IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 4, 2003 Session

THERESA GODBEE v. ROBERT DIMICK, M.D.

Appeal from the Circuit Court for Davidson County
No. 01C548 Barbara Haynes, Judge

No. M2003-00397-COA-R9-CV - Filed January 13, 2004

A woman filed a malpractice suit against two doctors after undergoing unsuccessful surgery for back pain. Her suit named the radiologist who performed a pre-surgical MRI and the surgeon who operated on her spine. The radiologist filed a Motion for Summary Judgment, which the plaintiff did not resist, and the trial court granted. The surgeon subsequently filed a Motion for Partial Summary Judgment, arguing that under the principles of res judicata, collateral estoppel and the law of the case, the summary judgment for the radiologist precluded the plaintiff from claiming that the surgeon's own reading of the MRI was negligent. The trial court granted the motion. We reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Reversed and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, J., joined.

Joe Bednarz, Sr., Karen M. Weimar, Nashville, Tennessee; Steven R. Walker, Memphis, Tennessee, for the appellant, Theresa Godbee.

Michael F. Jameson, Renee Levay Stewart, Nashville, Tennessee, for the appellee, Robert M. Dimick, M.D.

OPINION

I. Unsuccessful Spinal Surgery

This interlocutory appeal arose from an extensive course of surgical treatment for back pain. The surgery was ultimately unsuccessful, and apparently led to a condition called arachnoiditis, which made the pain worse. The following account is almost entirely derived from the plaintiff's initial complaint.

Theresa Godbee consulted with her family doctor several times about right lower back pain and right leg pain in October of 1994. Her condition did not improve, and on November 1, 1994, she saw orthopedic surgeon Robert M. Dimick. Dr. Dimick treated Ms. Godbee with medication for less than a month. When she failed to improve, he scheduled her for spinal surgery. Prior to the surgery, Dr. Dimick ordered an MRI of Ms. Godbee's lumbar spine, which was performed by Dr. Michael S. Metzman, a radiologist. Dr. Metzman prepared a report summarizing his findings.

Dr. Metzman's report indicated moderate degenerative changes in the discs at L4-5 and L5-1, and marked compression of the thecal sac at L4-5. There was no mention in the report of spinal stenosis, a condition where the spinal canal is narrowed. Dr. Dimick's reliance, or lack of reliance, on Dr. Metzman's report became a central point of contention during the proceedings in this case. Ms. Godbee's initial Complaint stated that "[t]here is no indication that Dr. Dimick independently reviewed the MRI."

Dr. Dimick performed limited surgery on the left side of Ms. Godbee's spine on December 6, 1994. Rather than improving, the patient's condition worsened after the surgery. Dr. Dimick accordingly ordered a second MRI of her lumbar spine, which was conducted by Dr. Jeffrey Landman on December 12. His report indicated both acquired and congenital stenosis of the spinal canal at the L4-L5 level. The following day, he performed a myelogram, which confirmed the presence of the stenosis.

The plaintiff claims that if the stenosis had been identified prior to the surgery of December 6, a different and more extensive surgical procedure would have been apppriate. Since it was not, Dr. Dimick performed the more complete procedure on December 14. This also did not bring Ms. Godbee relief. She subsequently consulted with Drs. Berklacich and Schoettle, an orthopedic surgeon and a neurosurgeon respectively, who recommended yet another surgery.

The two doctors performed this surgery on May 2, 1995. Their notes indicate that they performed a bilateral decompressive lumbar laminectomy at L4-5 and L5-S1, allegedly the same operation that Dr. Dimick had performed on December 14, 1994. Ms. Godbee has since been diagnosed with arachnoditis, a painful condition which her experts have testified was due to mismanaged surgery.

II. The First Malpractice Complaint

On December 6, 1995, Theresa Godbee filed a Complaint in the Davidson County Circuit Court, naming Dr. Dimick and Dr. Metzman as defendants. Her sole claim against Dr. Metzman was based on the allegation that he was negligent for failing to identify spinal stenosis on her first MRI.

The plaintiff's claims against Dr. Dimick alleged multiple acts of negligence, including failing to obtain routine spinal x-rays prior to the first surgery, failing to independently review Dr. Metzman's MRI, failing to perform the appropriate surgery, failing to take special precautions during surgery to avoid or minimize nerve damage, performing surgery on the wrong side of the spine,

scheduling a second surgery too close in time to the first surgery, and failing to adequately perform the second surgery, thus requiring the laminectomy to be repeated by Drs. Berklacich and Schoettle.

The Complaint was placed on the docket of the Fifth Circuit Court. On January 3, 1996, Dr. Metzman filed a Motion for Summary Judgment, accompanied by an affidavit in which he stated that his interpretation of the MRI was correct and accurate, and in conformity with "the recognized standard of acceptable professional practice applicable to a neuroradiologist in Nashville, Tennessee, and similar communities in 1994." The plaintiff filed a Motion for an extension of time in which to respond to Dr. Metzman's Motion, asserting that she needed to send X-rays, MRIs and other radiological studies to medical professionals in three different states for their interpretation.

On February 15, 1996, Dr. Dimick filed an Answer to Ms. Godbee's Complaint. He denied any negligence, stated that he had obtained and reviewed routine x-rays of Ms. Godbee's lumbar spine during her first office visit, and declared that he had independently reviewed Dr. Metzman's MRI. He also claimed that the surgery performed by Drs. Berklacich and Schoettle was a different procedure than he had performed. As affirmative defenses, Dr. Dimick declared that, if necessary, he would rely on comparative fault, and that the injuries to the plaintiff were the result of independent, intervening causes.

The plaintiff apparently decided that it was not worth pursuing her claim against Dr. Metzman, perhaps because of Dr. Dimick's statement that he had independently reviewed the MRI. In any case, she did not oppose Dr. Metzman's Motion for Summary Judgment, and on March 12, 1996, the trial court entered an "Agreed Order" dismissing Dr. Metzman on summary judgment. The Order does not mention the specific allegations against Dr. Metzman, but states that "...plaintiff has agreed that there is no genuine issue as to any material fact and that Dr. Metzman is entitled to judgment as a matter of law. . . . " The Judge of the Fifth Circuit Court signed the "Agreed Order" as did the attorneys for both parties. After several years of discovery relating to her remaining claims against Dr. Dimick, Ms. Godbee voluntarily dismissed her Complaint without prejudice, on February 22, 2000.

III. THE SECOND MALPRACTICE COMPLAINT

Ms. Godbee filed a second malpractice complaint on February 21, 2001, which named only Dr. Dimick as a defendant. The new Complaint omitted any mention of an MRI or x-rays, but simply stated that Dr. Dimick "failed to properly assess the medical condition of Theresa Godbee prior to performing surgery on December 6, 1994." Because of a scheduling problem, the case was transferred to the Third Circuit Court for all further proceedings. On July 15, 2002, Dr. Dimick filed a Motion for Partial Summary Judgment on four of the plaintiff's claims, only one of which is relevant for this appeal.

Dr. Dimick noted that in response to an interrogatory, Ms. Godbee had asserted that "the MRI of November 1, 1994 showed marked spinal stenosis." He reasoned that the Summary Judgment for Dr. Metzman amounted to a judicial determination that the MRI was interpreted correctly and asked

the court to rule that the plaintiff was barred from asserting any negligence by Dr. Dimick in his review of the MRI, invoking the doctrines of res judicata, collateral estoppel, and the law of the case.

The trial court conducted a hearing on the defendant's Motion on August 26, 2002. The court subsequently granted the Motion, affirming all three theories of preclusion asserted by the defendant. In an Order filed on January 22, 2003, the court declared that the plaintiff was "barred from re-litigating the interpretation of the November 1, 1994 MRI," because "[t]he determination upon that issue was previously rendered by the Court in ruling upon Defendant Metzman's Motion for Summary Judgment." Ms. Godbee subsequently filed a Motion for Interlocutory Appeal. The trial court and this court agreed that interlocutory appeal of the trial court's order was necessary "to prevent needless, expensive and protracted litigation. *See* Rule 9(b) Tenn.R.App.P.

IV. CLAIM PRECLUSION

Res judicata is often referred to as a claim-preclusion doctrine. *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 178 (Tenn. Ct. App. 2000). It bars a second suit between the same parties or their privies on the same cause of action, with respect to all the issues which were (or could have been) litigated in the former suit. *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 459 (Tenn. 1995); *Lien v. Couch,* 993 S.W.2d 53, 56 (Tenn. Ct. App. 1998).

A primary purpose of the doctrine is the promotion of finality in litigation *See Moulton v. Ford Motor Co.*, 533 S.W.2d 295, 296 (Tenn.1976). Some commentators have also cited the function of making sure that "an individual is not vexed twice for the same cause." *See* 50 C.J.S. *Judgments* § 697. Because of res judicata, Ms. Godbee cannot assert another claim against Dr. Metzman based upon his reading of her first MRI since her suit against him was dismissed by summary judgment.

A similar bar might arguably apply to the claim against Dr. Dimick if there was privity between the defendants in regard to the disputed MRI. Such would be the case if there had been an identity of interest between the two defendants, *see Kelly v. Cherokee Ins. Co.*, 574 S.W.2d 735, 738 (Tenn.1978), or some sort of agency relationship between them, such as that between partners or between an employer and an employee. *See Harris v. St. Mary's Medical Ctr., Inc.,* 726 S.W.2d 902, 905 (Tenn.1987). But the separate interests of Dr. Metzman and Dr. Dimick are at least potentially adverse, and there is nothing in the record to indicate any kind of agency relationship.

Further, it appears to us that the summary judgment for the radiologist should not preclude the plaintiff from fully exploring all the factors that went into the defendant surgeon's decisions regarding the surgery. Since Dr. Dimick alleged that he had independently reviewed the MRI, the plaintiff was free to assert a claim based upon allegations that his review was negligently performed. That review forms part of a claim that is entirely separate from the claim against Dr. Metzman. Dr. Dimick's negligence, or lack thereof, was not addressed in the summary judgment dismissing Dr. Metzman.

Res judicata serves the important function of ensuring that a claim that is conclusively determined on its merits cannot be re-litigated. It should not be used to preclude consideration of a different claim, which has not yet been fully scrutinized by a judge or jury. For this reason, we believe the trial court erred by granting partial summary judgment to Dr. Dimick on the basis of res judicata.

V. ISSUE PRECLUSION

In contrast to res judicata, collateral estoppel is referred to as an issue-preclusion doctrine. *Hampton v. Tennessee Truck Sales, Inc.*, 993 S.W.2d 643 (Tenn. Ct. App. 1999). As this court said in *Cihlar*, 39 S.W.3d at 178, "Once an issue has been actually or necessarily determined by a court of competent jurisdiction, the doctrine of collateral estoppel renders that determination conclusive on the parties and their privies in subsequent litigation, even when the claims or causes of action are different."

In the present case, the appellee argues that for all practical purposes, the question of whether Dr. Dimick could be found negligent in his interpretation of the October 6, 1994 MRI was necessarily and conclusively decided when the trial court granted summary judgment to Dr. Metzman. While we do not agree with his reasoning, we will attempt to summarize it as best as we can for the purposes of this discussion.

Appellee contends that by granting summary judgment to Dr. Metzman, the trial court implicitly found that there was no stenosis to be seen on the MRI and/or that Dr. Metzman's interpretation did not violate the standard of care. He then reasons that (1) Dr. Dimick could not be negligent for failing to diagnose stenosis that was non-existent, or (2) even if there was stenosis, he could not have violated the standard of care because he reached the same conclusion Dr. Metzman did. With all due respect, we believe he is reading more into the prior judgment than is actually there.

In order to prevail on a medical malpractice claim, the claimant must prove (1) the recognized standard of professional care, (2) that the defendant failed to act in accordance with the applicable standard of care, and (3) that as a proximate result of the defendant's negligent act or omission, the claimant suffered an injury which otherwise would not have occurred. Tenn. Code Ann. § 29-26-115(a). *Seavers v. Methodist Medical Center of Oak Ridge*, 9 S.W.3d 86, 92 (Tenn. 1999).

The Fifth Circuit Court's Summary Judgment Order simply stated that there was no genuine issue as to any material fact and that Dr. Metzman was entitled to judgment as a matter of law. Appellee argues that this statement conclusively negates all three elements of the plaintiff's medical malpractice claim against the radiologist. We note, however, that our courts have repeatedly stated that when a party fails to raise a genuine issue of material fact as to <u>any</u> element of a claim, all the other facts are thereby rendered immaterial. *Alexander v. Memphis Individual Practice Ass'n,* 870 S.W.2d 278, 280 (Tenn.1993); *Byrd v. Hall,* 847 S.W.2d 208, 213 (Tenn.1993); *Armoneit v. Elliott*

Crane Service, Inc., 65 S.W.3d 623, 628 (Tenn. Ct. App. 2001); *Austin v. Shelby County Government,* 3 S.W.3d 474, 481 (Tenn.Ct.App. 1999).

We therefore have no way of knowing whether the summary judgment rendered for Dr. Metzman should be considered a determination that he acted within the standard of care and thus could not be negligent, as Dr. Dimick argues must necessarily be the case, or a determination that negligent or not, his conduct was not a proximate cause of the plaintiff's injury, as Ms. Godbee argues.

It has been said that for a prior judgment to be a bar, "it is essential that it should be so far specific and definite and free from ambiguity or contradiction as to show clearly what was the claim or cause of action adjudicated." 50 C.J.S. *Judgments* § 717. The "Agreed Order" of summary judgment does not provide the specificity that would allow us to reach the conclusion urged by Dr. Dimick.

We further note that the familiar rule which presumes that a judge is the most reliable interpreter of the meaning of that judge's own orders is not applicable in this case. *See Richardson v. Richardson,* 969 S.W.2d 931 (Tenn.Ct.App. 1997). The reason is that the summary judgment for Dr. Metzman was rendered by one judge, and the partial summary judgment for Dr. Dimick by another.

We also must address the appellee's argument that as a matter of common sense, a finder of fact could not possibly conclude that Dr. Dimick's interpretation of the MRI was negligent. To create this argument, the appellee combines the assertion that Dr. Metzman was conclusively found not to be negligent (which we have discussed above) with several other propositions which the appellee asserts without proof, as if they were undisputed facts.

The first such proposition is that Dr. Dimick's interpretation of the MRI was identical to Dr. Metzman's. While neither doctor apparently noted any stenosis, that is not enough to conclude that the two doctors reached identical conclusions as to the condition of Ms. Godbee's lower spine. The second proposition is that the standard of care that a radiologist reading an MRI has to adhere to must necessarily be higher than that for a orthopedic surgeon.

We note that Tenn. Code Ann. § 29-26-115(b) of the Medical Malpractice Act makes questions as to standards of care the exclusive province of qualified expert witnesses. In *Bowman v. Henard,* 547 S.W.2d 527 (Tenn. 1977), our Supreme Court was confronted with the question of how much weight to give the affidavit of an experienced medical malpractice attorney as to a question of medical negligence. The court rejected the affidavit, because expert testimony is required "unless the act of alleged malpractice lies within the common knowledge of laymen." 547 S.W.2d at 531. Further, as this court noted in *Whittemore v. Classen*, 808 S.W.2d 447 (Tenn. Ct. App. 1991), "[q]ualification in radiology does not necessarily show knowledge of the standards of surgery. This must be shown by evidence . . . ." 808 S.W.2d at 456.

In sum, the question of whether Dr. Dimick was negligent in his interpretation of the disputed MRI has not yet been seriously examined, let alone decided. The trial court therefore erred in finding that he was entitled to partial summary judgment on the basis of collateral estoppel.

VI. The Law of the Case

The law of the case is similar to res judicata and collateral estoppel in that it precludes re-litigation of matters that have already been conclusively determined by the court. It differs from the other doctrines in that it only applies to successive proceedings within the same case, while the other rules of preclusion apply to subsequent cases involving the same parties or claims.

Like the other two doctrines, however, the law of the case only applies to claims or issues that were actually decided by the court. As the above sections on res judicata and collateral estoppel make clear, the summary judgment order for Dr. Metzman did not encompass the question of Dr. Dimick's negligence, and so it does not constitute the law of the case in regard to that negligence.

VII. Conclusion

The order of the trial court is reversed. This cause is remanded to the Circuit Court of Davidson County for further proceedings consistent with this opinion. Costs of this appeal are taxed to the appellee, Dr. Robert Dimick.

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PATRICIA J. COTTRELL, JUDGE