# STATE OF MICHIGAN

# COURT OF APPEALS

MICHAEL J. LONG, Personal Representative of the ESTATE OF MICHAEL KNUDSEN, and ZACHARY ALLEN KOTT-MILLARD,

Plaintiffs/Counterdefendants-Appellees,

v

GEOFFREY FIEGER and FIEGER LAW, PC,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellants,

and

RICHARD M. GOODMAN, KALAHAR GOODMAN, DEAN A. ROBB, and DEAN ROBB LAW FIRM,

Third-Party Defendants.

UNPUBLISHED
December 14, 2023

Nos. 363259; 363406
Grand Traverse Circuit Court
LC Nos. 2016-031437-NM; 2016-031442-NM

Before: LETICA, P.J., and O'BRIEN and CAMERON, JJ.

PER CURIAM.

In these interlocutory consolidated appeals[1] involving claims of legal malpractice, defendants/counterplaintiffs/third-party plaintiffs (defendants), Geoffrey Fieger and Fieger Law, PC, dispute two of the trial court's pretrial rulings. First, in Docket No. 363259, defendants, by

[1] *Estate of Knudsen v Fieger*, unpublished order of the Court of Appeals, entered October 25, 2022 (Docket Nos. 363259 & 363406).

leave granted,[2] contest the trial court's order denying defendants' motion in limine to preclude plaintiffs/counterdefendants (plaintiffs), the Estate of Michael Knudsen by personal representative Michael Long, and Zachary Allen Kott-Millard, from referencing a press conference and press release during the impending trial. Second, in Docket No. 363406, defendants, again by leave granted,[3] contest the trial court's order granting plaintiffs' motion to strike defendants' notice of reasserting their counterclaims. We affirm.

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case has a long, somewhat convoluted, and at times confusing history. This legal-malpractice case arose from defendants' representation of plaintiffs in a prior case. That prior case arose after Michael Knudsen died, and Kott-Millard was seriously injured, while swimming in the Grand Traverse Bay in Traverse City, Michigan. In a previous opinion, this Court provided the following factual summary of the events leading to Knudsen's death and Kott-Millard's injuries:

> This case involves the electrocution and drowning death of 18-year-old Michael Knudsen and the serious personal injury of plaintiff Zachary Kott-Millard. On August 15, 2011, Knudsen jumped off the F dock into the water at [the] defendant Duncan L. Clinch Marina. Knudsen surfaced and screamed that he could not swim. Kott-Millard jumped into the water to help Knudsen. Kott-Millard began screaming, "Current. There's current in the water." Holly Sellers observed the incident and began taking her shoes off intending to help the boys. When Sellers heard "current" she assumed there was an undertow, but then was told by another man not to jump in because there was electricity in the water.
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> One of Knudsen and Kott-Millard's friends who was present was able to pull Kott-Millard out of the water. Sellers continued to attempt to help Knudsen, but when she grabbed him the current began to run through her as well. Paramedics arrived and removed Knudsen from the water after the electricity had been turned off. Knudsen was taken to the hospital where he was pronounced dead at 8:00 p.m. An autopsy revealed that the cause of death was asphyxia by drowning due to low voltage electrocution.
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> Following the incident, electricians from Windemuller Electric inspected the dock and prepared a report. The report stated,
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> > We found corroded, broken, and over-heated equipment, ground materials and an ungrounded conductor that had worn through its insulation making contact with the junction box. . . . It appears that over time the motion or vibration of the dock began to wear at the

[2] *Estate of Knudsen v Fieger*, unpublished order of the Court of Appeals, entered October 21, 2022 (Docket No. 363259) (GADOLA, J., would have denied leave to appeal).

[3] *Estate of Knudsen v Fieger*, unpublished order of the Court of Appeals, entered October 25, 2022 (Docket No. 363406) (GADOLA, J., would have denied leave to appeal).

> insulation of the ungrounded conductor. . . . The insulation on the grounding conductor heading further out on the dock was completely melted and the copper was brittle and disintegrating.
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> [*Kott-Millard v Traverse City*, unpublished per curiam opinion of the Court of Appeals, issued June 5, 2014 (Docket Nos. 314971, 314975, 315043, and 315044), p 4.]

Plaintiffs, believing Knudsen's death and Kott-Millard's injuries were caused by negligence, retained third-party defendants Dean Robb and his law firm, Dean Robb Law Firm, to represent them. Defendants were retained as co-counsel. On September 13, 2011, defendants sent out a press release about the case that contained the following quote from Fieger:

> Our investigation reveals, without question, that the water around the floating dock area was electrified as a result of improper electrical wiring. The shoddy wiring and the danger of electrocution created by it appear to have been well known by the Marina prior to [Knudsen]'s death. A horrifying death of a child could easily have been prevented with just a little care.

During a press conference the following day, Fieger stated that the underlying negligence lawsuit was worth $50 million.[4]

In a direct appeal arising from the underlying negligence lawsuit, this Court summarized the following procedural history, which is pertinent to the present appeal:

> Plaintiffs each filed a negligence action, which were consolidated by stipulation, against, among others, Traverse City, the marina, Robert Cole, the director of public service for the city, and Barry Smith, the harbormaster (collectively referred to as "the [municipal entities]"). Plaintiffs alleged that the city's operation of the marina is a proprietary function because it charges fees and is engaged in an operation for profit. Plaintiffs also alleged that as governmental employees, Cole and Smith were grossly negligent.
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> The [municipal entities] jointly moved for summary disposition based on governmental immunity. The trial court granted the city and the marina's motion for summary disposition finding that the operation of the marina was a governmental function and did not fall under the proprietary function exception to governmental immunity. The trial court also granted summary disposition to [the] defendant Cole stating that he was entitled to governmental immunity because his conduct did not constitute gross negligence. However, the trial court denied [the] defendant Smith's motion for summary disposition, finding that there was a

[4] There is no evidence in the record of this press conference, but it is undisputed that it took place and that Fieger made the above statement at it.

genuine issue of material fact whether his conduct constituted gross negligence. [*Id*. at 4-5.]

Plaintiffs appealed the decision of the trial court granting summary disposition in favor of the municipal entities. *Id*. at 1. This Court determined that all of the municipal entities were protected from the suit under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. *Kott-Millard*, unpub op at 7-11. The case was remanded to the trial court to handle the remaining claims not involving the municipal entities. *Id*. at 11.

"After the underlying proceedings were remanded to the circuit court, plaintiffs retained the law firm of Goodman Kalahar and discharged [] defendants as their attorneys on November 23, 2015." *Estate of Knudsen v Fieger*, unpublished per curiam opinion of the Court of Appeals, issued March 5, 2019 (Docket Nos. 341412 and 341414), p 4. "After the Supreme Court denied leave to appeal this Court's decision [regarding the underlying negligence action], *Kott-Millard v City of Traverse City*, 497 Mich 972 (2015), plaintiffs' remaining claims against the remaining defendants were ultimately dismissed." *Estate of Knudsen*, unpub op at 4.

Plaintiffs, believing their negligence claims against the municipal entities were dismissed because of a legal mistake committed by defendants, decided to initiate the present litigation—lawsuits against defendants for legal malpractice. In a previous appeal in this case, this Court described the legal-malpractice claims as follows:

> In February 2016, plaintiffs [],through new counsel, filed separate legal malpractice actions in the trial court against [] defendants. The essence of plaintiffs' claim is that defendants breached the standard of care by failing to plead tort claims against the municipal entities under federal admiralty law. The lynch pin of plaintiffs' theory of the case was that under federal admiralty law the municipal entities, regardless if performing governmental functions, would not enjoy the protection of governmental immunity. The trial court consolidated the two cases. [*Id*. at 4.]

On October 5, 2016, defendants filed counterclaims against plaintiffs, alleging that plaintiffs breached the retainer agreements and were required to pay defendants over $3 million because of their breach and under a theory of quantum meruit.

On January 26, 2017, defendants initiated a separate lawsuit (the 2017 action) in Wayne County against plaintiffs and third-party defendants from this case, along with Kathleen Kalahar, Martin Knudsen, and Tina Tokar. As to plaintiffs, defendants asserted that they breached the retainer agreements by failing to cooperate with defendants in the underlying negligence action. *Fieger v Goodman*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2020 (Docket No. 344151), pp 2-3. Defendants also claimed that plaintiffs were part of a civil conspiracy with other law firms to craft a legal-malpractice action against defendants. *Id*. at 3. The 2017 action eventually was transferred to Grand Traverse Circuit Court but was not consolidated with the present case. *Id*. at 3.

Back in the present case, defendants moved the trial court for summary disposition of the claims against them under the attorney-judgment rule. While the motion was pending, defendants moved the trial court in limine to preclude plaintiffs from referencing the press release and press

conference during trial. Defendants contended that the evidence was irrelevant under MRE 401 and thus inadmissible under MRE 402, and alternatively argued that if the evidence was relevant, then it was excludable under MRE 403. Before this motion in limine was decided, however, the trial court granted defendants' motion for summary disposition. The order eventually entered by the trial court contained the following language:

> IT IS FURTHER ORDERED that Defendants' Counterclaim (Counter-Complaint) for Breach of Contract and Quantum Meruit, brought against Plaintiffs in the consolidated cases, is DISMISSED without prejudice, only to be reasserted if summary disposition is reversed and the case is remanded for trial. Can only be reasserted as a counterclaim in this action.[5]

Plaintiffs appealed this final order as of right. *Estate of Knudsen*, unpub op at 2.

While that appeal was pending, the litigation in the 2017 action continued. In March 2018, the trial court granted summary disposition in favor of Robb, his firm, and the Estate of Knudsen. In May 2018, the parties signed a stipulation and proposed order "that would have dismissed all claims against the remaining defendants." *Fieger*, unpub op at 4. "The proposed order stated that the reasons for dismissal were those stated by the trial court for dismissing the claims against the Robb parties and the estate. The stipulation and proposed order purported to preserve [defendants'] appellate rights to challenge the trial court's decision and reasons for dismissal." *Id*. Rather than enter the stipulation and proposed order, though, the trial court dismissed defendants' claims as a sanction for violating a scheduling order. *Id*. Defendants appealed the dismissal of the 2017 action as of right. *Id*.

On March 5, 2019, while the appeal of the 2017 action was pending, this Court decided the appeal in the present case. *Estate of Knudsen*, unpub op at 1-2. As relevant to the current appeal, this Court in that appeal reversed the trial court's order granting summary disposition in favor of defendants on the basis of the attorney-judgment rule, and remanded for further proceedings. *Id*. at 20, 23.[6] While defendants attempted to appeal that decision to our Supreme Court, this Court decided defendants' appeal in the 2017 action. *Fieger*, unpub op at 1.

To resolve the appeal of the 2017 action, this Court was asked to decide whether the trial court properly granted summary disposition in favor of Robb and his firm, which in turn required this Court to determine whether plaintiffs breached their contract with defendants. *Id*. at 5. This Court ruled that plaintiffs did not do so, reasoning as follows:

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[5] Some portions of this order are handwritten and difficult to read, but the contents of the order are undisputed.

[6] On March 3, 2020, our Supreme Court denied defendants' application for leave to appeal, *Long v Fieger*, 505 Mich 995; 939 NW2d 252 (2020), which was followed closely by an order denying defendants' motion for reconsideration of the order denying leave, entered on July 28, 2020, *Long v Fieger*, 506 Mich 855; 946 NW2d 254 (2020).

> [Defendants] have failed to make factual allegations or present evidence that [plaintiffs] breached the retainer agreements. The fact that [plaintiffs] discharged [defendants] does not establish a breach of contract. A client "has an absolute right to discharge an attorney and is therefore not liable under the contract for exercising that right." *Reynolds v Polen*, 222 Mich App 20, 25; 564 NW2d 467 (1997). [Defendants] suggest that [plaintiffs] failed to cooperate in the litigation of the electrocution cases, but [defendants] have provided no factual allegations or evidence to support that assertion. The fact that [plaintiffs] sought a second opinion from other attorneys does not establish a breach of contract by [plaintiffs]. [Defendants] assert that [plaintiffs] breached the implied duty to act in good faith, but again, there is no cause of action for breach of the implied covenant of good faith, and the duty to act in good faith cannot be invoked as a replacement for an express contractual provision to establish a breach of a contract. *Bank of America*[, *NA v Fidelity Nat'l Title Ins Co*], 316 Mich App [480,] 501[; 892 NW2d 467 (2016)]. Because [plaintiffs] did not breach the retainer agreements, [defendants] have failed to establish a necessary element of their claim against the Robb parties for tortious interference, and the trial court therefore properly granted summary disposition to the Robb parties with respect to the tortious-interference claim. [*Fieger*, unpub op at 5-6.]

Despite agreeing with the trial court in that regard, this Court determined that the trial court abused its discretion by dismissing defendants' remaining claims as a sanction, and therefore vacated the order that did so. *Id*. at 6-7. However, this Court remanded with instructions for the trial court to "enter the parties' stipulated dismissal." *Id*. at 7. Although the record does not contain the stipulated order dismissing the 2017 action, there appears to be no dispute that such occurred when the case was remanded to the trial court. At that point, the 2017 action was over.

The proceedings in the present case eventually reinitiated in the trial court, with a significant amount of motion practice occurring from 2020 to 2022 that is not relevant to this appeal. On March 14, 2022, plaintiffs moved the trial court to enter a trial-management order with the goal of narrowing the issues for trial. As relevant to the present appeal, plaintiffs sought an order ensuring defendants would not attempt to relitigate their counterclaims given the outcome of the 2017 action. During the hearing on that motion, the trial court asked defense counsel if defendants were making any claims that plaintiffs breached the retainer agreements. Defense counsel, after taking time to consider the question, answered they were not making any such claims. The trial court acknowledged the concession but did not enter an order memorializing such. Despite their concession, defendants later filed a "Notice Reasserting Counterclaim."

Plaintiffs moved to strike the notice, arguing, among other things, that reassertion of the counterclaims was barred by the doctrine of res judicata considering the resolution of the 2017 action. Plaintiffs also responded to defendants' motion in limine regarding the press release and press conference, arguing that Fieger's statements were relevant, admissible, and not excludable under the rule relied on by defendants. Plaintiffs additionally noted that the statements were not hearsay pursuant to MRE 801(d)(2), which pertains to party-opponent admissions.

At a hearing, the trial court considered the motion in limine first. Defendants claimed that Fieger's statements were not a party-opponent admission because they merely were comments

about a case on the basis of a preliminary investigation. Defendants also asserted that Fieger's statements were not admissions because they were opinions offered as an advocate. The trial court rejected those arguments, and held that the statements were admissible under MRE 801(d)(2), were relevant to the issue of damages and Fieger's belief that the municipal defendants were responsible for plaintiffs' injuries, and were not excludable. The trial court noted that defendants' arguments to the contrary focused on weight, not admissibility. The appeal in Docket No. 363259 followed.

Next, the trial court considered plaintiffs' motion to strike defendants' notice of reasserting counterclaims. Defendants argued that the doctrine of res judicata did not apply to their counterclaims because the 2017 action was filed after the counterclaims in the present case, and the counterclaims were still pending in this case at the time. The trial court agreed with plaintiffs that the doctrine of res judicata barred defendants from relitigating any claims arising out of the retainer agreements, and therefore entered an order striking defendants' counterclaims. The appeal in Docket No. 363406 followed. The case is now before us for plenary review.

## II. FIEGER'S STATEMENTS TO THE PRESS

Defendants argue that the trial court should have precluded Fieger's statements from being mentioned during trial because they were inadmissible hearsay, irrelevant, and excludable. We disagree.

### A. STANDARD OF REVIEW

"We review a trial court's decision on a motion in limine for an abuse of discretion." *Bellevue Ventures, Inc v Morang-Kelly Investment, Inc*, 302 Mich App 59, 63; 836 NW2d 898 (2013). "A trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but preliminary legal determinations of admissibility are reviewed de novo." *Gequita Shivers v Covenant Healthcare Sys*, 339 Mich App 369, 373; 983 NW2d 427 (2021). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Cary Investments, LLC v City of Mount Pleasant*, 342 Mich App 304, 312; 994 NW2d 802 (2022) (quotation marks and citations omitted). A trial court necessarily abuses its discretion if it makes an error of law. *Shivers*, 339 Mich App at 373.

### B. LAW AND ANALYSIS

The trial court did not abuse its discretion when it decided that Fieger's statements during the press conference and in the press release were admissible.

Defendants argue that the trial court should have precluded Fieger's statements during the press conference and in the press release from trial for an array of reasons, the first of which is that the evidence is irrelevant. In general, relevant evidence is admissible, while evidence that is not relevant is not admissible. MRE 402. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "The relevance contemplated in MRE 401 and MRE 402 is logical relevance." *Rock v Crocker*, 499 Mich 247, 256; 884 NW2d 227 (2016). "The threshold is minimal: any tendency is sufficient probative

force." *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 333 Mich App 457, 500; 960 NW2d 186 (2020) (quotation marks and citation omitted). Evidence is not rendered irrelevant or objectionable "simply because it fails to supply conclusive proof." *Id*. (quotation marks and citation omitted). In *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 667; 819 NW2d 28 (2011), this Court explained the characteristics of relevant evidence as follows:

> Relevance divides into two components: materiality and probative value. Material evidence relates to a fact of consequence to the action. A material fact need not be an element of a crime or cause of action or defense but it must, at least, be in issue in the sense that it is within the range of litigated matters in controversy. Materiality looks to the relation between the propositions that the evidence is offered to prove and the issues in the case. If the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial. [Quotation marks, citations, and alterations omitted.]

"The credibility of witnesses is a material issue and evidence that shows bias or prejudice of a witness is always relevant." *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003).

At issue in this case are statements by Fieger that were made when defendants were representing the Estate of Knudsen during the early stages of the underlying negligence lawsuit. In a press release, Fieger was quoted as saying:

> Our investigation reveals, without question, that the water around the floating dock area was electrified as a result of improper electrical wiring. The shoddy wiring and the danger of electrocution created by it appear to have been well known by the Marina prior to [Knudsen]'s death. A horrifying death of a child could easily have been prevented with just a little care.

At a press conference the following day, Fieger stated the lawsuit was worth $50 million. In the underlying negligence lawsuit, plaintiffs ended up receiving no damages at all. All of the municipal parties that plaintiffs sued had the claims against them dismissed on the basis of governmental immunity. In the legal-malpractice claims now at issue, plaintiffs allege that defendants should have brought the underlying negligence lawsuit under federal admiralty law, under which municipal entities are not protected by governmental immunity.

To properly consider whether Fieger's statements are relevant to plaintiffs' legal-malpractice claims, it is important to first address what plaintiffs must prove in a case alleging legal malpractice. To establish legal malpractice, a plaintiff bears the burden of proving the following elements: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation;" (3) a causal connection between the negligence and the injury; and "(4) fact and extent of the injury alleged." *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). The issue of causation has two parts: (1) "causation in fact" and (2) "foreseeability." *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). Speculation or conjecture is not enough to hold a defendant causally liable for negligence. *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 613; 563 NW2d 693 (1997).

This Court has previously stated that, to satisfy the causation element, "a plaintiff must show that but for the attorney's alleged malpractice, [the plaintiff] would have been successful in the underlying suit." *Bowden v Gannaway*, 310 Mich App 499, 503; 871 NW2d 893 (2015). "In other words, the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding." *Charles Reinhart Co*, 444 Mich at 586 (quotation marks and citation omitted). While our Supreme Court also noted that "the 'suit within a suit' concept is not universally applicable," *id.*, the parties agree that, here, plaintiffs will be required to prove that the underlying negligence lawsuit would have been successful if it had been brought under federal admiralty law.

Defendants initially focus their argument on the case-within-a-case rule, asserting that Fieger's statements are irrelevant because they would not have been admissible in the underlying negligence lawsuit. Defendants are undoubtedly correct that Fieger's statements would not have been admissible evidence during the underlying negligence trial—plaintiffs do not dispute such. Nevertheless, defendants' argument lacks merit for one obvious reason: this is not the underlying negligence lawsuit. Plaintiffs' responsibility to prove the case-within-the-case is only one part of a legal-malpractice claim; plaintiffs will also have to prove that defendants breached their professional duty to plaintiffs, which requires an inquiry into the legal work performed by defendants. *Coleman*, 443 Mich at 63. In the press release, Fieger stated that he and his firm investigated and determined that the water was electrified when plaintiffs jumped in because of negligence by the municipal defendants. This is relevant because the extent of defendants' investigation is of primary importance in this case. Pertinently, in the course of the investigation, defendants apparently did not discover that the negligence claims could and should be brought under federal admiralty law. Therefore, the comments about defendants' investigation is relevant to the nature and thoroughness of that investigation, which was a material issue for trial.

Fieger also stated that he believed that the Estate of Knudsen had a $50 million claim, which included allegations pertaining to the municipal entities. Importantly, in the present legal-malpractice case, plaintiffs are required to prove damages resulting from defendants' alleged negligent representation. *Id*. The statement by Fieger about the value of the claim, after an investigation occurred, is relevant to damages. Briefly, Fieger stated that the claims were worth $50 million after an investigation, but plaintiffs ended up with no award because the claims were dismissed for various reasons, including governmental immunity. Thus, the estimate provided by Fieger is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action"—here, the issue of damages—"more probable or less probable than it would be without the evidence." MRE 401.

Lastly, Fieger's statements are also relevant to the issue of credibility. There appears to be little doubt that defendants plan to argue that plaintiffs' underlying negligence lawsuits lacked merit and, thus, would not have been successful regardless of the dismissal on the basis of governmental immunity. In fact, during one hearing, Fieger openly stated that Knudsen did not die because of an electric current, but instead he died because he was using drugs. Yet, when speaking to the press via the release, Fieger was quoted as explicitly blaming electrified water resulting from municipal negligence as the reason for Knudsen's death. As this Court has explained, "[t]he credibility of witnesses is a material issue and evidence that shows bias or prejudice of a witness is always relevant." *Lewis*, 258 Mich App at 211. Allowing the jury to

consider Fieger's contradictory statements is relevant to whether the jury would ultimately believe his potential testimony at trial that plaintiffs' claims were worthless.

In an attempt to challenge the relevance of Fieger's statements in the above context, defendants argue that Fieger was merely offering an opinion after a preliminary investigation. Defendants further insist that the evidence lacks relevance because Fieger was an advocate at the time he gave his opinion. As the trial court correctly observed, these arguments relate to the weight the jury might eventually give the evidence, not its admissibility. The fact that the evidence is not determinative of any issue, or that there are grounds on which the jury might choose not to believe the evidence, does not render it inadmissible. See *Spectrum Health Hosps,* 333 Mich App at 500. Instead, during trial, the jury will be provided reasons to believe and disbelieve Fieger's statements, and will be able to make an informed decision. *Id*.

With respect to credibility, defendants claim that Fieger's statements to the press are not relevant because he does not deny saying them. Defendants insist that this renders the evidence irrelevant because neither Fieger nor defendants dispute the content of the statements that Fieger made as plaintiffs' advocate, only the statements' veracity. Frankly, this argument makes little sense. As stated, credibility of a witness is always material, and "evidence that shows bias or prejudice of a witness is always relevant." *Lewis,* 258 Mich App at 211. Defendants effectively argue that the evidence of Fieger's statements to the press are not relevant because he had reason to speak in a biased manner at the time. While making this argument, though, defendants ignore that the same is true of Fieger's possible testimony at trial. During the press release and conference, Fieger was speaking as an advocate for plaintiffs and therefore had reason to overstate the strength and value of their cases. Now, however, Fieger has reason to do exactly the opposite; he and his firm are being sued for legal malpractice and could be responsible for significant damages if a jury determines that plaintiffs' claims against the municipal entities would have been successful but for defendants' failure to bring the case under federal admiralty law. As a result, Fieger has every reason to now under-state the validity and value of plaintiffs' underlying negligence claims. Yet defendants do not allege that Fieger should be barred from testifying at trial because of the chance for bias, and the same should be true for his statements to the press. The jury must be permitted to consider Fieger's statements when he was speaking in favor of plaintiffs and when speaking in favor of himself and his firm, then decide what to believe on the basis of all of the facts. Because Fieger's statements to the press are material to and probative of his credibility at trial, they are relevant under MRE 401. *Lewis,* 258 Mich App at 211.

Next, defendants argue that the trial court abused its discretion by admitting Fieger's statements under MRE 801(d)(2). "Under MRE 802, hearsay evidence is not admissible unless it falls within an exception provided in the court rules." *Kuebler v Kuebler,* ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 362488); slip op at 8. " 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). An out-of-court statement is not considered hearsay under MRE 801(d)(2)(A) when "[t]he statement is offered against a party and is . . . the party's own statement, in either an individual or a representative capacity . . . ." See also *Merrow v Bofferding,* 458 Mich 617, 633; 581 NW2d 696 (1998). Stated differently, the rule "provides that a statement that would otherwise be hearsay is not considered hearsay if the statement is offered against a party and is the party's own statement." *Becker-Witt v Bd of Examiners of Social Workers,* 256 Mich App 359, 365 n 3; 663 NW2d 514 (2003).

Despite defendants' best efforts to obscure the issue, analysis of whether Fieger's statements were inadmissible hearsay is relatively simple. Defendants do not dispute that Fieger is a party nor that he is a representative of his firm. And there can be no dispute that Fieger's words are being offered against Fieger and his firm. Under the plain language of MRE 801(d)(2)(A), then, Fieger's statements are not hearsay.

Defendants raise a number of misleading and otherwise meritless arguments in an attempt to escape this conclusion. First, with respect to whether Fieger's statements in the press release and during the press conference can be considered defendants' statements, defendants argue that the statements must actually be attributed to the Estate of Knudsen because Fieger was speaking in his representative capacity at the time. This argument lacks merit because it ignores that Fieger can speak both for himself, his firm, and plaintiffs at the same time. Indeed, defendants are being sued for legal malpractice, so most if not all of Fieger's relevant statements will have been made in the course of his representation of plaintiffs. Just because Fieger was speaking as an advocate does not mean he was not also speaking as an individual and a representative of his firm. Moreover, in the press release, Fieger specifically mentioned "[o]ur investigation," which plainly refers to himself and his firm, as there is nothing to suggest that the Estate of Knudsen was in anyway involved in the investigation. Therefore, the trial court properly concluded that Fieger's statements were, at least in part, given as an individual and as a representative of Fieger Law, PC.

Second, defendants attempt to shift this Court's focus from the language used in the body of MRE 801(d)(2)(A) to the italicized header of the rule, which states "*Admission by Party-Opponent*." Defendants contend that Fieger's statements cannot be considered an "admission" because it was offered after a preliminary investigation and as a representative of the Estate of Knudsen. Defendants have not identified any legal support for the contention that MRE 801(d)(2)(A) only applies to admissions made after a sufficient time to ensure the veracity of the statement. And, contrary to defendants' argument, MRE 801(d)(2)(A) does not contain a requirement that a statement be an "admission." Instead, as our Supreme Court succinctly stated: "MRE 801(d)(2) allows admission of a *statement* offered against a party when it is the party's own *statement*, in either an individual or a representative capacity." *Merrow*, 458 Mich at 633 (emphasis added). The appropriate inquiry, then, is whether Fieger's words could be considered a "statement." But that inquiry is ultimately irrelevant for present purposes—either Fieger's written and spoken words were "statements" and therefore are not considered hearsay pursuant to MRE 801(d)(2)(A), or they were not "statements" and thus are not hearsay by definition. See MRE 801(c) (defining hearsay as a "statement"). Either way, Fieger's statements were properly determined to be admissible as nonhearsay.

Next, defendants argue that, if this Court determines that the evidence is admissible, the trial court still abused its discretion by not excluding the evidence under MRE 403. Even when evidence is relevant under MRE 401, it can be excluded under MRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Supreme Court has noted that MRE 403 only prohibits evidence that is *unfairly* prejudicial. *People v Feezel*, 486 Mich 184, 198; 783 NW2d 67 (2010) (opinion by CAVANAGH, J.). The unfairness with which MRE 403 is concerned arises if there is a danger that marginally probative evidence will be given undue weight by the jury. *Id*.

Defendants claim that the evidence is unfairly prejudicial because it has little to no probative value, is likely to confuse the jurors, and risks being given undue weight by the jurors because of Fieger's status as a famous attorney. The probative value of the evidence was discussed above in relation to the relevance of the evidence under MRE 401. To briefly reiterate, the evidence is relevant to assessing Fieger's credibility, as well as proving that defendants' representation of plaintiffs was negligent and that plaintiffs suffered damages. Regarding Fieger's credibility, considering that the statements by Fieger are likely to be directly contrary to his testimony at trial, the statements are highly probative of his credibility. Thus, defendants' contention that the evidence has very little, if any, probative value lacks merit, and the evidence is only excludable if the danger of unfair prejudice substantially outweighs the aforementioned probative value of the evidence. MRE 403.

Defendants insist that the danger of unfair prejudice substantially outweighs the evidence's probative value because introduction of the evidence will cause "confusion of the issues," a specific ground cited in MRE 403. But defendants do not clearly explain how admission of Fieger's statements will be likely to confuse the jury regarding the issues to be tried. The statements are directly on topic—they address the underlying negligence lawsuit that plaintiffs claim was negligently litigated by defendants. The statements focus on important issues, such as defendants' investigation of the claims, whether Fieger believed they were legitimate claims, and the value of those claims. Defendants do not actually explain why the evidence would confuse the jurors, but only vaguely assert that the statements would distract the jury from deciding the case-within-the-case, negligence, and damages. However, as discussed above, the challenged statements are directly relevant to two of those issues, so any danger of confusion has been overstated by defendants, and, accordingly, their argument lacks merit.

Defendants also claim that the evidence might be given undue weight because of Fieger's status as an attorney. This concern does not establish unfair prejudice for a simple reason—the jury can also hear Fieger's explanation for why he gave those statements if he testifies during trial. If, as Fieger claims, a juror is more likely to believe his claim that the underlying negligence lawsuit was legitimate and worth $50 million, then the same juror also would be more likely to believe Fieger's reasoning behind making the claims. Because jurors' opinions of Fieger will be the same with respect to his testimony and his statements to the press, there is no concern about the jurors giving the evidence undue weight. Consequently, this argument lacks merit.

In a last-ditch effort to avoid having a jury consider Fieger's statements to the press, defendants argue that it would be against public policy to admit the statements. Defendants cite to our Supreme Court's acknowledgment of "the public policy of maintaining a vigorous adversary system," *Friedman v Dozorc*, 412 Mich 1, 25; 312 NW2d 585 (1981), and warn that there might be a chilling effect if statements made during the course of representation can later be used against an attorney in a legal-malpractice claim. While such a public policy undoubtedly exists, extension to the point suggested by defendants would effectively bar any claim of legal malpractice. Defendants essentially contend that any actions or argument an attorney makes on behalf of a client cannot then be used against the attorney in a later malpractice case, which ignores the fact that any legal-malpractice case is *about* the lawyer's representation of the client, so most if not all of the lawyer's relevant statements will have been made as a representative of the client. Defendants have not cited any caselaw to suggest a veritable bar of all statements of an attorney in a later-filed legal-malpractice action.

The closest defendants come to doing so is citing a case from Idaho, which is not binding on this Court. See *Estate of Voutsaras by Gaydos v Bender*, 326 Mich App 667, 676; 929 NW2d 809 (2019). Regardless, the case cited by defendants does not actually support their position in the present case. Pertinently, the Idaho Supreme Court held that a lawyer's court filing on behalf of a client during underlying litigation cannot be considered a binding admission by the lawyer in a subsequent malpractice lawsuit. *Henize v Bauer*, 145 Idaho 232, 238; 178 P3d 597 (2008). Although defendants attempt to analogize that situation to the present one, the Idaho Court specifically ruled out such arguments, explaining:

> This conclusion does not mean that every statement by a lawyer in the course of earlier litigation may not be used against that lawyer in a subsequent malpractice action. Representations of fact, purporting to be on the basis of the lawyer's personal knowledge, may well be used against that lawyer in subsequent proceedings. [*Id.*]

In this case, Fieger stated that an investigation had occurred, a finding of negligence by the municipal entities had been discovered, and the Estate of Knudsen suffered $50 million in damages. Thus, even under Idaho law, Fieger's statements at the press conference and in the press release would have been admissible because they were "[r]epresentations of fact, purporting to be on the basis of the lawyer's personal knowledge." *Id.* Because defendants have not established that Michigan public policy bars admission in legal-malpractice cases of all comments made by an attorney while representing their client in the underlying proceeding, this argument fails.

In sum, the challenged evidence was relevant under MRE 401, admissible under MRE 402 and 801(d)(2)(A), not excludable under MRE 403, and not violative of public policy. Consequently, the trial court did not abuse its discretion by denying defendants' motion in limine to preclude introduction of the evidence at trial.

## III. STRIKING NOTICE OF COUNTERCLAIMS

Defendants next argue that the trial court erred by applying the doctrine of res judicata to their counterclaims. We disagree.

### A. STANDARD OF REVIEW

This Court reviews de novo the applicability of the doctrine of res judicata. *Jackson v Southfield Neighborhood Revitalization Initiative*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 361397); slip op at 24.

### B. LAW AND ANALYSIS

The trial court did not err by applying the doctrine of res judicata to defendants' counterclaims. This Court recently summarized the law related to res judicata in a published opinion:

> "The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action." *Adair v Michigan*, 317 Mich App 355, 365; 894 NW2d

665 (2016) (quotation marks and citation omitted). "The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007) (quotation marks and citation omitted). "The doctrine bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair*, 317 Mich App at 365 (quotation marks and citation omitted). Michigan courts "use[] a transactional test to determine if the matter could have been resolved in the first case." *Washington*, 478 Mich at 420. "The 'transactional' test provides that the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief." *Id*. (quotation marks and citation omitted). "Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit . . . ." *Adair*, 317 Mich App at 366-367 (quotation marks and citation omitted; alterations in original). [*Jackson*, ___ Mich App at ___; slip op at 26.]

The present case was filed by plaintiffs in 2016. They contended that defendants committed legal malpractice while representing plaintiffs in the underlying negligence action against the municipal entities. Later in 2016, defendants filed counterclaims against plaintiffs, alleging that plaintiffs were in breach of the retainer agreements by failing to pay for certain costs incurred by defendants during the course of the underlying negligence action. Defendants also asserted that the retainer agreements provided that, if plaintiffs discharged defendants before the litigation was complete, defendants would be entitled to relief in the form of quantum meruit.

While the present case was being litigated, defendants filed the 2017 action in Wayne County. There, defendants alleged in pertinent part that plaintiffs breached the retainer agreement by not fully cooperating in the underlying negligence action and by participating in a conspiracy with other law firms to craft a legal-malpractice claim against defendants. Both cases continued in parallel until October 2017 when the trial court granted defendants' motion for summary disposition in the present case on the basis of the attorney-judgment rule. As part of the order granting summary disposition in defendants' favor, the trial court included language dismissing defendants' counterclaims without prejudice. The order stated that defendants' counterclaims could only be reasserted in the present litigation if this Court reversed the order granting summary disposition and remanded the case for a trial.

The trial court in the 2017 action eventually dismissed defendants' case against all of the parties, which included plaintiffs. Defendants appealed that decision as of right. While the appeal of the 2017 action was pending, this Court reversed the summary-disposition order in the present case and remanded for further proceedings. *Estate of Knudsen*, unpub op at 1. On appeal in the 2017 action, this Court disagreed with the reasoning for the dismissal cited by the trial court, but still affirmed that dismissal was warranted because of a lack of merit in defendants' claims. *Fieger*, unpub op at 1.

The question presented to us is whether the resolution of the 2017 action warrants application of the doctrine of res judicata in the present case. Recall that res judicata has three elements: "The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Washington*, 478 Mich at 418 (quotation marks and citation omitted). There is no dispute in the present case that the 2017 action was decided on the merits and involved the same parties as here. *Id.* And there is no substantive dispute that the counterclaims and the breach-of-retainer-agreement claims in the 2017 action arise out of a "single group of operative facts." *Jackson*, ___ Mich App at ___; slip op at 26 (quotation marks and citation omitted). The claims, after all, come from allegations that plaintiffs violated the same retainer agreements, although in a different manner.

Defendants, instead, initially challenge application of res judicata because the 2017 action was "a second, subsequent action," *Washington*, 478 Mich at 418 (quotation marks and citation omitted), and thus, according to defendants, could not be the basis of a res judicata argument with respect to the first-filed counterclaims. This argument is founded on defendants' belief that references to first and second cases when discussing res judicata relate solely to the *date of filing*. Defendants reason that because the present litigation was *filed* first, the 2017 action (which was filed second) cannot be used as a basis for applying res judicata. The confusion likely arises from the fact that, generally speaking, the first case filed is typically the first case adjudicated. However, the doctrine of res judicata as interpreted by our Supreme Court clearly relates to the *adjudication date*, not the filing date. "This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims *already litigated*, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.* (quotation marks and citation omitted; emphasis added). At the time plaintiffs moved to strike defendants' notice of reasserting their counterclaims, the 2017 action was the only one that had been litigated to a final disposition. Therefore, even though the 2017 action was filed second, it was litigated and adjudicated first, and consequently can properly be considered as grounds for asserting res judicata under the appropriate circumstances. *Id.*

Defendants next argue that application of the doctrine of res judicata was improper in this case because, regardless of the timing of adjudication, the counterclaims in the present case could not have been litigated in the 2017 action. This means, defendants insist, that the third element of the doctrine of res judicata, which requires "the matter in the second case was, or could have been, resolved in the first," is not met. *Jackson*, ___ Mich App at ___; slip op at 26 (quotation marks and citation omitted). For this argument, defendants rely on the language used in the October 27, 2017 order entered by the trial court:

> IT IS FURTHER ORDERED that Defendants' Counterclaim (Counter-Complaint) for Breach of Contract and Quantum Meruit, brought against Plaintiffs in the consolidated cases, is DISMISSED without prejudice, only to be reasserted if summary disposition is reversed and the case is remanded for trial. Can only be reasserted as a counterclaim in this action.

Defendants claim that they would have violated this order if they attempted to bring the counterclaims in the 2017 action, and because they were not permitted to violate a valid order of the trial court, they could not bring the counterclaims in the 2017 action. Defendants further

contend that if they tried to bring the counterclaims in the 2017 action, those claims would have been summarily dismissed under MCR 2.116(C)(6), which states that dismissal is warranted when "[a]nother action has been initiated between the same parties involving the same claim."

These arguments by defendants fail for two reasons. First, with respect to defendants' reliance on the trial court's order, it was entered on October 27, 2017. This was more than 10 months after defendants filed the 2017 action. Therefore, contrary to defendants' arguments, the order at issue did not bar defendants from raising the counterclaims in the 2017 action at the time the 2017 action was filed. In other words, the existence of the order does not mean that the third element of res judicata was not fulfilled. *Washington*, 478 Mich at 418.

Second, defendants' citation to MCR 2.116(C)(6) as a reason to avoid application of the doctrine of res judicata is misplaced because the doctrine does not consider the legal merit of the claims, and it is defendants' own misconduct that would result in summary disposition under the subrule. "In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action . . . ." MCR 2.203(A). "In determining whether two claims arise out of the same transaction or occurrence for purposes of MCR 2.203(A), res judicata principles should be applied." *Garrett v Washington*, 314 Mich App 436, 451; 886 NW2d 762 (2016). " 'The law abhors multiplicity of suits. Attempts to split a claim into separate causes of action have often met with disfavor.' " *Bergeron v Busch*, 228 Mich App 618, 621 n 1; 579 NW2d 124 (1998), quoting *Krolik & Co v Ossowski*, 213 Mich 1, 7; 180 NW 499 (1920). Additionally, "[a] party may not appeal an error that the party created." *In re Estate of Koch*, 322 Mich App 383, 403; 912 NW2d 205 (2017).

Defendants brought counterclaims in the present case in October 2016. The counterclaims relied on application of language in the retainer agreements. Indeed, even though one of the counterclaims referred to quantum meruit, it cited to language in the retainer agreement providing for relief in that form if defendants were discharged before the underlying negligence action was complete. Therefore, the counterclaims were reliant on allegations of a breach of the retainer agreements between defendants and plaintiffs.

Knowing full well that those claims were pending, defendants decided to file the 2017 action in a different county. In the 2017 action, although defendants raised some claims against other parties, defendants also accused plaintiffs of breaching the retainer agreements. To reiterate, at the time defendants filed the 2017 action, the present case was still actively proceeding and defendants' counterclaims had not been dismissed. Thus, it was defendants' decision to file separate litigation that created a situation where, undoubtedly, summary disposal of the counterclaims would have been warranted had they been brought in the 2017 action. Defendants now attempt to use their own gamesmanship to their advantage by claiming that, because of their own improper behavior, they could not have brought the counterclaims in the 2017 action.

As noted above, this argument by defendants initially lacks merit because application of res judicata does not depend on whether certain claims would have been successful if brought in the first-litigated case. The elements of res judicata, as described above, are "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Washington*, 478 Mich

at 418 (quotation marks and citation omitted). The third element requires consideration of whether the counterclaims in the present case were, or could have been, resolved in the 2017 action. *Id*. Notably, it is of no concern whether the counterclaims would have been resolved in defendants' favor. Indeed, as our Supreme Court recently explained, "the doctrine of res judicata applies even if the prior judgment rested on an invalid legal principle." *Foster v Foster*, 509 Mich 109, 121; 983 NW2d 373 (2022), amended 509 Mich 988 (2022). Therefore, defendants' reliance on the likely dismissal of the counterclaims if brought in the 2017 action is ultimately irrelevant to consideration of whether they could have been raised in the action. *Washington*, 478 Mich at 418.

Additionally, defendants' arguments for reversal fail because they rely on errors that defendants themselves created. By filing breach-of-contract actions in two different lawsuits, defendants violated MCR 2.203(A), which required defendants to file all of their claims against plaintiffs arising out of the retainer agreements in a single action. Defendants have never substantively disputed in this litigation that their claims of breach of retainer agreements made in their counterclaims and in the 2017 action arose out of the same set of facts. *Garrett*, 314 Mich App at 451. Nor could they, frankly, considering that all of their claims rely on alleged breaches of the same contracts. Defendants' decision to ignore MCR 2.203(A) meant that they were going to be bound by the doctrine of res judicata as to all claims pertaining to the contractual relationships between the parties once one of the lawsuits was litigated on the merits. Defendants now rely on their improper action of splitting their causes of action as a reason not to apply the doctrine of res judicata. However, this Court has been clear that "[a] party may not appeal an error that the party created." *Estate of Koch*, 322 Mich App at 403. Therefore, defendants' attempts to escape the application of the doctrine of res judicata lack merit, and the trial court did not err when it relied on the doctrine when striking defendants' notice of reasserting counterclaims.[7]

[7] Although now unnecessary to consider because we are affirming on other grounds, we also agree with plaintiffs' contention that defendants made a judicial admission that they would not be raising counterclaims on the basis of breach of the retainer agreements at trial. Our Supreme Court has defined judicial admissions as "formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698 (1996) (quotation marks and citation omitted). Judicial admissions include oral statements made by a party's attorney "if it is a distinct, formal, solemn admission made for the express purpose of, *inter alia*, dispensing with the formal proof of some fact at trial." *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969). "Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be." *Radtke*, 453 Mich at 420 (quotation marks and citation omitted).

As trial approached in the present case, plaintiffs moved the trial court to enter a trial-management order, which would include a clear order disposing of defendants' counterclaims. Plaintiffs argued that the counterclaims had been decided in the 2017 action and, as a result, could not be litigated again in the present case. Before allowing substantive arguments, the trial court asked defendants if they intended to present the counterclaims during trial. Defense counsel

## IV. CONCLUSION

For all of the reasons stated above, we affirm the trial court's orders denying defendants' motion in limine and granting plaintiffs' motion to strike defendants' notice of reasserting counterclaims. We now remand this case for trial. We do not retain jurisdiction. Plaintiffs, being the prevailing parties, may tax costs. MCR 7.219(A).

/s/ Anica Letica
/s/ Colleen A. O'Brien
/s/ Thomas C. Cameron

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specifically answered that there were no such claims. Plaintiffs are correct that this was a judicial admission by defendants that they would not be making any claim that plaintiffs breached the retainer agreements; defense counsel's statement was "a distinct, formal, solemn admission made for the express purpose of, *inter alia*, dispensing with the formal proof of some fact at trial." *Ortega*, 382 Mich at 222-223. The hearing at which defense counsel made the statements was specifically being held to narrow the issues for the upcoming trial. Defense counsel was expressly asked if defendants intended to bring a claim for breach of the retainer agreements by plaintiffs, and defense counsel responded in the negative. Thus, the statement by defense counsel was made for the purpose of "dispensing with the formal proof of some fact at trial." *Id*. When a party makes a judicial admission, they have "conclusively [] admitted such facts," thereby removing the responsibility of the opposing party to litigate it. *Radtke*, 453 Mich at 420. Consequently, because of defendants' judicial admission that they would not be making any claims of plaintiffs' breaching the retainer agreements, and all of defendants' counterclaims are reliant on the language found in the retainer agreements, dismissal of the counterclaims was required. *Ortega*, 382 Mich at 222-223; *Radtke*, 453 Mich at 420. Therefore, we would also affirm the trial court's order striking defendants' notice of reasserting counterclaims on this ground.