of particulars to "lock" the prosecution to a theory of which conduct pertained to which charge.

Lawrence Wasser, a forensic polygraph examiner, also testified at the *Ginther* hearing. He performed a polygraph examination on defendant [herein plaintiff] and asked [him] three questions, all of which inquired whether [he] put his finger or ointment "into the lips of the victim's vagina." [He] responded "no" to each question, and Wasser opined that [he] had been truthful.

Dr. Katherine Okla, a licensed clinical psychologist, testified regarding the Michigan Forensic Interviewing Protocol and how it pertains to this case. She opined that expert testimony could have assisted defendant's [plaintiff's] case by explaining how to weigh the victim's testimony and the reliability of her statements. She opined that the victim's statements to her mother were suspect, but conceded that defendant's [plaintiff's] admission that he touched her vagina allayed some of her concerns about the victim's claims being the result of violations of questioning protocol. Dr. Okla also testified regarding a notebook that contained the victim's description of the incidents. The trial court admitted the notebook as evidence.

Defendant's [plaintiff's] attorney, McKelvy, testified at the *Ginther* hearing. She acknowledged that the five charges in the information did not specify the conduct that pertained to each charge, that she waived a preliminary examination, and that she did not file a motion for a bill of particulars but maintained that these were matters of trial strategy. She believed that it would be difficult for the prosecution to prove the charges without having specified the conduct that constituted each charge. She also believed that the trial court would likewise be confused regarding which conduct pertained to which charge. In addition, McKelvy determined that it would benefit defendant [herein plaintiff] if the prosecutor did not have an opportunity to see the victim testify before trial and that this was a factor in her decision to waive the preliminary examination.

Regarding the allegations that the victim touched defendant's [plaintiff's] genital area, McKelvy said that her strategy was to challenge the victim's credibility. McKelvy noted several inconsistencies in the victim's statements, the police reports, and the Child Protective Services report regarding how many times the touching occurred. With respect to the allegations that [he] touched the victim's vagina, McKelvy's strategy was to show that the touching was not for the purpose of sexual gratification. She explained that her strategy accounted for the fact that [he] admitted touching the victim's vagina on several occasions.

McKelvy denied that [defendant (herein plaintiff)] gave her lists of proposed questions for witnesses. She decided not to call Hesskel as a witness because his testimony would not have been relevant to the issues whether the abuse occurred or whether defendant [herein plaintiff] acted with sexual intent.

> She did not recall [him] telling her that Hesskel was present when Tetarly told him to apply the ointment. Every time she spoke with [him], he added a new piece of information that she had not heard before. McKelvy did not allow [him] to testify regarding his acrimonious relationship with Tetarly because she wanted to make him seem as credible as possible. She also did not want to open the door to his personality traits and was aware that the psychological profiles of him were not complimentary. Moreover, she did not believe that [his] relationship with Tetarly was relevant to whether he touched the victim for the purpose of sexual gratification. McKelvy did not interview Hesskel, Tetarly, or the Care House workers and did not call expert witnesses or psychologists because they could not testify regarding [his] intent when he admittedly touched the victim's vagina multiple times. McKelvy believed that the primary issues in the case were whether [he] touched the victim for sexual gratification and whether he forced the victim to touch his genital area. Calling additional witnesses would not have assisted her strategy.[6] Further, McKelvy did not pursue an "evil mom" defense because she believed it would open the door to testimony unfavorable to defendant [herein plaintiff]—an unsympathetic witness in light of his personality.

The trial court granted the motion for a new trial. Although it found that the "no sexual gratification/denial defense" was objectively reasonable, it concluded that the "sinister or bad mom" defense would also have been objectively reasonable. See *People v Trakhtenberg II*, slip op at 6. It rejected the newly discovered evidence argument, finding that the materiality of the polygraph results and notebook may have been newly discovered but that it was not newly discovered evidence. *Id.*, slip op at 6-7.

This Court reversed. Noting that the trial court had "acknowledged that McKelvy's decision [to present the one defense] was objectively reasonable and "'sound and insightful,'" it concluded that "her representation did not fall below an objective standard of reasonableness" on this basis. *People v Trakhtenberg II*, slip op at 7. Moreover, it rejected the remaining claims of ineffective assistance. With respect to the claim "that McKelvy was ineffective for failing to impeach Tetarly's testimony and establish her bias," this Court held that MCR 6.508(D)(2) precluded relief from judgment on this basis because the issue had been adversely decided in *People v Trakhtenberg I*, and that the law of the case doctrine also precluded a different result. See *People v Trakhtenberg II*, slip op at 8-9. Regarding "McKelvy's decisions regarding the introduction of evidence, including exhibits, calling additional witnesses, cross-examining Tetarly, and cross-examining the prosecution's other witnesses," *People v Trakhtenberg II*, slip op at 13, this Court held that defensive collateral estoppel barred the ineffective assistance claim; specifically, it found that these issues had previously been addressed by this panel's decision in *Trakhtenberg v McKelvy I* and this Court's prior decision in *People v Trakhtenberg I*. See *People v Trakhtenberg II*, slip op at 11-13. Regarding arguments not previously addressed, this

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[6] "Defense counsel testified that she was unaware of the complainant's continued therapy, her feelings toward defendant, her testimony in the civil trial that defendant applied medication to her vagina, and her meeting with a youth pastor." *People v Trakhtenberg III*, 493 Mich at 47.

Court concluded that McKelvy "waived defendant's preliminary examination and did not file a motion for a bill of particulars to ascertain the conduct that constituted each charge as a matter of trial strategy," *People v Trakhtenberg II*, slip op at 13-14, and that McKelvy employed a reasonable trial strategy. *Id.*, slip op at 14. Accordingly, the Court reversed the trial court's grant of the motion for relief from judgment based on the ineffective assistance claim. *Id.* Regarding the newly discovered evidence claim, this Court determined that the testimony of two witnesses who were not known to McKelvy would not have been favorable to plaintiff, that the polygraph test was irrelevant since he was charged with sexual contact and it established only that there had been no penetration, and that the victim's notebook, although newly discovered, would not have been favorable to plaintiff. *Id.*, slip op at 15-16. Regarding the other allegedly new evidence, this Court stated:

> Tetarly and the victim testified at defendant's criminal trial, and McKelvy determined that Hesskel's testimony was not necessary. McKelvy was also aware that Amy Allen had interviewed the victim at Care House and decided not to interview Allen or call her to testify. Therefore, these witnesses were known before trial and their post-criminal trial testimony does not constitute newly discovered evidence. Further, Dr. Okla's testimony could have been discovered before trial if McKelvy's strategy had involved presenting expert testimony. Thus, Dr. Okla's testimony likewise does not constitute newly discovered evidence. [*People v Trakhtenberg II*, slip op at 15].

As previously noted, the Supreme Court reversed in *People v Trakhtenberg III*. It held that this Court erred in applying cross-over collateral estoppel (crossing over from a civil to a criminal proceeding), stating:

> We hold that the Court of Appeals erred when it applied collateral estoppel to preclude its review of defendant's ineffective-assistance-of-counsel claim because defendant did not have a full and fair opportunity to litigate his claim in the malpractice proceeding. Considering the nature of the forum in which defendant's allegations concerning counsel's errors were initially rejected, it is clear that defendant's interest when pursuing his civil malpractice claim differed from his interest in asserting his constitutional right to effective counsel in the criminal proceeding. Indeed, defendant sought monetary gain in the malpractice case, whereas in his criminal case he seeks protection of a constitutional right and his liberty. Accordingly, because defendant has a different and most likely stronger incentive to litigate counsel's errors in the criminal proceeding, the prior civil litigation concerning counsel's alleged claims of error did not afford defendant a full and fair opportunity to litigate his ineffective-assistance-of-counsel claim. [*People v Trakhtenberg III*, 493 Mich at 50-51.]

The Court went on to hold that defendant was denied the effective assistance of counsel. It indicated that counsel would have to provide a reasonable basis for a chosen strategy, *id.* at 53 n 8, and stated:

> In this case, the trial court and the Court of Appeals erred by failing to recognize that defense counsel's error was the failure to exercise reasonable professional judgment when deciding not to conduct any investigation of the case in the first instance. Accordingly, no purported limitation on her investigation of the case can be justified as reasonable trial strategy. We hold that because defense counsel failed to exercise reasonable professional judgment when deciding to forgo particular investigations relevant to the defense, her representation fell below an objective standard of reasonableness. [*Id.* at 52-53 (footnotes omitted).]

Further, the Supreme Court found that counsel failed

> "to identify the factual predicate of each of the five charged counts of CSC-II" and "was left without a competent understanding of the prosecution's theories of guilt." [*Id.* at 493 Mich at 53.]
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> "to consult with key witnesses who would have revealed weaknesses in the prosecution's case," particularly Allen, and to consult an expert regarding how the victim made her allegations "*before* she decided to pursue a defense strategy for which she concluded that no further investigation was necessary." [*Id.* at 53-54 (emphasis in original).]
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> "to sufficiently develop the defense that was actually presented at trial" by cross-examining Tetarly and adequately impeaching the victim, which resulted from "counsel's unreasonable decision to forego any investigation in this case," as evidenced by counsel's admission that, if discovered, "she would have (1) impeached the complainant with her additional inconsistent statements regarding the number of times defendant allegedly forced her to touch him, (2) impeached the complainant and Tetarly regarding the complainant's impression that defendant did not love her, and (3) consulted experts and Allen regarding proper forensic-interviewing protocol." [*Id.* at 54-55.]
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> to interview Hesskel, given that he was "intimately familiar with the relationship between defendant [plaintiff herein] and the complainant" and might have provided corroborating testimonial evidence. [*Id.* at 55.]
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> to find the evidence now being identified as "newly discovered." [*Id.* at 55 n 10.[7]]

[7] As previously stated, this Court had concluded that many aspects of the ineffective assistance claim had not only been previously addressed in the civil malpractice case, but also in *People v Trakhtenberg I*. See *People v Trakhtenberg II*, slip op at 11-13. The Supreme Court's analysis

Regarding prejudice, the Supreme Court concluded:

> Had counsel exercised reasonable judgment when investigating the case, she would have been able to impeach the complainant's testimony with the complainant's additional inconsistent statements and with expert testimony that discredited the propriety of the complainant's accusations. Further, defense counsel's failure to impeach Tetarly left the record completely devoid of any motivation that Tetarly may have had to distort and encourage the complainant's allegations. Without this evidence, "in a case that essentially boil[s] down to whether the complainant's allegations of [criminal sexual conduct] [are] true," we have no doubt that the reliability of defendant's convictions is adequately called into question. [*Id.* at 57-58, quoting *People v Armstrong*, 490 Mich 281, 293; 806 NW2d 676 (2011).]

As previously noted, following *People v Trakhtenberg III*, the Supreme Court vacated this panel's opinion and remanded the present case for reconsideration in light of its decision in the criminal case. See *Trakhtenberg v McKelvy III*. This panel issued orders allowing supplemental briefing on May 8, 2013.

II. ARGUMENTS AND ANALYSIS.

Plaintiff argues that our Supreme Court's reasoning in *People v Trakhtenberg III* is highly relevant to this case because a legal malpractice case has elements similar to an ineffective assistance of counsel claim. Plaintiff contends that *Knoblauch v Kenyon*, 163 Mich App 712; 415 NW2d 286 (1987), does not impose a less stringent standard for ineffective assistance claims. The case relied upon for this proposition has been overruled, and given the strong presumption of trial strategy, the standard for ineffective assistance claims is not a "low bar." Moreover, the Court in *People v Trakhtenberg III* did not rely on hindsight or fail to consider that defendant's actions were trial strategy. Rather, it considered the strong presumption of trial strategy, but noted that substandard performance cannot be insulated by calling it trial strategy.

Plaintiff alleged in the malpractice case that defendant failed "to generally test the prosecutor's case," and talked him into waiving his right to a jury trial and preliminary examination, which the Supreme Court determined she did before identifying the factual predicates of the charges. Plaintiff further alleged that defendant failed to interview and/or call key witnesses, and the Supreme Court held that she "failed to consult with key witnesses who would have revealed weaknesses of the prosecution's case." Plaintiff also alleged inadequate cross-examination and the Supreme Court concurred that she failed to develop the defense actually presented and that her "failure to cross-examine Tetarly and adequately impeach the complainant was a result of counsel's unreasonable decision to forgo any investigation in the case." While the ineffective assistance determination may not automatically take defendant's actions outside the attorney-judgment rule, the decision in *People v Trakhtenberg III* is

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in *People v Trakhtenberg III* is lacking in that it did not account for the potential collateral estoppel effect of *People v Trakhtenberg I*.

consistent with *Simko v Blake*, 448 Mich 648; 532 NW2d 842 (1995), which did not bar a finding of malpractice whenever professional judgment is at issue. Hence, plaintiff argues, the issue whether defendant exercised reasonable care, skill, and diligence should be submitted to a jury just as all standard of care issues are questions of fact submitted to juries. Similarly, summary disposition should not have been granted for failure to state a claim based on the breach of duty/attorney-judgment rule where plaintiff's complaint stated a claim for malpractice.

Defendant argues *People v Trakhtenberg III* does not warrant reversal of the trial court's rulings with respect to the attorney-judgment rule. Plaintiff's claims in this case mirror those made in *Simko v Blake*, 448 Mich at 657 that such trial strategy claims were deemed insufficient to survive a (C)(8) motion since the Court determined it was the duty of the attorney to determine strategy, the decisions were regarded as trial tactics based on an honest exercise of professional judgment, and tactical decisions were not subject to second guessing with the benefit of hindsight. Tactical decisions that are matters of professional opinion cannot constitute grounds for legal malpractice. Moreover, where defendant admitted the touching, failing to call other witnesses was reasonable where only defendant could refute that there was sexual gratification. Consequently, defendant argues, *Simko* bars these strategy-based malpractice claims as a matter of law and *People v Trakhtenberg III* does not change this conclusion.

As stated in this Court's prior opinion:

> This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Barrow v Pritchard,* 235 Mich App 478, 480; 597 NW2d 853 (1999).
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> When deciding a motion brought under MCR 2.116(C)(8), a court considers only the pleadings. MCR 2.116(G)(5); *Maiden v Rozwood,* 461 Mich 109, 119-120; 597 NW2d 817 (1999). A motion under this subrule "tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden, supra* at 119. "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.*, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).
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> This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:
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> A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey, supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534,

> 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

The first question that must be determined on remand is whether plaintiff effectively stated a claim for relief. In *Simko*, 448 Mich at 655, quoting *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993), the Court stated:

> In order to state an action for legal malpractice, the plaintiff has the burden of adequately alleging the following elements:
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> (1) the existence of an attorney-client relationship;
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> (2) negligence in the legal representation of the plaintiff;
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> (3) that the negligence was a proximate cause of an injury; and
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> (4) the fact and extent of the injury alleged.

Simko indicates that negligence may occur when the attorney violates the duty to exercise a reasonable degree of skill and care and to make decisions based on reasonable professional judgment. See, e.g., *Simko*, 448 Mich at 656. The issue here is whether plaintiff adequately stated this element. Plaintiff alleged that defendant (1) "submitted a deficient witness list"; (2) "failed to call certain indispensable witnesses" as well as the witnesses who testified at the subsequent civil trial; (3) only called plaintiff; (4) "did not present any exhibits"; (5) failed to cross-examine Tetarly, or bring to light that she had previously accused Hesskel's mother of sexually molesting him and had spoken with the victim's pediatrician about the possibility of abuse before any allegations were made; (6) failed to interview or depose Hesskel about issues relevant to plaintiff's innocence; (7) failed to adequately cross-examine the victim; and (8) wrongfully talked plaintiff into waiving a jury trial. Further, in a list of allegations averring that these actions were below the standard of care, plaintiff averred that "the failure to generally test the prosecutor's case" and "failure to generally defend" plaintiff was below the standard of care. Finally, in a list of allegations that many of these failures constituted a breach of duty, plaintiff averred that defendant "failed to ask intelligent or meaningful questions of the various witnesses on cross examination and failed to adequately conduct direct examination of her own client"; "failed to protect the legal rights of the Plaintiff," and "failed in other ways to comply with the standard of practice and care, the canons of ethics, the Michigan rules of Professional Conduct, and ethical considerations applicable to attorneys in the State of Michigan."

As previously noted, the Supreme Court in *People v Trakhtenberg III* found ineffective assistance based on the failure to adequately investigate before arriving at a trial strategy, *id.*, 493 Mich at 52-53, the failure to identify the factual predicate of counts, *id.* at 53, the failure to consult an expert regarding how the victim made her allegations before arriving at a strategy, *id.*

at 53-54; and the failure to find the evidence identified as "newly discovered," *id.* at 55 n 10. Plaintiff has not expressly alleged that these failures constituted malpractice. Consistent with the allegations of deficiency in the malpractice case, the Supreme Court found that defendant provided ineffective assistance because she failed "to consult with key witnesses," see *id.* at 53-54, failed to properly cross-examine Tetarly and impeach the victim, *id.* at 54-55, and failed to interview Hesskel, *id.* at 55. Given that the Court in *People v Trakhtenberg III* concluded that defendant failed to exercise reasonable professional judgment with respect to these matters, it cannot be concluded as a matter of law that these actions are insulated by the attorney-judgment rule. Thus, plaintiff stated a claim for relief.

Secondly, this Court must decide whether the doctrine of collateral estoppels applies in this case.[8] We begin our analysis by noting that no case has been cited that would allow the legal malpractice plaintiff to use a finding of ineffective assistance to collaterally estop the attorney from arguing that there was no breach of duty to support the legal malpractice claim. Plaintiff is not making such an argument in his supplemental brief after remand. Rather, he argues only that there is a question of fact for the jury. However, as the Court noted in *People v Trakhtenberg III*, 493 Mich at 48, quoting *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008):

> Generally, the proponent of the application of collateral estoppel must show "that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel."

Citing *Barrow* 235 Mich App at 484-485, as an example, the Court observed "that a criminal defense attorney may rely on the doctrine of collateral estoppel in order to avoid malpractice liability when a full and fair determination was made in a previous criminal action that the same client had received effective assistance of counsel." *People v Trakhtenberg III*, 493 Mich at 48. Yet, the criminal defense attorney would not have been a party to the criminal proceeding in which the ineffective assistance determination was made. Thus, it could be argued that the attorney not being a party to the previous criminal proceeding would not be fatal here. However, it cannot be said that the attorney would have "had a full and fair opportunity to litigate the issue." Although other rationales might also support this conclusion, it has been held that

> relitigation of the issue in a subsequent action between the parties is not precluded [if] . . . [t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action[.] [*Monat v State Farm Ins Co*, 469 Mich 679; 677 NW2d 843 n 2 (2004), quoting 1 Restatement Judgments, 2d, ch 3, Former Adjudication, § 28, p 273.]

Defendant could not have obtained review of the determination that plaintiff received ineffective assistance of counsel. She had no standing, for example, to seek reconsideration in the Supreme

[8] As previously indicated, the panel did not address this issue in the first appeal.

Court. Accordingly, collateral estoppel could not be used to preclude a determination of whether defendant breached her duty to plaintiff with respect to this legal malpractice claim.

Accordingly, we reverse the order of the trial court granting summary disposition and remand this matter for further proceedings consistent with this opinion and the opinions of our Supreme Court in this matter.

Reversed and remanded. We do not retain jurisdiction. No costs are awarded to either party. MCR 7.219.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello