Dated: May 09, 2018
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re:
EARL BENARD BLASINGAME and
MARGARET GOOCH BLASINGAME,
Debtors.

Case No. 08-28289-L
Chapter 7

Church Joint Venture, a limited partnership,
on behalf of Edward L. Montedonico, Chapter 7 Trustee
of the Bankruptcy Estate of Earl Benard Blasingame
and Margaret Gooch Blasingame,
Plaintiff,
v.
Earl Benard Blasingame,
Margaret Gooch Blasingame,
Martin A. Grusin,
MAG Management Corp. d/b/a JG Law Firm,
Tommy L. Fullen, and
Law Office of Tommy L. Fullen,
Defendants.

Adv. Proc. No. 14-00429

ORDER ON MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is the Motion for Summary Judgment filed on behalf of Church Joint Venture, a limited partnership, acting derivatively on behalf of Edward L. Montedonico,

Chapter 7 Trustee of the bankruptcy estates of Earl Benard Blasingame and Margaret Gooch Blasingame ("Plaintiff") (Dkt. No. 73). The Motion seeks summary judgment with respect to the question of whether causes of action for legal malpractice against Defendants Grusin, MAG Management Corp., Fullen, and Law Offices of Tommy L. Fullen (collectively the "Malpractice Defendants"), arising out of their representation of the Defendants Earl Benard Blasingame and Margaret Gooch Blasingame, belong exclusively to the Debtors' bankruptcy estates. The Plaintiff maintains that acts of legal malpractice occurring after the bankruptcy case was filed had their genesis in the pre-petition period, and thus constitute assets of the bankruptcy estate. In support of its motion, the Plaintiff relies upon the Original Complaint and the First Amended Original Complaint filed in *Church Joint Venture, A Limited Partnership, on Behalf of Edward L. Montedonico, Chapter 7 Trustee v. Grusin, et al.,* Adv. Proc. No. 12-00454, Bankruptcy Court of the Western District of Tennessee (the "Malpractice Action"), and the Original Complaint filed in *Blasingame v. Grusin, et al*., No. 9231, Chancery Court of McNairy County, Tennessee (the "Debtors' Chancery Court Malpractice Action"). Each of the Defendants has filed a response in opposition to the Motion for Summary Judgment. Defendant Fullen relies upon the Answer filed by himself and Defendant Law Offices of Tommy L. Fullen in the Malpractice Action. The Plaintiff has filed replies to the Debtors' Response and the other Defendants' Responses. The Plaintiff and the Debtors have filed Supplemental Briefs.

JURISDICTION

The Original Complaint in the Malpractice Action was filed in the United States District Court for the Western District of Tennessee on February 13, 2012, and was referred to the Bankruptcy Court for the Western District of Tennessee pursuant to 28 U.S.C. § 157(a), and its standing order *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*,

Misc. No. 81-30 (W.D. Tenn. July 10, 1984). A Motion for Withdrawal of the Reference was filed by Defendants Grusin and JG Law Firm on February 8, 2017, which is pending before the District Court. A Motion for Recusal of the undersigned bankruptcy judge was filed by Defendants Fullen and Law Offices of Tommy L. Fullen in the Malpractice Action on March 15, 2018. It is being held in abeyance pending the decision of the District Court on the withdrawal of the reference.

The present adversary proceeding seeks more narrow relief. It asks whether any causes of action for legal malpractice arising out of the filing and prosecution of the Debtors' bankruptcy case up until the disqualification of the Malpractice Defendants on July 19, 2011, are property of the Debtors' bankruptcy estate. Jurisdiction over a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11 in the standing order referenced above. The determination of what property constitutes property of the bankruptcy estate is one of the core duties of the bankruptcy judge. *See* 28 U.S.C. § 157(b)(2)(A); *Stern v. Marshall*, 564 U.S. 462, 473-75, 131 S. Ct. 2594, 2603, 180 L. Ed. 2d 475 (2011). Accordingly, the bankruptcy court has authority to enter its judgment concerning the Plaintiff's Motion for Summary Judgment subject only to appellate review under section 158 of title 28. 28 U.S.C. § 157(b)(1).

SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), incorporated at Fed. R. Bankr. P. 7056. "'Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no

genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.'" *Pazdzierz v. First American Title Ins. Co. (In re Pazdzierz)*, 718 F.3d. 582, 586, (6th Cir. 2013), quoting *Mazur v. Young*, 507 F.3d 1013, 1016 (6th Cir. 2007). The Court of Appeals for the Sixth Circuit has described the standards for granting summary judgment as follows:

> A genuine issue of material fact exists when, "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In deciding whether this burden has been met by the movant, this court views the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). However, to survive summary judgment, the plaintiff must present affirmative evidence sufficient to show a genuine issue for trial. *Anderson*, 477 U.S. at 249, 106 S. Ct. 2505. Therefore, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50, 106 S. Ct. 2505.

White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 475-76 (6th Cir. 2010). When cross motions for summary judgment are filed, the court must consider each motion in turn to determine whether it may be granted. *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir. 2003); *Taft Broadcasting Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991).

In this case, the parties have agreed that the facts alleged in each of their complaints are substantially similar and may be taken as true for the purpose of analyzing when the cause or cause of action for legal malpractice accrued.

BACKGROUND FACTS

The Blasingame Defendants filed a petition for voluntary relief under Chapter 7 of the Bankruptcy Code on August 15, 2008. They were represented by the Fullen Defendants in consultation with the Grusin Defendants. On February 22, 2011, this court granted summary judgment to the Trustee on the question of whether the Debtors were entitled to discharge. "Memorandum on Plaintiffs' Motion for Partial Summary Judgment on Discharge Claims,"

Montedonico v. Blasingame (In re Blasingame), Adv. Proc. No. 09-00482 (Bankr. W.D. Tenn.), Adv. Proc. Dkt. No. 117. The Debtors filed a motion to alter or amend judgment, which was supported by the Affidavits of Defendants Grusin and Fullen. This motion was denied by the court on May 9, 2011. On July 19, 2011, the Malpractice Defendants were disqualified from further representation of the Debtors pursuant to this court's "Order Granting Motion to Disqualify Counsel," Adv. Proc. No. 09-00482, Dkt. No. 187.

The Debtors hired new counsel, David J. Cocke, who filed a motion to alter or amend and for relief from the judgment denying the Debtors' discharges, which was granted. After an extended trial, the court again denied the Debtors' discharges on January 15, 2015. Adv. Proc. No. 09-00482, Dkt. No. 598.

The Plaintiff was granted derivative standing to pursue a malpractice action on behalf of the Trustee against the Malpractice Defendants on January 30, 2012. (Bankr. Dkt. No. 403). The Plaintiff filed the Original Complaint on February 13, 2012, and the First Amended Original Complaint on February 2, 2017. The Debtors filed their Original Complaint in the Chancery Court of McNairy County, Tennessee, on February 21, 2017. Both complaints describe substantially similar actions by the Malpractice Defendants that resulted in the denial of the Debtors' discharges. The parties agree that the facts alleged in the complaints are substantially similar that they may be taken as true for the purpose of analyzing the pending motion.

DISCUSSION

This complaint in this adversary proceeding asks the court to declare that the Debtors' causes of action for legal malpractice are property of their bankruptcy estates. The discussion thus must begin with section 541(a) of the Bankruptcy Code, which provides:

> The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is composed of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541(a). None of the exceptions set forth in subsections (b) or (c)(2) apply to the question of the ownership of a legal malpractice action. In *Butner v. United States,* the Supreme Court clarified:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy."

440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979) (citation omitted). Section 541 tells us that causes of action that existed before the commencement of a bankruptcy estate belong to the bankruptcy estate. *Butner* tells us that in order to determine whether a cause of action exists, we must look to state law.

But for the filing of the bankruptcy case, both the Plaintiff's and the Debtors' complaints for legal malpractice would have been filed in Tennessee courts. The Debtors live in Tennessee, and their lawyers practice in Tennessee. Thus, Tennessee law will determine when any causes of action for legal malpractice accrued. The prima facie case for legal malpractice consists of the following elements:

(1) The accused attorney owed a duty to the client;

(2) The attorney breached that duty;

(3) The client suffered damages;

(4) The breach was the cause in fact of the client's damages; and

(5) The attorney's negligence was the proximate or legal cause of the client's damages.

Gibson v. Trant, 58 S.W.3d 103, 108 (Tenn. 2001). As described by the Tennessee Court of Appeals,

> A cause of action for legal malpractice accrues … when (1) the attorney has committed negligence, (2) the client has been injured by that negligence, *Ameraccount Club, Inc., v. Hill*, 617 S.W.2d 876, 878-79 (Tenn. 1981), and (3) the client discovers, or in the exercise of reasonable care and diligence, should have discovered, the existence of the facts constituting negligence by the attorney and the injury caused by the attorney's negligence. *Security Bank & Trust v. Fabricating, Inc.*, 673 S.W.2d 860, 865 (Tenn. 1983).

Caledonia Leasing and Equipment Co., Inc. v. Armstrong, Allen, Braden, Goodman, McBride & Prewitt, 865 S.W.2d 10, 13 (Tenn. Ct. App. 1992). The date of accrual of a legal malpractice action is the date on which the statute of limitations begins to run. *Story v. Bunstine*, 538 S.W.3d 455, 463 (Tenn. 2017). For determining when a cause of action for legal malpractice accrues, the Tennessee Supreme Court has adopted a discovery rule pursuant to which "a cause of action accrues when the plaintiff knows or in the exercise of reasonably care and diligence should know that an injury has been sustained as the result of wrongful or tortious conduct by the defendant." *John Kohl & Co., P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 532 (Tenn. 1998). In legal malpractice claims, the Court explains:

> [T]he discovery rule is composed of two distinct elements: (1) the plaintiff must suffer legally cognizable damage – an actual injury – as a result of the defendant's wrongful or negligent conduct, and (2) the plaintiff must have known or in the exercise of reasonable diligence should have known that this injury was caused by the defendant's wrongful or negligent conduct. An actual injury occurs when there is the loss of a legal right, remedy or interest, or the imposition of a liability. An actual injury may also take the form of the plaintiff being forced to take some action or otherwise suffer "some actual inconvenience," such as incurring an expense, as a result of the defendant's negligent or wrongful act. However, the injury element is not met if it is contingent upon a third party's actions or amounts to a mere possibility.
>
> The knowledge component of the discovery rule may be established by evidence of actual or constructive knowledge of the injury. Accordingly, the statute of

> limitations begins to run when the plaintiff has actual knowledge of the injury as where, for example, the defendant admits to having committed malpractice or the plaintiff is informed by another attorney of the malpractice. Under the theory of constructive knowledge, however, the statute may begin to run at an earlier date – whenever the plaintiff becomes aware or reasonably should have become aware of facts sufficient to put a reasonable person on notice that an injury has been sustained as a result of the defendant's negligent or wrongful conduct. We have stressed, however, that there is no requirement that the plaintiff actually know the specific type of legal claim he or she has, or that the injury constituted a breach of the appropriate legal standard. Rather, the plaintiff is deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct. It is knowledge of facts sufficient to put a plaintiff on notice that an injury has been sustained which is crucial. A plaintiff may not, of course, delay filing suit until all the injurious effects or consequences of the alleged wrong are actually known to the plaintiff. Allowing suit to be filed once all the injurious effects and consequences are known would defeat the rationale for the existence of statutes of limitations, which is to avoid the uncertainties and burdens inherent in pursuing and defending stale claims.

Kohl, 977 S.W.2d at 532-33 (citations and internal quotation marks omitted), quoted in *Story*, 538 S.W.3d at 463-64.

The First Amended Original Complaint and the Debtors' Chancery Court Original Complaint allege that the Malpractice Defendants were negligent in their representation of the Debtors both before and after the filing of the Debtors' bankruptcy petition on August 15, 2008. Both of them allege that the Debtors were injured by that negligence when their discharges in bankruptcy were denied, first on February 22, 2011, and then again, after rehearing, on January 15, 2015. The Debtors began to understand that their representation by their attorneys could be called into question when the complaint in Adversary Proceeding No. 09-00482 was filed on September 29, 2009. Their knowledge deepened when this court initially denied their discharges, and again when they read the affidavits filed by Defendants Fullen and Grusin in support of their Motion to Alter or Amend, which was filed March 8, 2011 (Adv. Proc. No. 09-00482, Dkt. No. 126), and again when they received this court's disqualification order, which was issued July 19, 2011 (Adv. Proc. No. 09-00482, Dkt. No. 187).

The Plaintiff argues the malpractice action reflected in the First Amended Original Complaint belongs to the bankruptcy estate because the facts that resulted in the denial of the Debtors' discharges either occurred or were "substantially rooted" in the pre-petition period. They rely upon *Mueller v. Hall (In re Parker),* 368 B.R. 86, 2007 WL 1376081 (B.A.P. 6th Cir. 2007) (unpublished opinion); and *In re Richards,* 249 B.R. 859, 861 (Bankr. E.D. Mich. 2000).

The Debtors argue that the malpractice action reflected in their Chancery Court Original Complaint belongs to them, not to the bankruptcy estate, because the only damage complained of is the denial of their discharges, which occurred after the filing of their bankruptcy petition. They also argue that, had their discharges been granted, there would have been no damages resulting from the pre-petition activity of their lawyers. They rely upon *Caledonia Leasing,* 865 S.W.2d 10; *Burgess v. Sikes (In re Burgess),* 438 F.3d 493 (5th Cir. 2006); *Bracewell v. Kelley (In re Bracewell),* 454 F.3d 1234 (11th Cir. 2006); and *In re Vote,* 276 F.3d 1024 (8th Cir. 2002).

The opinion relied upon by the Plaintiff, *Mueller v. Hall*, was designated by the appellate panel that issued it to be one of limited precedential effect. Its underlying facts are very complex, but revolve around the sale of a legal malpractice claim by a trustee in bankruptcy. The debtor asserted that the trustee was without authority to sell the claim because it arose post-petition. The appellate panel ultimately concluded that the sale could not be collaterally attacked because the debtor failed to raise this argument during the sale process. 2007 WL 1376081, at *7. The appellate panel then went on to note that in *Segal v. Rochelle,* 382 U.S. 375, 86 S. Ct. 511 (1966), the Supreme Court held that a loss-carryback refund claim was "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start that it should be regarded as 'property'…." *Id.* This, however, was not necessary to the appellate panel's decision.

Segal is of very limited use to the court in analyzing the question before it now, which in essence is: was there an action for legal malpractice that could have been brought by the Debtors before their petition in bankruptcy was filed? The simple answer is no, there was not. The damage complained of by the Debtors is the loss of their discharges. Had no petition in bankruptcy been filed, they could not have suffered that damage. Even after the petition was filed, errors in the Debtors' bankruptcy statements and schedules could have been timely corrected to avoid loss of discharge. The First Amended Original Complaint and the Debtors' Chancery Court Original Complaint both allege damage suffered in the post-petition period that only could have been suffered after a bankruptcy petition was filed. Until the client has suffered damage, there can be no cause of action for legal malpractice. *Story,* 538 S.W.3d at 470.

In its Supplemental Brief filed May 4, 2018 (Dkt. No. 92), Plaintiff asserts that the decision of the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals in *Holcomb v. Altagen (In re Holcomb),* 2018 WL 1976526 (B.A.P. 9th Cir. April 25, 2018), decided after the court heard oral argument in this case, should influence the court's decision. The issue in *Holcomb* was whether the bankruptcy court had jurisdiction over the debtor's adversary proceeding alleging legal malpractice relating to post-petition acts, errors, and omissions of her former counsel. The appellate panel concluded that although the cause of action arose during the pendency of the bankruptcy case and concerned bankruptcy counsel's handling of the case, the claim was not administrative but rather personal in nature. *Id.* at *7. The Plaintiff argues that on the strength of *Holcomb,* this court should consider whether there are, in fact, two malpractice claims arising out of the conduct of the Malpractice Defendants, one pre-petition action that belongs to the bankruptcy estate, and another post-petition action that belongs to the Debtors. The *Holcomb* decision is helpful to the court's analysis, but not in the way that the Plaintiff suggests. The

distinction between a personal and administrative injury made in *Holcomb* is an important one to be applied in this case.

The Debtors respond in their Supplemental Brief, filed May 7, 2018 (Dkt. No. 93), that the Plaintiff misstates the Debtors' position as well as certain underlying facts in making its argument for co-existing malpractice claims. The Debtors point out that the First Amended Original Complaint and the Debtors' Chancery Court Original Complaint are substantially identical, alleging the same pre- and post-petition acts of the Malpractice Defendants. And they point out that both complaints allege the same damage resulting to the Debtors, i.e., denial of their discharges. This, they say, points to one malpractice action that belongs to the Debtors.

The Debtors are correct. There can be no more personal damage in connection with a bankruptcy case than the loss of a debtor's discharge. The Plaintiff has alleged no other damage that accrued to the bankruptcy estate, and has alleged no damage that accrued to the Debtors prior to the filing of their bankruptcy petition. Neither of the complaints describes a cause of action that could have been pursued by the Debtors prior to the filing of their bankruptcy petition. With very limited exceptions, property of the estate includes all legal and equitable interests of the debtor *as of the commencement of the case.* 11 U.S.C. § 541(a). The Debtors had no cause of action against the Malpractice Defendants at the commencement of their case, and their complaint is not administrative in nature. It is personal to them and is not property of the bankruptcy estate.

CONCLUSION

For the foregoing reasons, summary judgment is **DENIED** to the Plaintiff and **GRANTED** to the Blasingame Defendants. The legal malpractice action described in the First Amended Original Complaint and in the Debtors' Chancery Court Malpractice Action belongs to the Debtors, not to the bankruptcy estate.

cc: Debtors
Attorney for Debtors
Plaintiff
Attorney for Plaintiff
Defendants
Attorneys for Defendants
Chapter 7 Trustee