

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2009-CP-46-5178

RECEIVED
APR 23 2013
SC Court of Appeals

Gladys Sims, as the Duly Appointed Appellant/Respondent
Guardian and Conservator of Kristy
L. Orłowski (a/k/a Kristy Wood)

v.

Amisub of South Carolina, Inc.,
d/b/a Piedmont Medical Center,
and C. Edward Creagh, M.D., Respondents/Appellants

APPELLANT'S FINAL BRIEF OF APPELLANT/RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. Whether the circuit court erred in estopping Kristy Orlowski from pursuing a medical negligence claim against Dr. C. Edward Creagh and Piedmont Medical Center based on an entirely distinct medical negligence claim against Ms. Orlowski's other medical providers.

STATEMENT OF THE CASE

Kristy Orłowski was pregnant in 2003 with her first child when she sought prenatal care from Dr. R. Norman Taylor and Rock Hill Gynecological & Obstetrics, P.A. (“RH GYNOB”). (R. p. 14 at ¶ 10-11). Kristy had headaches, dizziness, nausea, and extremity swelling for several months during the summer of 2003. (R. p. 14 at ¶ 17-18). Kristy saw Dr. Taylor for a regularly scheduled prenatal visit on September 11, 2003, and discussed her symptoms with Dr. Taylor. (R. p. 14 at ¶ 18-19). Dr. Taylor led Kristy to believe her condition was normal and sent her home without further treatment. (R. p. 15 at ¶ 20). Hours later, Kristy suffered a seizure and was found unresponsive in her home. (R. p. 15 at ¶ 21). Kristy was rushed to Piedmont Medical Center (“PMC”) where she was placed on a ventilator. (R. p. 15 at ¶ 22). Her doctors delivered baby Brianna by cesarean section. (R. p. 15 at ¶ 23).

Kristy remained hospitalized from September 12 through most of November 2003. (R. p. 15 at ¶ 24). During this hospitalization, Kristy endured multiple surgical procedures, severe respiratory distress, and other life-threatening conditions. Id. Kristy was discharged on November 24th but was rushed back to PMC hours later with severe chest pain and shortness of breath. (R. p. 20 at ¶ 12). Dr. Edward Creagh admitted Kristy and was responsible for her care during this hospitalization. (R. p. 20 at ¶ 12). Dr. Creagh diagnosed a left pleural effusion and performed a thoracentesis for suspected empyema but still chose to send Kristy home on November 27, 2003. (R. p. 20 at ¶ 12-13). Two days later, Kristy returned to PMC with severe nausea and vomiting. (R. p. 21 at ¶ 14). Dr. Creagh finally ordered a CT scan on November 30th that revealed a hydropneumothorax in Kristy’s left lung. Id.

Kristy's condition deteriorated rapidly over the next several days. She developed metabolic acidosis, stiff lungs, and continued having severe respiratory difficulties even with a ventilator. (R. p. 21 at ¶ 17). On December 3, 2003, Kristy suffered a cardiopulmonary arrest. (R. p. 21 at ¶ 17-18). Kristy was resuscitated but suffered permanent and severe damages caused by extended oxygen deprivation. (R. p. 21 at ¶ 19-20). Kristy was rendered permanently unable to care for any of her own needs.

Kristy, through her husband and guardian/conservator, filed a medical negligence claim against Dr. Taylor and RH GYNOB in August 2006. Kristy alleged Dr. Taylor and RH GYNOB improperly responded to Kristy's preeclampsia symptoms during the September 11, 2003 office visit causing Kristy to suffer a seizure, extended hospitalization, and permanent impairments. (R. p. 16-17 at ¶ 28-30). This will be referred to as the "Taylor Case."

The Taylor Case was based on alleged negligence occurring in September 2003. In preparation for trial of the Taylor Case, Kristy retained medical experts who testified that Kristy's permanent impairments were proximately caused by the negligence of Dr. Taylor and RH GYNOB. These witnesses testified accordingly at the April 2009 trial. For example, Plaintiff's expert Dr. Barry S. Schifrin testified that Kristy had signs and symptoms consistent with eclampsia during her visit to Dr. Taylor's office on September 11, 2003. (R. p. 64). The presence of those signs and symptoms required a different type of care than Dr. Taylor actually provided. Id. The preeclamptic episode Kristy suffered on September 12th would not have happened had Dr. Taylor responded properly to the signs and symptoms Kristy displayed on the 11th. (R. p. 65). Dr. Schifrin concluded that

Kristy's permanent injuries would not have occurred but for Dr. Taylor's improper conduct. See (R. p. 8).

None of this testimony addressed Dr. Creagh's conduct, or any negligence occurring during the November 25th hospital admission. This testimony never claimed Dr. Taylor's negligence was the sole cause of Kristy's injuries, to the exclusion of other potentially liable parties. Simply put, the medical negligence occurring during the November 25 hospital admission was never at issue in the Taylor Case.

The Taylor Case ended in a Defense Verdict.

Kristy filed the "Creagh Case" in November based on Dr. Creagh and PMC's negligence arising out of Kristy's November 2003 hospital admission. Dr. Creagh was NOT a party to the Taylor Case, his conduct was never examined in that litigation, and his alleged negligence arises out of a different hospital admission. The Creagh Complaint alleged that Dr. Creagh and PMC negligently provided Kristy's medical treatment beginning with the November 25, 2003 hospitalization. (R. p. 22-23 at ¶¶ 21-25; (R. p. 27-30 at ¶¶ 31-35). Kristy alleged Dr. Creagh and PMC failed to timely diagnose her condition, failed to properly monitor her, and failed to take proper interventions. (R. p. 28 at ¶ 33). Kristy suffered cardiopulmonary arrest, hypoxic brain injury, and permanent impairment as a direct and proximate result of Dr. Creagh and PMC's negligence. (R. p. 29 at ¶ 34). Although discovery is incomplete in this case, Defendants moved for summary judgment based on collateral estoppel in April 2012 and the motions were granted by order dated August 10, 2012.

Thus, the Circuit Court dismissed the instant case, based on testimony given in an earlier case that involved different parties, different allegations of medical negligence, and a different hospital visit. This was error.

STANDARD OF REVIEW

Summary judgment is appropriate only if the pleadings, discovery responses, and affidavits show “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. On a motion for summary judgment, a court must “construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party.” Byers v. Westinghouse Elec. Corp., 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Summary judgment should be granted “only where it is perfectly clear that no genuine issue of material fact exists and inquiry into facts is not desirable to clarify application of the law.” Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). On appeal, the court “applies the same standard used by the trial court” when reviewing a summary judgment order. Epstein v. Coastal Timber Co., 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN ESTOPPING KRISTY ORLOWSKI FROM PURSUING A MEDICAL NEGLIGENCE CLAIM AGAINST DR. C. EDWARD CREAGH AND PIEDMONT MEDICAL CENTER BASED ON AN ENTIRELY DISTINCT MEDICAL NEGLIGENCE CLAIM AGAINST MS. ORLOWSKI’S OTHER MEDICAL PROVIDERS.

There are several clear rules of law applicable to this case:

1) A plaintiff is the master of her complaint. See Chester v. S.C. Dep’t of Pub. Safety, 388 S.C. 343, 344, 698 S.E.2d 559, 560 (2010)(“It is well-settled that a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue”)(citing Doctor v. Robert Lee, Inc., 215 S.C. 332, 335, 55 S.E.2d 68, 69 (1949)(“One who is injured by the wrongful act of two or more joint tort-feasors has the option of bring an action against either one or all of them as parties defendants”)).

2) A negligent party is liable for all reasonably foreseeable injuries a plaintiff suffers including subsequent medical malpractice. Graham v. Whitaker, 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984).

3) For acts of medical negligence performed by different providers during different hospital admissions separated by two months, the South Carolina Rules of Civil Procedure do not call for joinder of parties. See Rule 19(a), SCRPC (limiting involuntary joinder to indispensable parties whose absence would prevent “complete relief...among those already parties”); Rule 20(a), SCRPC (permitting but not requiring a claiming party to join all defendants in a single action). Thus, as a matter of law, where the Taylor Case alleged different negligent conduct performed by different parties during different hospital admissions, the Taylor Case’s outcome has no effect on the Creagh Case.

Despite these clear legal principles, the circuit court found that the Taylor Case also concluded the Creagh Case. The basis for the circuit court’s decision was not clear. During the proceedings related to Respondents’ Motions for Summary Judgment, the court referred to several different types of estoppel as a potential basis for dismissing Appellant’s Complaint. At various times, the court discussed (1) collateral estoppel¹; (2) judicial estoppel²; (3) “estoppel of a judgment”³; and (4) “estoppel by judgment.”⁴ The court appeared unsure as to which type of estoppel formed the basis for its decision. See (R. p. 11)(“whether the legal theory of the defense is collateral estoppel or estoppel by judgment...”); (R. p. 287, lines 1-2)(applying a “collateral estoppel—if that’s the right word—argument”). Accordingly, all of these terms are addressed below.

¹ (R. p. 287, line 1); (R. p. 7)

² (R. p. 274, line 3)

³ (R. p. 11)(quoting Jenkins v. Atl. Coastline R.R. Co., 89 S.C. 408, 421, 71 S.E. 1010, 1012 (1911))

⁴ (R. p. 7).

A. The circuit court's order was not a proper application of collateral estoppel.

Collateral estoppel or issue preclusion is a bar on relitigation of issues previously decided in earlier proceedings. This legal doctrine is based on the “public interest [that] demands an end to the litigation” where a party has once litigated and lost the issue in question. Beall v. Doe, 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct. App. 1984). A proper application of collateral estoppel supports the “[p]rinciples of finality, certainty, and the proper administration of justice.” Id. Collateral estoppel applies only if the particular issue was “(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” Carolina Renewal, Inc. v. S.C. Dep’t of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

Of all the estoppel iterations mentioned in the proceedings below, collateral estoppel is the most prevalent. Collateral estoppel is the doctrine cited by Dr. Creagh and PMC in their respective motions. See (R. p. 78); (R. p. 81). The Order’s section discussing estoppel is titled “Collateral estoppel,” and collateral estoppel is the doctrine Judge Kimball explicitly cited in announcing his decision to grant Respondents’ motions. (R. p. 7); (R. p. 287, line 1).

Collateral estoppel was cited as a basis for dismissing Appellant’s complaint. The court reviewed testimony from Appellant’s trial against Dr. Taylor and RH GYNOB and concluded Appellant asserted “that all of Kristy’s injuries, damages, expenses of every kind, past and future, were directly and proximately caused by the negligence of Dr. Taylor and his group.” (R. p. 10). This statement is true yet incomplete as Creagh and PMC were also proximate causes of Kristy’s damages. Even so, the court used this premise as the basis for its conclusion that Ms. Orłowski was collaterally estopped from asserting a claim for the later negligence of Dr. Creagh and PMC. However, the collateral

estoppel elements are not satisfied here, and the court erred in applying the doctrine in this case.

As noted above, Ms. Orlowski cannot be collaterally estopped from asserting a negligence claim against Dr. Creagh and Piedmont unless the issue of these parties' negligence was "actually litigated" in the previous suit. An issue is "actually litigated" when there is testimony on the issue in the previous litigation. See e.g., Carolina Renewal, Inc., 385 S.C. at 557-58, 684 S.E.2d at 783-84 (finding contract damages issue "actually litigated" where party testified on damages at earlier trial). This court has turned to the Restatement for guidance as to when an issue is "actually litigated". See Smith v. Hastie, 367 S.C. 410, 420, 626 S.E.2d 13, 18 n. 15 (Ct. App. 2005)(citing Restatement (Second) of Judgments § 27 (1982)). The Restatement indicates that an issue is "actually litigated" when it is "properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined." Restatement (Second) of Judgments § 27 cmt. d.

None of these indicators are present here. Dr. Creagh's and PMC's alleged negligence were never raised in the Taylor Case and none of the trial testimony Respondents' cited below indicates otherwise. There was no need to raise these two parties' negligence in the Taylor trial since neither was a party to the suit. Only Dr. Taylor and RH GYNOB's negligence were presented to the jury for decision. The jury's verdict was limited to those parties because no other party's conduct was at issue. Similarly, Respondents produced no evidence that their negligence was either directly determined or necessary to the judgment in the Taylor Case. Respondents produced no evidence on these points because the issue of their negligence was not pertinent to the Taylor case and was never determined in that litigation.

The trial court relied heavily on Graham v. State Farm Fire & Casualty Insurance Co., 277 S.C. 389, 287 S.E.2d 495 (1982), in granting Respondents' motions. See (R. p. 10-11). In Graham, a homeowner's car and a portion of his house were destroyed by a fire that started in the garage. 277 S.C. at 390, 287 S.E.2d at 495. The homeowner originally sued to recover on his auto insurance policy. In its defense, the insurer claimed the fire was "of incendiary origin," i.e. intentionally set by the homeowner. Id. at 390, 287 S.E.2d at 496. This case resulted in a verdict for the insurer. The homeowner then filed a claim on his homeowner's insurance policy, and filed a second lawsuit when that insurer refused to pay the claim. Id. The trial court granted summary judgment to the insurer concluding the homeowner was collaterally estopped from denying that the fire was of an incendiary origin. The Supreme Court affirmed summary judgment. Id.

The Graham court used several different terms in reference to the estoppel doctrine it applied including "collateral estoppel by judgment," "estoppel by judgment," and "estoppel of a judgment." 277 S.C. at 391, 287 S.E.2d at 496. Citations to Graham since it was decided show that all of these terms refer to the single doctrine now referred to simply as "collateral estoppel." Graham has been called "the defensive application of nonmutual collateral estoppel." Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984). As recently as 2009, this Court acknowledged the doctrine at issue in Graham was collateral estoppel. See Carolina Renewal, Inc., 385 S.C. at 555, 684 S.E.2d at 782 (discussing Graham's holding eliminating mutuality as collateral estoppel requirement).

Regardless of the various labels given to the doctrine, the Graham court was applying collateral estoppel. The Graham facts clearly meet all three collateral estoppel elements. The homeowner's suit against his auto insurer "actually litigated" whether the

fire was of an incendiary origin as this issue “was vigorously pursued” by the homeowner’s attorney during the first trial. Graham, 277 S.C. at 391, 287 S.E.2d at 496. The fire’s origin was directly determined with the appellate court noting the first trial “resulted in an adjudication as to the origin of the fire.” Id. The fire origin issue was necessary to the prior judgment since the fire’s origin was the “sole issue in both actions.” Id. To apply Graham is to apply the doctrine the Graham court applied. In other words, applying Graham means applying collateral estoppel and meeting all three collateral estoppel elements. Since Respondents cannot meet these elements, Graham offers no support for their position and cannot serve as basis for summary judgment in this case.

The other cases Respondents cited in their motions and supporting memoranda also meet collateral estoppel’s three elements. In Irby v. Richardson, 278 S.C. 484, 298 S.E.2d 452 (1982), a litigant sued his attorney for malpractice following a child custody dispute, arguing the attorney failed to adequately prepare his case. The court applied collateral estoppel because the litigant consented to his wife’s custody of the children and was, therefore, not permitted to pursue a suit against his attorney premised on a contested custody claim. Id. at 485, 298 S.E.2d at 453. Child custody was a key issue in the divorce case and subsequent proceedings and the court made specific findings granting custody to the mother. In Nelson v. QHG of South Carolina, Inc., 362 S.C. 421, 608 S.E.2d 855 (2005), the issue in both suits was whether a particular doctor was negligent. This issue was litigated in the first suit and was both directly determined and necessary to the court’s order granting summary judgment in the first suit.

Respondents moved for summary judgment based on collateral estoppel. They bore the burden of establishing the doctrine for the facts of this case. Since none of collateral estoppel's essential elements were demonstrated, Respondents did not meet their burden. Accordingly, the circuit court erred in granting summary judgment based on collateral estoppel.

B. The circuit court's order was not a proper application of judicial estoppel.

Judge Kimball referred to "judicial estoppel" during the hearing on Respondents' motions. (R. p. 274, line 3). Although judicial estoppel is not cited in the circuit court's order, the judge's reference to this doctrine during the hearing was not merely in passing. Judge Kimball referred to "judicial estoppel" as the term for the doctrine he would ultimately apply in this case. (R. p. 274, lines 3-6). However, this case does not meet the established elements for judicial estoppel and this doctrine does not support the court's summary judgment order.

Judicial estoppel, an equitable doctrine that "should be applied sparingly," is designed to prevent a party from advocating a position that conflicts with one the party has previous taken in the same or a related case. Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004). Judicial estoppel applies only if all of the following five elements are present:

- (1) two inconsistent positions taken by the same party or parties in privity with one another;
- (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other;
- (3) the party taking the position must have been successful in maintaining that position and have received some benefit;
- (4) the inconsistency must be part of an intentional effort to mislead the court; and
- (5) the two positions must be totally inconsistent.

Id. at 215-16, 592 S.E.2d at 632 (citing Carrigg v. Cannon, 347 S.C. 75, 83, 552 S.E.2d 767, 772 (Ct. App. 2001)). Judicial estoppel is designed to protect judicial integrity rather than protect litigants from their opponent's perceived improper conduct. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997).

This doctrine does not apply primarily because Ms. Orlowski has not taken two inconsistent positions. In the Taylor Case, Ms. Orlowski took the position that Dr. Taylor and RH GYNOB provided negligent medical care that caused Ms. Orlowski to suffer a seizure leading to a series of hospitalizations and eventually the permanent damages she continues to experience today. (R. p. 16 at ¶ 27-29). This position was supported by expert testimony, including some of the testimony Respondents cite in their motions. South Carolina law holds a negligent party liable for all damages proximately caused by the party's negligent act or omission. See Mellen v. Lane, 377 S.C. 261, 287, 659 S.E.2d 236, 250 (Ct. App. 2008)(noting actual damages include "all injuries which are naturally the proximate result of the alleged wrongful conduct"). A person injured by a negligent act who receives negligent medical treatment for the injury may pursue the original negligent actor for the original injury **and** all damages caused by the negligent medical care. Graham v. Whitaker, 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984). In such circumstances, the later-arising negligent medical care is "part of the immediate and direct damages which naturally flow from the original injury." Id. (citing Bessinger v. DeLoach, 230 S.C. 1, 94 S.E.2d 3 (1956)).

Ms. Orlowski's negligence claim against Dr. Taylor/RH GYNOB for all damages proximately flowing from their conduct does not preclude her from asserting that Respondents' actions were proximate causes of her damages flowing from the late-

November 2003 hospitalization. Taylor/RH GYNOB, Dr. Creagh, and PMC can all be proximate causes of Ms. Orłowski's permanent damages. A party's unreasonable conduct need not be the "sole cause" of the plaintiff's injury to meet the proximate cause element of a negligence claim. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977).

The proximate cause requirement is satisfied so long as the defendant's unreasonable act "was at least one of the proximate, concurring causes" of the plaintiff's injury. Id.; see also Madison v. Babcock Ctr., Inc., 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006) ("the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury"). "The fact that other causes also contribute" to a plaintiff's injury "does not relieve the defendant from responsibility." Mellen, 377 S.C. at 282, 659 S.E.2d at 247 (quoting State v. Burton, 302 S.C. 494, 496-97, 397 S.E.2d 90, 91 (1990)). Accordingly, even for those areas where the alleged damages overlap, there is no inconsistency between Ms. Orłowski's position regarding Dr. Taylor/RH GYNOB in the Taylor Case and her position on Respondents' conduct in the Creagh Case. Without inconsistent positions, Respondents cannot satisfy the first or fifth judicial estoppel elements and summary judgment on this basis is improper.

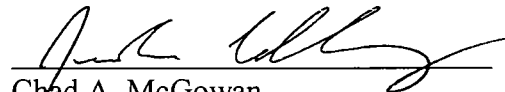
Respondents are also unable to meet the third judicial estoppel element requiring that the party to be estopped has been successful in maintaining the prohibited position and has garnered some benefit. Dr. Creagh and PMC contend Ms. Orłowski previously claimed Dr. Taylor and RH GYNOB were responsible for all her damages to the exclusion of all other medical providers. That conclusion is not supported by the evidence in this case. Even if the Court concludes Appellant took this position, she certainly was

not successful in maintaining it and garnered no benefit as the jury rendered a defense verdict in the Taylor trial. This is an additional ground to refuse application of judicial estoppel in this case. Several of the required elements are not present and this doctrine does not apply. Summary judgment based on judicial estoppel should not have been granted.

CONCLUSION

Based on the arguments stated above, Appellant respectfully requests that the Court reverse the circuit court's summary judgment order. Respondents have failed to satisfy the required elements for either collateral estoppel or judicial estoppel. Accordingly, they have failed to meet their burden for summary judgment and the motions should be denied.

Respectfully submitted,



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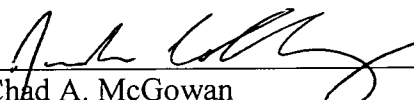
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CERTIFICATE OF COUNSEL

Counsel hereby certifies that the following briefs comply with Rule 211(b), SCACR:

- (1) Appellant's Final Brief of Appellant/Respondent;
- (2) Appellant's Final Reply Brief of Appellant/Respondent; and
- (3) Respondent's Final Brief of Appellant/Respondent.


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and C. Edward Creagh, M.D.Respondents/Appellants

PROOF OF SERVICE

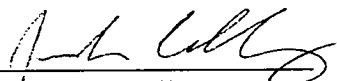
The undersigned hereby certifies that on this 23rd day of April, 2013, he served counsel for the Defendants with a copy of the following documents:

- (1) Appellant's Final Brief of Appellant/Respondent;
- (2) Appellant's Final Reply Brief of Appellant/Respondent; and
- (3) Respondent's Final Brief of Appellant/Respondent

in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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