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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4782-08T2

GORJUICE WRAP, INC. (d/b/a COMPUTER WORLD),
a New Jersey Corporation and
YOUNG KANG (a/k/a JASMINE KANG),

Plaintiffs-Appellants,

v.

OKIN, HOLLANDER & DE LUCA, LLP, a
New Jersey Partnership and
JAMES DE LUCA, individually,

Defendants-Respondents.

Argued December 14, 2010 - Decided January 12, 2011

Before Judges Wefing, Payne and Baxter.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-2150-07.

Charles M. Yoon (Yoon & Kim LLP) of the New York bar, admitted pro hac vice, argued the cause for appellants (Jennifer Chung (Yoon & Kim LLP) and Mr. Yoon, attorneys and on the briefs).

Robert B. Hille argued the cause for respondents (Kalison, McBride, Jackson & Robertson, P.C., attorneys; Mr. Hille, of counsel and on the briefs; John W. Kaveney, on the briefs).

PER CURIAM

This is a legal malpractice case in which plaintiffs asserted that their lawyer negligently failed to seek emergent relief when plaintiffs' commercial landlord locked them out of the leased premises. Plaintiffs Gorjuice Wrap, Inc., d/b/a Computer World (Gorjuice), and its president, Young Kang, appeal from an April 15, 2009 Law Division order that granted summary judgment to defendant James De Luca and to his law firm, Okin, Hollander & De Luca LLP (OH&D), thereby dismissing the legal malpractice case with prejudice. Plaintiffs also appeal from a second order entered the same day, which denied their cross-motion for summary judgment on liability.

We disagree with the motion judge's conclusion that plaintiffs' malpractice complaint was barred by the Puder doctrine, see Puder v. Buechel, 183 N.J. 428 (2005), judicial estoppel and the entire controversy doctrine. We therefore reverse the dismissal of plaintiffs' claim for damages related to the disposal of their personal and commercial property after Gorjuice's landlord locked Gorjuice out of the leased premises, and we remand for trial on that issue.

In contrast, we affirm the judge's grant of summary judgment dismissing Gorjuice's claim for lost profits, although we do so for different reasons than those expressed by the judge. Viewing the evidence in the light most favorable to

plaintiffs, as required in the summary judgment context, we are nonetheless satisfied that: 1) the alleged malpractice was not a proximate cause of Gorjuice's failure, as Gorjuice was already failing before defendants' involvement; and 2) any such lost profit damages were purely speculative and therefore prevented under the "new business rule."

We also affirm the dismissal of plaintiffs' claim for punitive damages, as plaintiffs failed to raise a genuine issue of material fact on whether defendants' conduct was willfully and wantonly reckless or malicious. We also affirm the denial of plaintiffs' cross-motion on liability, as defendants presented a genuine issue of material fact on the question of proximate cause that was sufficient to entitle them to a denial of plaintiffs' cross-motion.

We thus affirm in part and reverse in part.

I.

In the fall of 1998, while she was a graduate student in Education at Columbia University, plaintiff Kang established a company known as Edreamcom, Inc. (Edream), which offered a series of computer-aided educational courses for children and adults. Edream operated from a small retail space located in Closter. According to Kang, Edream was relatively successful, earning a total of $150,000 in gross revenue during its first

two years of operation.[1] Toward the end of 1999, Kang decided to expand Edream by offering a greater variety of courses and activities, incorporating the new venture as Gorjuice Wrap, Inc. According to Kang, like Edream, "Gorjuice's core business" was "a computer lounge and facility that offered educational services." However, the new business was designed

> to provide various other services to create a new family-oriented, community center combining educational, recreational and entertainment services for children, teens, and adults in one modern facility. In addition, Gorjuice would provide computer access and training at all levels of sophistication, classrooms for lectures, workshops, and tutoring in English, math, science and other subjects; recreational rooms with billiards, table tennis and other games; auditorium rental space for parties and other gatherings; a snack bar that specialized in healthy fare such as smoothies and sandwich wraps; and a tea room with special Korean . . . premium teas. . . . Gorjuice [was intended] to be the first in a new franchise of "family centers" in other affluent, family-oriented neighborhoods.

The space occupied by Edream at 211 Closter Dock Road in Closter consisted of only 1,500 square feet. Because the expanded activities of Gorjuice required considerably more

[1] Even though Gorjuice argues that Edream was "relatively successful in its nascent years [1998 and 1999] earning revenues totaling more than $150,000," Edream's tax return for 1998 shows taxable income of "-$47,184." Its 1999 income tax return shows taxable income of "-$10,679."

space, Gorjuice entered into a lease for a 10,000 square foot property on three levels located at 40 Homans Avenue in Closter with a ten-year lease term beginning January 1, 2000. The building was owned by Robert and Sylvia Talmo, t/a Talmo Real Estate Partnership. The Homans Avenue property had formerly been used as a sports bar, and needed considerable renovation, but it had several parking spaces immediately adjacent to the building, with additional parking available "contiguous" to the building.

Gorjuice was represented in the lease negotiations by David Watkins, a lawyer whom the Talmos had recommended. Kang asked both the Talmos and Watkins whether they had an attorney-client relationship, but neither disclosed that Watkins had been a longtime attorney for the Talmos and had represented them when they acquired the Homans Avenue property.

During the lease negotiations, Watkins advised Kang that the lease had to be executed immediately to expedite the zoning process. In deciding to lease the premises, Gorjuice relied on Watkins's advice and the Talmos' assurances that the premises were suitable for Kang's intended purposes.

Kang also retained Watkins to petition the Closter Planning Board for site plan approval so Gorjuice could commence its business operations. Despite his representations that he would

file the required applications, Watkins failed to do so in a timely manner, causing Kang to fire Watkins and retain new counsel to obtain the necessary site plan approval.

By letter dated March 2, 2000, the Closter Planning Board advised Kang that its Site Plan Subcommittee had approved her site plan application, contingent upon "the stipulation that no food, alcohol or beverages be served, no live entertainment be offered, the word 'lounge' be removed from the sign currently in the window and that the premises not be used as a video game arcade." After receiving partial zoning approval, Gorjuice began making repairs and renovations, installing the fixtures and equipment necessary to convert the premises to the uses Gorjuice intended.

On May 11, 2000, the Talmos sold the parking lot contiguous to the premises to Bergen Food Enterprises, Inc., d/b/a Nathan's Hot Dogs. Kang learned about the sale after it had occurred, and also discovered that Watkins had represented the Talmos in the transaction. As a result of that sale, the Closter Planning Board determined that the remaining parking spaces available to Gorjuice were insufficient to support Gorjuice's business. Consequently, Gorjuice was unable to obtain full zoning approval.

When Gorjuice opened for business in June 2000, it began to experience significant problems from leaks and structural problems in the building. According to Kang, the Talmos assured Gorjuice they would make the necessary repairs, but never did.

Gorjuice failed to make its initial and second monthly rent payments, which were due on May 1 and June 1, 2000. On June 11, 2000, the Talmos threatened collection and eviction proceedings. On June 24, 2000, Gorjuice paid the Talmos a portion of the overdue rent.

Gorjuice also defaulted on its July and August rent. By letter dated August 4, 2000, the Talmos again threatened litigation if the past due rent was not paid immediately. In response, Kang advised the Talmos that because of the reduction in parking spaces available to Gorjuice, the Planning Board had refused to issue Gorjuice full zoning approval. She also told the Talmos that the Board had limited the number of pool tables in the basement, and prohibited Gorjuice from offering classes for adults and from renting a party room or offering entertainment. She told the Talmos that in light of these restrictions, she did not believe she was able to develop a profitable business plan for Gorjuice. She explained that the restrictions imposed by the Planning Board had caused her to fall behind in her rent. In an undated letter, she wrote:

> If I can't have [a] profitable plan, or even I can't have any sort of make-up for the loss . . ., there is no reason for me to keep working to death. Specially now, my baby is most important to me. I do not want to get myself stressed out.

Gorjuice remained in arrears on its payment of rent. On November 16, 2000, the Talmos' counsel advised Gorjuice that it was "habitually in arrears" on its rent obligations, and specifically in breach of its lease for its failure to the pay rent due on November 1, 2000. On January 5, 2001, Kang wrote to Sylvia Talmo and advised her of Gorjuice's financial problems, stating:

> As you know well, it has been impossible to survive here. I have been borrowing a lot of money to pay rent and make this place nice. So, I tried to get money from Korea to purchase this building as you offered back in April, but Warren said you do not want to sell the building any more, then there seems like no other way to survive within those business restriction caused by parking limit from town [sic]. Then, I would like to get business partner, or loan to payoff debt and pay rent and expenses to settle down.

Gorjuice's inadequate revenue stream continued to impact the payment of its rent. On February 7, 2001, the Talmos' counsel again advised Gorjuice that its rent was past due and as a result a late charge had been assessed for the February 2001 rent. Gorjuice responded, blaming its inability to pay rent on the condition of the property, specifically, the interior and

the roof, even though the lease placed on Gorjuice all responsibility for maintaining and repairing the interior and the roof. The Talmos sent additional letters on February 28, and March 22, 2001, again complaining that Gorjuice's rent was past due.

On April 3, 2001, Kang met with defendant De Luca to discuss the possibility of retaining OH&D to represent Gorjuice against the Talmos in its lease disputes. Although no retainer agreement had been executed at that time, De Luca drafted, for submission by Gorjuice, a proposed standstill agreement regarding the parties' various lease disputes.

That same day, April 3, 2001, a leak from the water heater and drain pipes in an adjacent property, the Greek Grill, caused serious flooding in the basement of the Talmos' building, damaging plaintiffs' property. Thereafter, Gorjuice filed a claim with its insurance carrier, Zurich-US Commercial Insurance Co. ("Zurich") for loss of business revenue and damage to its property. Gorjuice also sought reimbursement from Zurich for rental trucks and three self-storage units Gorjuice was forced to rent as a result of the flooded basement. Kang would later testify at her deposition that Gorjuice's last day of operations was April 3, 2001, the day of the flood. In her correspondence with Zurich, Kang advised the claims representative that

Gorjuice was in the process of obtaining another location "to relocate our business" and hoped to be able to reopen by November 1, 2001.

Gorjuice remained in arrears, not paying any rent in March or April 2001. On April 6, 2001, the Talmos made a proposal to Gorjuice to resolve its default. Gorjuice never responded.

On the evening of April 10, 2001, pursuant to the requests of the insurance adjuster, and to facilitate the assessment of the property damage, Kang removed some equipment and files. Warren Talmo, the Talmos' son and agent for Talmo Real Estate Partnership, saw Kang removing property from the building.

The next day, Warren returned and spoke with Hamin Kang, plaintiff Kang's father. Citing reports of recent burglaries in the area, he told Hamin that all of the locks in the building needed to be replaced. After changing the locks, Warren forcibly removed Hamin from the premises without allowing him to reenter, and without giving him keys to the new locks. At his deposition, however, Warren insisted that before changing the locks, he inspected the premises and saw no computer equipment, disks, books, records, safe or jewelry left behind. The building "was just abandoned"; "[n]othing of value remained."

That afternoon, April 11, 2001, Kang faxed to De Luca a handwritten list of items that she alleged remained in the

building. Later that evening, she filed a complaint with the Closter Police Department against Warren Talmo alleging an unlawful lockout.

Although OH&D still had not been officially retained by Gorjuice, on April 12, 2001, De Luca drafted a second letter for Gorjuice, this time demanding immediate reentry into the premises and access to Gorjuice's corporate, and Kang's personal, property. Kang's sister and father attempted to enter the building to retrieve her personal property, but they were stopped and ordered out by the police.

On April 16, 2001, Kang met with De Luca and with Peter A. Ouda, of the law firm Voorhees & Ouda, to discuss the handling of Gorjuice's claims against Watkins and the Talmos. The next day, De Luca forwarded a retainer agreement to Kang, which specified that De Luca's firm was being retained to, among other things, secure the "return of personal property currently at the Closter Property." A few days later, Ouda forwarded a retainer agreement to Kang governing his firm's representation of Gorjuice in a legal malpractice suit against Watkins. Ouda confirmed that while his firm would be handling the malpractice case against Watkins, De Luca and OH&D would be responsible for the lease dispute concerning the Talmos.

A few days later, Kang executed the OH&D retainer agreement on behalf of Gorjuice. The agreement noted that Gorjuice had advised OH&D it was "no longer interested in operating its business at the [premises], since the conditions at the [premises], including a recent flood, ha[d] made the [premises] unusable for Gorjuice's intended purposes."

According to Kang, during her discussions with De Luca regarding the lockout, both before and after the execution of the retainer agreement, she had repeatedly urged him to take immediate legal action to retrieve or protect Gorjuice's and her property that remained in the building. She asserted De Luca had repeatedly assured her that the Talmos could not dispose of plaintiffs' property and, in any case, plaintiffs would be compensated for any loss in the lawsuit he was preparing.

At approximately the same time, Kang began hearing rumors that the Talmos were attempting to sell the building. She contacted De Luca to advise him of the rumors and to again request that he take immediate action to retrieve or protect the property that remained in the building. De Luca advised her "that he was working on the matter" and she should "wait until he called [her]." According to De Luca, on June 13, 2001, Warren notified him that Gorjuice could enter the building to

remove any personal or corporate property. That same day, De Luca contacted Kang's husband, A.J. Chon, and told him arrangements should be made directly with Warren; however, when De Luca spoke with Warren on June 22, 2001, Warren advised him he had not been contacted by Kang or her husband. That same day, De Luca spoke to Kang, advising her to remove her property as soon as possible.

Kang disputed De Luca's assertion that he informed her and her husband in June and July of 2001 that she could re-enter the premises to retrieve her property. According to Kang, it was not until November 7, 2001, when the new owners allowed her into the building, that she learned that all of the property she left in the premises was gone.

On July 19, 2001, Gorjuice filed a six-count complaint against Watkins, the Talmos and their real estate partnership. Kang was not a plaintiff. In light of the trial judge's later conclusion that plaintiffs' malpractice complaint against De Luca and his firm was barred, we shall describe in their entirety the allegations against Watkins and the Talmos. The first count, against Watkins, alleged that Watkins's representation of Gorjuice deviated from accepted professional standards because Watkins: failed to disclose his prior and ongoing attorney/client relationship with the Talmos; failed to

disclose that he represented the Talmos in the purchase of the Closter Property and therefore knew of the various defects in the building that ultimately caused Gorjuice to suffer financial harm; negotiated a lease between Gorjuice and the Talmos that was not in the interests of Gorjuice; failed to file the request for site plan approval with the Closter Planning Board that he had assured Gorjuice he would pursue; failed to disclose to Gorjuice that he would be representing the Talmos in the sale of the very parking lot that Gorjuice understood was a part of the property it was leasing from the Talmos; failed to advise Gorjuice of its rights and remedies against the Talmos, such as termination of the lease, after the Talmos sold the parking lot; and committed numerous violations of the Rules of Professional Conduct.

The second and third counts of the Watkins/Talmos complaint pertained to the Talmos' false statement concealing their relationship with Watkins; the fourth count alleged that the Talmos misrepresented the condition of the building by concealing the poor condition of the basement and roof; and the sixth count sought return of the security deposit. The fifth count, which alleged that the Talmos illegally locked Gorjuice out of the property, provided as follows:

> 31. On or about April 11, 2001, Warren Talmo, property manager of . . . 40 Homans

> Avenue, Closter, New Jersey . . . on behalf of the Talmos, entered the Closter Property. At the time, the father of Ms. Kang was at the Closter Property waiting for insurance adjusters . . . .
>
> 32. Warren Talmo forcibly removed Ms. Kang's father from the Closter Property and then changed the locks . . . . Since that time, the Talmos have denied Plaintiff access to the Closter Property and Plaintiff's personal property contained therein.
>
> 33. Plaintiff has made attempts to gain access . . . in order to recover the personal property which is being improperly detained by the Talmos. The Talmos have denied Plaintiff access . . . and [Plaintiff] has been unable to recover its personal property.
>
> 34. Upon information and belief, the Talmos have removed all of Plaintiff's personal property from the Closter Property, including but not limited to, all corporate books and records, machinery, equipment and other assets, including jewelry.
>
> 35. Despite due demand, the Talmos have failed to turn over possession of Plaintiff's property.
>
> 36. As a result of the Talmos' actions, Plaintiff has suffered damages.

A few weeks after filing its complaint against Watkins and the Talmos, Gorjuice settled its insurance claim with Zurich concerning the flooding of the basement. In exchange for payment of $152,000 from Zurich, Kang, as president of Gorjuice, signed a proof of loss in which she agreed that "the whole loss

and damage" was $152,000. She acknowledged at her later deposition that a portion of that amount was reimbursement for the "business loss" Gorjuice had incurred.

On September 26, 2002, the Talmos filed a bankruptcy petition in the District of Nevada. Although Gorjuice retained Nevada counsel to represent its interests in the bankruptcy proceeding, ultimately Gorjuice filed no objection to the petition, and on September 15, 2003, the Bankruptcy Court granted the Talmos bankruptcy, thereby discharging any and all claims Gorjuice had against them. Shortly thereafter, Gorjuice dismissed the portion of its complaint directed against the Talmos without prejudice.[2]

On April 11, 2006, Gorjuice settled its malpractice case against Watkins for the sum of $250,000, and signed a general release, which stated:

> It is expressly understood and agreed that this release extends only to Watkins and his carrier with respect to the claim against Watkins asserted in this lawsuit [under Docket No. BER-L-6072-01] and to no other person, party or entity.

We now describe the malpractice action Kang and Gorjuice instituted against De Luca and OH&D. Their March 23, 2007 complaint alleges that De Luca and OH&D breached their duty of

[2] By then, De Luca was no longer representing Gorjuice. A different firm had been retained.

care by not obtaining immediate injunctive relief to gain reentry into the building to permit plaintiffs to retrieve their property, or to prohibit the Talmos from discarding or selling it. They alleged that the lost property included computer equipment, commercial furniture, business records, "a vast library of educational materials [including] over 3,000 research-related books and internet content being . . . developed both for Computer World and for outside providers," materials for Kang's doctoral thesis and Kang's jewelry and antiques. Although Kang was not specifically named as a client in the retainer agreement Gorjuice signed with De Luca, Kang maintained that "De Luca had an implied attorney-client and contractual relationship" with her.

In addition to plaintiffs' claim for damages resulting from the loss of the personal and corporate property that remained in the building, Gorjuice also sought damages for lost profits. In particular, Gorjuice asserted that because De Luca failed to secure Gorjuice's access to the building, Gorjuice was unable to retrieve from the premises the educational materials that were to be provided pursuant to Gorjuice's contract with a Korean company, known as Digital IMI, Inc. (Digital). Pursuant to that contract, Gorjuice was responsible for forwarding curriculum materials to Digital no later than April 1, 2001, which was

prior to the flooding of the premises and prior to the alleged illegal lockout. Gorjuice never provided any educational materials to Digital.

Even though Gorjuice's relationship with Digital never proceeded past the signing of the contract documents, Gorjuice maintained it was entitled to damages for lost profits, and presented an expert report from a certified public accountant assessing Gorjuice's lost profits at $6,411,000. The expert also concluded that Gorjuice's lost profits from Gorjuice's regular business, unrelated to Digital, was an additional $1,671,000.

After the completion of discovery, defendants moved for summary judgment, arguing they were entitled to judgment as a matter of law pursuant to Puder v. Buechel, supra. They argued that the Puder doctrine establishes that a client, after entering into a settlement agreement for less than a claim is purportedly worth, may not attempt to recoup the difference by filing a legal malpractice action against his or her attorney on the theory that the attorney's malpractice resulted in a less favorable settlement. Puder, supra, 183 N.J. at 438-43. Plaintiffs cross-moved for partial summary judgment on liability, supporting their liability argument with an expert

report alleging that De Luca deviated from the applicable duty of care he owed to Gorjuice and Kang.

In a written decision and order of April 15, 2009, the judge granted summary judgment to defendants, and denied plaintiffs' cross-motion. The court reasoned:

> Plaintiffs' current counsel settled the Watkins/Talmos litigation and certainly should have been aware of any possible malpractice claim against Defendants prior to that settlement. The damages requested in the present action are the very same damages asserted in the underlying action against Watkins and the Talmos. Therefore, Plaintiffs seek, after settling one legal malpractice suit arising out of the same lease agreement, to recover in a second legal malpractice suit for the same damages to personal property recovered in the first suit. Pursuant to the Entire Controversy Doctrine and Rule 4:28-1, mandatory joinder, the Court will not provide a double recovery for Plaintiffs.
>
> Moreover, like Puder, the Court is presented here with a plaintiff who is seeking to profit from litigation positions that are clearly inconsistent and uttered to obtain judicial advantage. If plaintiff was dissatisfied with the payouts they received for their personal property under the Watkins/Talmos action or the Zurich insurance proceeds, then plaintiffs should have addressed such issues at the onset of those actions. Therefore, under Puder, Plaintiffs are precluded from bringing the present claims against defendants. Plaintiffs were free to join the defendants in the previous action but they chose not to join them. Furthermore, under the doctrine of judicial estoppel, plaintiffs are prevented from asserting the damage claims

> against Watkins and the Talmos in one suit and asserting the same claims against [OH&D] and De Luca in another action.

On appeal, plaintiffs raise the following claims: 1) the trial court misapplied the summary judgment standard by failing to construe the facts in the light most favorable to them as the non-moving parties, and by ignoring the genuine issues of material fact that were present in the record; 2) even if no genuine issues of material fact exist, the grant of summary judgment was inappropriate because neither the Puder doctrine, judicial estoppel nor the entire controversy doctrine, upon which the judge relied, entitled defendants to judgment; and 3) the judge erred by denying plaintiffs' cross-motion for summary judgment on liability because the proofs established that defendants were negligent as a matter of law.

II.

We review the trial court's grant of summary judgment de novo. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Employing the same standard the trial court uses, ibid., we review the record to determine whether there are material factual disputes and, if not, whether the undisputed facts viewed in the light most favorable to plaintiff nonetheless entitle defendant to judgment as a matter of law.

Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

In point one, plaintiffs maintain that the judge misapplied the Brill standard because, rather than construe the facts in the light most favorable to them as the party opposing the motion, the judge instead adopted a version of the facts consistent only with defendants' version of the events, ignoring evidence to the contrary. Gorjuice points to a portion of the judge's opinion in which he specifically found that defendants successfully negotiated for Gorjuice "to have access to the [building]." In so finding, the judge ignored plaintiffs' assertion in their verified complaint that De Luca never negotiated access to the premises prior to the disposal of their property by the Talmos, and that not until November 7, 2001, when the new owners took over, were they permitted to enter the building, but by then all their property was already gone.

Unquestionably, there was a sharp dispute on this issue, and the Brill standard does not authorize a judge to adopt the moving party's version of the facts. Instead, it requires the opposite, namely, that the judge construe the facts in the light most favorable to the party opposing the motion. Brill, supra, 142 N.J. at 539-41.

Even though we agree with plaintiffs' argument that the judge misapplied the Brill standard, this error does not entitle plaintiffs to reversal of the order granting summary judgment. We reach this conclusion because the judge's erroneous adoption of defendants' claim that they successfully negotiated access to the building had no bearing on the ultimate grant of summary judgment. Stated differently, the judge did not grant defendants' motion because he concluded that defendants negotiated access to the building and therefore were not negligent. Instead, the judge granted the motion based upon the Puder doctrine, the entire controversy doctrine and judicial estoppel. We turn now to an analysis of those issues.

III.

In point two, plaintiffs maintain that even if there were no genuine issues of material fact, the judge's legal conclusions were wrong. As we have already noted, relying on Puder, the judge held that Gorjuice was "seeking to profit from litigation positions that were clearly inconsistent and uttered to obtain judicial advantage," and that if they were "dissatisfied with the payouts they received for their personal property under the Watkins/Talmos [litigation] or the Zurich proceeds," they should have addressed those issues then. Therefore, the judge held that plaintiffs were precluded, under

Puder, supra, 183 N.J. at 438-43, from bringing a malpractice claim against their attorneys.

A. The Puder doctrine

In Puder, the Supreme Court was presented with the question of whether a matrimonial litigant should be permitted to sue her first attorney for malpractice after she retained new counsel and settled her case on terms virtually identical to those negotiated by the first attorney. Puder, supra, 182 N.J. at 432-33. The client stated on the record that the second settlement was "acceptable" and a "fair compromise of the issues" in her matrimonial case, even though she believed otherwise and had expressly reserved the right to continue her malpractice case against her former attorney. Id. at 433-35. The Court held that under those circumstances the plaintiff was barred from suing her first attorney for malpractice because she was bound by her statement under oath to the judge approving the divorce settlement that the settlement was "acceptable" and "fair." Id. at 437. The Court noted that "a client should not be permitted to settle a case for less than it is worth . . . and then seek to recoup the difference in a malpractice action against [the] attorney." Id. at 443.

We agree with plaintiffs' argument that Puder is entirely inapplicable because Gorjuice has never contended that it was

the malpractice of De Luca and his firm that caused them to accept an insufficient settlement from Zurich and Watkins. Indeed, De Luca and his firm were not involved either in the settlement of the Watkins/Talmos litigation or the resolution of the Gorjuice insurance claim. Nothing in Puder prevents Gorjuice from asserting a malpractice claim against De Luca that does not arise out of legal services provided in connection with the settlement of those prior matters.

Finally, and of greater importance, the equitable concerns implicated in Puder are not present here. Unlike the plaintiffs in Puder, Gorjuice made no representations to any court that they were satisfied with the settlement in the Watkins/Talmos litigation, or that it was "fair" or "adequate." We thus conclude that the trial court erred when it relied upon the Puder doctrine in dismissing plaintiffs' complaint.

B. Judicial estoppel

As we have noted, the judge also relied upon the doctrine of judicial estoppel, holding that plaintiffs were prevented from asserting damages against Watkins and the Talmos in one suit, and asserting the same damages against defendants in the present action. Gorjuice and Kang contend that judicial estoppel was inapplicable because the damages they claimed and

recovered in the malpractice action against Watkins were different from those damages claimed against De Luca and OH&D.

"The purpose of the judicial estoppel doctrine is to protect 'the integrity of the judicial process.'" Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 606 (App. Div. 2000) (quoting Cummings v. Bahr, 295 N.J. Super. 374, 387 (App. Div. 1996)), certif. denied, 167 N.J. 88 (2001). It operates to "bar a party to a legal proceeding from arguing a position inconsistent with one previously asserted." Cummings, supra, 295 N.J. Super. at 385 (internal quotation marks and citation omitted).

"Because the doctrine of judicial estoppel only applies when a court has accepted a party's position, a party ordinarily is not barred from taking an inconsistent position in successive litigation if the first action was concluded by a settlement." Kimball, supra, 334 N.J. Super. at 607 (citation omitted). See also Pressler & Verniero, Current N.J. Court Rules, comment 15.2.1 on R. 4:5-4 (2010) ("[A] party will not be deemed to have prevailed in asserting a litigation position and hence will not be barred by judicial estoppel if the action in which that position was taken was settled without judicial determination.").

Applying these principles, we conclude that the trial judge's reliance on judicial estoppel was error for several reasons. First, none of plaintiffs' positions or arguments were decided by a court in the Watkins/ Talmos litigation. Instead, the matter was settled without judicial determination as to Watkins, and dismissed, without judicial determination, as to the Talmos and Talmo Real Estate Partnership.

Second, the position plaintiffs have asserted against De Luca and his firm is not contrary to the position Gorjuice took against the Talmos and Talmos Real Estate Partnership in the Watkins/Talmos litigation. Plaintiffs' attempt to recover from both the Talmos and defendants does not establish that the positions plaintiffs took in the two lawsuits are contrary to each other. Accordingly, allowing plaintiffs to sue De Luca and his firm, after they took a certain position in the Watkins/Talmos litigation, would not result in a miscarriage of justice or otherwise jeopardize the integrity of the judicial process, which is a required element of a judicial estoppel claim. See Kimball, supra, 334 N.J. Super. at 606. We therefore conclude that the trial judge's reliance on judicial estoppel in granting defendants' summary judgment motion was error.

C. Entire controversy doctrine

We turn next to the trial judge's conclusion that plaintiffs' complaint against defendants was barred by the entire controversy doctrine, namely, they settled the Watkins/Talmos litigation "and certainly should have been aware of any possible malpractice claim against defendants prior to that settlement." The judge also reasoned that "[t]he damages requested in the present action are the very same damages asserted in the underlying action against Watkins and the Talmos" and such "double recovery" is prohibited by the entire controversy doctrine.

The entire controversy doctrine compels litigants, at the risk of preclusion, to assert all claims in a single action. Prevratil v. Mohr, 145 N.J. 180, 190 (1996). The reasons behind it are threefold: "(1) the need for complete and final disposition through the avoidance of piecemeal decisions; (2) fairness to parties to the action and those with a material interest in the action; and (3) efficiency and the avoidance of waste and the reduction of delay." DiTrolio v. Antiles, 142 N.J. 253, 267 (1995) (citing Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 15 (1989)).

Defendants never raised the entire controversy doctrine in their answer to the verified complaint. Nor did they raise or

argue the doctrine in their summary judgment motion. Indeed, they defended this case for nearly two years without raising or even mentioning the entire controversy doctrine. Rather, the entire controversy doctrine was raised, sua sponte, by the trial judge in his written opinion.

The entire controversy doctrine is an affirmative defense required to be pleaded by a party or otherwise timely raised, and the failure to do so results in a waiver of any entire controversy defense to which that party would otherwise have been entitled. See Brown v. Brown, 208 N.J. Super. 372, 384 (App. Div. 1986). See also Aikens v. Schmidt, 329 N.J. Super. 335, 339-40 (App. Div. 2000); Kopin v. Orange Prods., Inc., 297 N.J. Super. 353, 375-76 (App. Div.), certif. denied, 149 N.J. 409 (1997)). Consequently, having never raised the defense, defendants waived it, Brown, supra, 208 N.J. Super. at 384, and because defendants waived any right to rely upon the entire controversy doctrine, the judge erred by applying that doctrine in defendants' favor.

We have thus concluded that the trial court improperly applied the Brill standard, and improperly relied upon the Puder doctrine, judicial estoppel, and the entire controversy doctrine. Nonetheless, for the reasons we shall shortly explain, we do not accept plaintiffs' argument that the summary

judgment order should be reversed in its entirety. In particular, we conclude that plaintiffs' claim for damages arising from the disposal of Kang's personal, and Gorjuice's corporate, property should have survived defendants' motion, as plaintiffs raised a genuine issue of material fact and their claims related to the disposal of their property were not barred by any of the doctrines upon which the judge relied. We therefore reverse the grant of summary judgment in relation to the damages Kang and Gorjuice asserted from the disposal of their property. We reach a different result on plaintiffs' remaining claims, which we discuss below.

IV.

In light of his reliance on the Puder doctrine, judicial estoppel and the entire controversy doctrine, the judge dismissed the verified complaint in its entirety. He therefore did not specifically address Gorjuice's claims for lost profits. On appeal, defendants argue that even if the judge's reasons for dismissing Gorjuice's lost profits claims were incorrect, there are other, correct, reasons for sustaining the result the judge reached. Defendants' argument is two-fold: 1) the alleged malpractice was not a proximate cause of Gorjuice's failure, as the company was already failing before defendants became

involved; and 2) Gorjuice's claim for economic loss is speculative and therefore barred under the "new business rule."[3]

We turn first to defendants' causation argument, that any alleged malpractice was not a proximate cause of the failure of Gorjuice. They maintain that Gorjuice was forced to shut down its business due to the flooding in the basement and the numerous significant restrictions imposed by the Closter Planning Board. As to the latter, defendants point to Gorjuice's inability to obtain site plan approvals on the terms and conditions necessary, and to Kang's statement to the Talmos that because of the parking restrictions imposed by the Closter Planning Board, she did not believe she was able to develop a profitable business plan for Gorjuice at the Talmos' building, and it was impossible for Gorjuice to "survive" there. Defendants also argue that as early as April 16, 2001, prior to the execution of the retainer agreement with OH&D, Kang advised them that Gorjuice was "no longer interested in operating its

[3] Defendants also contend that summary judgment was appropriate because: (1) plaintiffs lacked the requisite expert testimony as the report of their liability expert constituted an impermissible net opinion; (2) defendants' decision to negotiate with the Talmos was a legitimate exercise of legal judgment as a matter of law; and (3) by subrogating its rights to Zurich, Gorjuice lacked standing. In light of our conclusion that any economic loss was barred by the "new business rule," we need not address these additional arguments.

business at the [premises], since the conditions at the [premises], including a recent flood, ha[d] made the [premises] unusable for Gorjuice's intended purposes."

Defendants also point to evidence in the record showing Gorjuice ceased its operations after the April 3, 2001 flooding of the basement, namely, Kang's deposition testimony that Gorjuice's last day of operations was April 3, 2001, the day of the flood. Thus, defendants maintain, and we agree, Gorjuice was not open for business at the time of the April 11, 2001 lockout, and it was therefore not the lockout, or defendants' purported lack of response to the lockout, that caused Gorjuice to cease business operations.

We recognize that plaintiffs also maintain that they would have been able to reopen their operation after the flood if defendants had arranged for them to reenter the building to retrieve their property, and defendants' negligence was the cause, or at least a cause, of their inability to reopen their business in the Talmos' building. This claim lacks any support in the record. As a result of the April 3 flood, Gorjuice was not operating at the time of the lockout, and there is no evidence in the record that Gorjuice could have reopened for business between April 23, 2001 when the retainer agreement was signed, and May 1, 2001, when Gorjuice terminated its lease.

Indeed, Gorjuice had admittedly removed much of its property from the premises and placed it into storage prior to the lockout. There is no evidence that Gorjuice intended, or was even able, to reopen for business in the Talmos' building prior to its voluntary termination of its lease. We therefore agree with defendants' argument that Gorjuice failed to raise a genuine issue of material fact on the question of causation.

We turn to defendants' second argument, namely, they were entitled to summary judgment on Gorjuice's claim for future lost profits because any alleged damages are purely speculative and prevented under the "new business rule." Under the "new business rule," prospective profits of a new business are considered too remote and speculative to meet the legal standard of reasonable certainty. Seaman v. U.S. Steel Corp., 166 N.J. Super. 467, 468-75 (App. Div.), certif. denied, 81 N.J. 282 (1979). In Seaman, the plaintiffs operated a marine business, specializing in marine salvage. Id. at 469. The plaintiffs sought to construct a 100-ton-capacity floating crane. Ibid. The plaintiff had purchased steel plates from the defendant to build it, but the plates were unacceptable for the plaintiff's stated purpose. Id. at 469-70. The plaintiff sued for lost profits, id. at 470, identified as "resulting from their inability to bid on an Army contract which required the use of

the crane and, alternatively, loss of rental value of the floating crane at $25,000 a month." Id. at 472.

We held that the jury award in favor of the plaintiffs was not supported by the evidence, explaining that the plaintiffs had

> never operated a crane of this size in their business, nor had they ever rented such a crane to others. It was to be a new operation in their business, without prior experience as to the floating crane's potential as profit-producing equipment. . . . It is where it is certain that damages have resulted and the evidence affords a basis for estimating the damages with some degree of certainty that recovery is allowed. . . . We conclude that here . . . the alleged loss of rental value was . . . incorrectly considered by the jury . . ., because it was not shown that plaintiffs suffered any loss of profits or that they had previously engaged in the floating-crane rental business and, finally, it was not shown that they had lost any opportunity to rent the floating crane.
>
> [Id. at 475.]

We reached the same result in Bell Atlantic Networks Services, Inc. v. P.M. Video Corp., 322 N.J. Super. 74, 101 (App. Div.) (internal quotation marks and citation omitted), certif. denied, 162 N.J. 130 (1999), when we held that alleged lost profits that are dependent on "entry into unknown . . . markets, or the success of a new and unproved enterprise, cannot

be recovered" because the business venture is so "risky" as to "preclude recovery of lost profits in retrospect."

Gorjuice was a new company which, prior to the lockout, had been in operation for only two and one-half years, even if we include its predecessor, Edream. Gorjuice's claims to the contrary notwithstanding, Edream's tax returns demonstrate that Edream's expenses exceeded its revenue, and it had no taxable income in either 1998 or 1999. From the outset of its own operation in January 2000, Gorjuice struggled to pay its rent. The combination of the flood, and the restrictions imposed by the Planning Board, had made it, in Kang's own words, "impossible to survive." Gorjuice was therefore "a new and unproved enterprise." Bell Atlantic, supra, 322 N.J. Super. at 101.

Gorjuice's alleged damages from its intended joint venture with Digital are likewise too remote and speculative to satisfy the legal standard of "reasonable certainty" established in Seaman and Bell Atlantic. Gorjuice concedes that its joint venture with Digital never progressed past the execution of the initial contract. The record also demonstrates that Gorjuice never provided Digital with any of the educational content that the contract with Digital contemplated, and there is no evidence that Gorjuice ever earned any profits under the joint venture

agreement. The undertaking was a start-up business with no operational history.

Moreover, the record demonstrates that Gorjuice had actually defaulted under its agreement with Digital prior to the lockout or defendants' alleged malpractice. Pursuant to the joint venture agreement, Gorjuice was to provide Digital with the materials "beginning with the second quarter of year 2001"; and Digital's membership service under the agreement "beg[a]n from the second quarter of the year 2001." However, Gorjuice failed to provide the promised materials to Digital on or before April 1, 2001.

We thus conclude that Gorjuice's alleged lost profits are too remote and speculative to satisfy the damages threshold established by the caselaw. We affirm the grant of summary judgment dismissing Gorjuice's complaint for lost profits, although we have done so on grounds different from those articulated by the trial judge. We affirm judgments, not reasons. Isko v. Planning Bd. of Tp. of Livingston, 51 N.J. 162, 175 (1968).

V.

We turn next to plaintiffs' argument that the judge erred when he dismissed their punitive damages claim. "The purpose of punitive damages is to punish a wrongdoer and deter others."

Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). "To be subject to liability for punitive damages, a defendant's conduct must be willfully and wantonly reckless or malicious." Ibid. Indeed, in Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 49 (1984), the Supreme Court explained that to warrant the imposition of punitive damages, "the defendant's conduct must have been wantonly reckless or malicious. There must be an intentional wrongdoing in the sense of an 'evil-minded act' or an act accompanied by a wanton and willful disregard of the rights of another."

"Mere negligence, no matter how gross, will not suffice as a basis for punitive damages." Smith v. Whitaker, 160 N.J. 221, 242 (1999). "Rather, [a] plaintiff must prove by clear and convincing evidence a 'deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to the consequences.'" Ibid. (quoting Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)).

Plaintiffs have alleged nothing remotely resembling wanton, reckless or malicious acts on the part of defendants sufficient to warrant the imposition of punitive damages. At best, defendants' actions were merely negligent. The failure to seek immediate injunctive relief after the lockout is, without more, an entirely insufficient basis for an award of punitive damages.

We thus affirm the dismissal of plaintiffs' punitive damages claim.

VI.

Last, we turn to plaintiffs' contention that the judge committed an error of law when he denied their cross-motion for partial summary judgment on liability. Plaintiffs argue the evidence "overwhelmingly" demonstrated that defendants breached the duty of care arising from their attorney-client relationship with plaintiffs by "failing to recognize and weigh the various remedies available in order to retrieve plaintiffs' wrongfully distrained property," which proximately caused their damages.

"The requisite elements of a cause of action for legal malpractice are: (1) the existence of an attorney-client relationship creating a duty of care upon the attorney; (2) the breach of that duty; and (3) proximate causation." Conklin v. Hannoch Weisman, 145 N.J. 395, 416 (1996) (quoting Lovett v. Estate of Lovett, 250 N.J. Super. 79, 87 (Ch. Div. 1991)). "Proximate cause is a factual issue, to be resolved by the jury . . . ." Scafidi v. Seiler, 119 N.J. 93, 101 (1990).

As we have already noted, we do not agree with the judge's conclusions respecting the Puder doctrine, judicial estoppel and the entire controversy doctrine. Nonetheless, we conclude that the judge was correct when he denied plaintiffs' cross-motion.

Plaintiffs were not entitled to summary judgment on liability because the issue of proximate cause could not be decided by motion, as it is a question of fact for a jury to decide. Ibid.

In particular, there was a genuine issue of material fact on the question of whether De Luca advised Kang's husband, A.J. Chon, in late June 2001 that Gorjuice and Kang could reenter the premises to retrieve their property. There was also a question of fact based upon Warren Talmo's testimony that plaintiffs had already removed all of their property before the lockout even occurred. Accordingly, genuine issues of material fact present in the record required the judge to deny plaintiffs' cross-motion on liability. Brill, supra, 142 N.J. at 540. We thus affirm the denial of plaintiffs' cross-motion.

VII.

Affirmed in part, reversed in part, and remanded.