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

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

v.

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

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I. Respondents inaccurately frame the issue to which estoppel purportedly applies.

Respondents' briefs assert that Ms. Orlowski's claims against Dr. Creagh and AMISUB are an attempt to relitigate "*the* cause of her alleged injuries." Respondent's Brief (AMISUB) at 7 (emphasis added). In fact, the issue is whether collateral estoppel bars Ms. Orlowski from litigating, for the first time, the unresolved issue of whether Dr. Creagh and AMISUB's treatment fell below the standard of care and was *a* proximate cause of Ms. Orlowski's injuries. Accordingly, Respondents' task in asking the Court to affirm Judge Kimball's order is to show that Orlowski's suit against Dr. Taylor[1] actually litigated and directly determined Dr. Creagh and AMISUB's potential liability in a way that was necessary to the judgment reached by the jury in the Taylor case. Respondents endeavor to accomplish this task with an argument that contravenes the rudiments of South Carolina civil procedure.

Respondents' framing of the issue supposes the Taylor case jury decided Dr. Taylor and all other potential but unnamed medical providers were not liable for Ms. Orlowski's injuries. That is, by filing suit against Taylor alone and presenting evidence that he was a proximate cause of Ms. Orlowski's injuries, Orlowski barred herself from claiming others were a proximate cause of the injuries. Judge Kimball accepted this line of reasoning. He applied estoppel as a basis for barring Ms. Orlowski's claims after concluding Ms. Orlowski presented evidence in the Taylor trial that her injuries and damages "were directly and proximately caused by the negligence of Dr. Taylor and his

[1] For ease of reference, Appellant refers to the defendants from the Taylor trial simply as Dr. Taylor. The Taylor suit also named Dr. Taylor's medical practice, Rock Hill Gynecological & Obstetrical Associates, P.A.

group." Order at 7. In other words, Respondents' estoppel argument and the circuit court's decision are grounded in the notion that a person's tort injury can have but a single proximate cause.

This notion violates the first principles of the law of causation. As the courts have recognized and as juries have been instructed, "the law recognizes further there may be more than one proximate cause." Mellen v. Lane, 377 S.C. 261, 281, 659 S.E.2d 236, 247 (Ct. App. 2008)(quoting State v. Burton, 302 S.C. 494, 496-97, 397 S.E.2d 90, 91 (1990)).[2] It is "well recognized that an act or omission need not be the sole cause" since "[a] given injury may result from multiple causes." McPherson v. Michigan Mut. Ins. Co., 306 S.C. 456, 461, 412 S.E.2d 445, 448 (Ct. App. 1991). Courts often refrain from referring to "the proximate cause" of an injury recognizing that "[w]hen we speak of proximate cause, we are not referring to the 'sole cause.'" Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 269 S.E.2d 753, 757 (1977). For purposes of pursuing a claim against a particular defendant and to prevail against a defendant on a negligence claim, "[i]t is enough if the negligent act complained of is at least one of the causes without which the injury would not have occurred." Shepard v. S.C. Dep't of Corrections, 299 S.C. 370, 374, 385 S.E.2d 35, 37 (Ct. App. 1989).

Respondents' briefs imply that an overlap in damages between Ms. Orlowski's claim against Dr. Taylor and her current claims against Dr. Creagh and AMISUB is a conclusive indication that Ms. Orlowski must be estopped from pursuing her current claims. Respondent's Brief (AMISUB) at 9-11, Respondent's Brief (Creagh) at 7. However, the cases cited above show that South Carolina law expressly permits a

[2] Judge Kimball appeared to acknowledge this point at oral argument. When Ms. Orlowski's attorney argued "Dr. Creagh can be completely at fault" even when Dr. Taylor was alleged to have been at fault, Judge Kimball replied, "I don't disagree with that...as a general principal of law." (R. p. 285, lines 8-15).

plaintiff to claim, prove, and potentially recover from multiple defendants for the same injury.[3] Dr. Creagh and AMISUB can be a proximate cause of Ms. Orlowski's injuries even if Ms. Orlowski previously claimed Dr. Taylor was a proximate cause. There is nothing in South Carolina law that supports the position that a claim of proximate causation for damages identified in the Taylor suit prevents a claim of proximate causation against Respondents now.

Respondents also offer nothing from the record of the Taylor case to support their conclusion. AMISUB's brief points to a similarity between allegations in Ms. Orlowski's complaint in the Taylor case and her allegations in the present case. Respondents Brief (AMISUB) at 9. There is a clear distinction between the deviations in the standard of care claimed against Dr. Taylor and those claimed against Dr. Creagh and AMISUB. Dr. Creagh's brief cites testimony from Ms. Orlowski's expert in the Taylor trial (Dr. Stephen Pliskow) as well as testimony from that trial on economic damages from expert Dr. Oliver Wood. Respondents Brief (AMISUB) at 9. It is clear Ms. Orlowski's experts testified that Dr. Taylor was a proximate cause of Ms. Orlowski's injuries including her permanent impairment. But, as discussed above, that testimony does not foreclose a later claim that a different medical provider was also a proximate cause of the injuries. In fact, to support the conclusion Respondents ask the Court to reach, there would need to be evidence that Ms. Orlowski excluded the possibility of a non-Dr. Taylor cause for Ms. Orlowski's injuries. Dr. Pliskow's causation opinion against Dr. Taylor certainly does not

[3] Appellant acknowledges that rule permitting claimant to sue multiple parties for the same injury does not allow the claimant to recover more than the actual damage sustained as a result of the injury. Truesdale v. S.C. Hwy. Dep't, 264 S.C. 221, 234-35, 213 S.E.2d 740, 746 (1975)(discussing set-off and noting "there can be only one satisfaction for an injury or wrong").

make such a claim, and Respondents point to nothing else in the record from the Taylor case to support that claim.

Respondents err in framing the issue to which estoppel should be applied as "the cause of [Ms. Orlowski's] injuries and damages." The framing fails because it is based on an inaccurate statement of South Carolina law on proximate causation. This framing error infects the application of every variety of estoppel cited in Judge Kimball's order and argued in Respondents' briefs.

A. With the issues in question properly framed, it is evident collateral estoppel does not apply.

Collateral estoppel applies only if the issue in question was, in a prior action, (1) "actually litigated"; (2) "directly determined"; 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). Even if all collateral estoppel elements are present, the doctrine "should not be rigidly or mechanically applied." Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001). Respondents frame the issue in question for collateral estoppel as "the issue of damages—an issue already litigated in the Taylor lawsuit." Respondent's Brief (Creagh) at 12-13. This is not an accurate statement of the issue resolved in the Taylor case. It was only "the issue of damages" relative to Dr. Taylor that was litigated and resolved in the earlier case. Whether Dr. Creagh and AMISUB breached their duty to Ms. Orlowski and whether any such breach proximately caused Ms. Orlowski injury are issues that have never been litigated. The jury never passed on Dr. Creagh's conduct and never considered whether AMISUB's care proximately caused Ms. Orlowski's injuries. The first element of collateral estoppel is not present and the doctrine cannot be applied here.

This is the point that distinguishes the current case from many of the cases on which the Circuit Court ruled and on which Respondents now rely. In those cases, the same issue a party sought to litigate was litigated in an earlier action. Judge Kimball's order quotes from Graham v. State Farm Fire & Casualty Insurance Co., 277 S.C. 389, 287 S.E.2d 495 (1982), an insurance case where the court applied defensive nonmutual collateral estoppel. Order at 7-8; see also Beall v. Doe, 281 S.C. 363, 368, 315 S.E.2d 186, 189 (Ct. App. 1984)(noting Graham "involved the defensive application of nonmutual collateral estoppel"). The plaintiff in Graham suffered damage to his car and home from a fire originating in his garage. 277 S.C. at 390, 287 S.E.2d at 495-96. In a suit against his auto insurer, the insurer argued the plaintiff started the fire and willfully caused the damage. The veracity of this allegation "was the sole issue before the jury and the jury returned a verdict for the insurer." Id. The plaintiff tried to prove he did not cause the fire, but the jury disagreed and the law prevented the plaintiff from making a second effort in a different case to prevail on this issue. Thus, when the plaintiff sued his homeowner insurer, he was estopped from denying that he started the fire and summary judgment to the insurer was granted since the fire's origin was "the sole issue in both actions." Id. at 391, 287 S.E.2d at 496. The plaintiff was not estopped, as Respondents suggest, simply because both suits sought the same damages. See Respondent's Brief (AMISUB) at 9; Respondent's Brief (Creagh) at 11. Issue identity was the key component in Graham.

The same is true in the other cases cited by the circuit court and Respondents. There is no "reason or justice" in permitting a second opportunity to litigate "the identical issue" litigated in an earlier case. Watson v. Goldsmith, 205 S.C. 215, 222, 31 S.E.2d

317, 320 (1944). In Mackey v. Frazier, 234 S.C. 81, 106 S.E.2d 895 (1959), the court refused to permit Mackey to claim another driver was the cause of an auto accident when Mackey raised the driver's alleged negligence as a counterclaim in an earlier suit. The issue in both suits was whether the driver was negligent. Collateral estoppel was appropriate because Mackey actually litigated this issue in the first suit and lost.

Respondents' briefs also rely on Carolina Renewal. However, this case is distinguishable on its facts. Carolina Renewal and SCDOT entered a contract for road construction. After an SCDOT employee's false statements about Carolina Renewal's sole shareholder led to resignation of the company's employees and thwarted the company's efforts to perform its contractual duties, the shareholder sued SCDOT for slander. 385 S.C. at 553, 684 S.E.2d at 781. The shareholder sought benefits due Carolina Renewal under the contract as damages in his slander suit. The shareholder received a verdict and over $100,000 in damages.

Later, Carolina Renewal sued SCDOT for breach of contract and sought contract damages. This Court affirmed summary judgment to SCDOT since the issue of damages SCDOT's conduct caused on the contract was actually litigated in the slander suit. Id. at 558, 684 S.E.2d at 784. In essence, Carolina Renewal simply barred a claimant who recovered for contract damages from later coming back to the same defendant for a greater damage award on the same contract. Carolina Renewal took its shot against SCDOT on the contract by seeking contract damages in the slander claim. The company was not permitted a second shot. The current case is very different. Ms. Orlowski did not take her shot against Dr. Creagh or AMISUB in the Taylor suit, and Ms. Orlowski is not attempting a second shot against Dr. Taylor. Carolina Renewal is simply another case of

identical issues where collateral estoppel was appropriate. Since identity of issues is not present here, Carolina Renewal does not support the circuit court's order.

The issue of Dr. Creagh and AMISUB's alleged negligence was not "actually litigated" in the Taylor case. An essential element of collateral estoppel was absent and the circuit court erred in applying the doctrine and awarding summary judgment. The "actually litigated" element is not met because the Taylor case did not litigate Dr. Creagh or AMISUB's alleged negligence or the damages flowing from their alleged negligence. The deficiency on the "actually litigated" element spills over to the other collateral estoppel elements.[4] The issue of Dr. Creagh and AMISUB's negligence was not "directly determined." The Taylor case jury rendered a verdict on Dr. Taylor's care but not on Dr. Creagh or AMISUB, which is understandable since issues related to care they provided were not actually litigated. Clearly, issues related to Dr. Creagh and AMISUB were not necessary to the final judgment in the Taylor case since those were neither determined nor litigated in the Taylor case.

B. The required elements of judicial estoppel are not present.

The required elements for judicial estoppel include: (1) two inconsistent positions taken by the same party; (2) taken in same or related proceedings by same parties or parties in privity with each other; (3) party taking earlier position was "successful in maintaining the position that position and have received some benefit"; (4) inconsistency was part of an intentional effort to mislead the court; and (5) positions were totally

[4] AMISUB claims Appellant abandoned arguments on the "directly determined" and "necessary to prior judgment" elements of collateral estoppel. Respondent's Brief (AMISUB) at 12. As AMISUB acknowledges, however, Appellant's Initial Brief outlined collateral estoppel's essential elements and presented arguments demonstrating that all of these elements were not present. See Initial Brief of Appellant at 7-11. The failure of all three collateral estoppel elements is evident from the overarching claim in Appellant's Initial Brief, i.e. issues of Dr. Creagh and AMISUB's deviations from the standard of care and damages proximately caused by these deviations were not present or litigated in the Taylor suit.

inconsistent." Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004). Judicial estoppel is to be applied "sparingly." Id. at 216, 592 S.E.2d at 632. Respondents' misapprehension on the effect of Ms. Orlowski's trial posture in the Taylor case on the viability of her current claims is as applicable to judicial estoppel as it was to collateral estoppel and it touches all five of judicial estoppel's five required elements.

As Respondents argue in their brief "[t]he crux of judicial estoppel" is an inconsistency between factual positions taken in the same or related cases. Respondent's Brief (AMISUB) at 19.[5] There is no inconsistency between Ms. Orlowski's position against Dr. Taylor in the Taylor case and her position against Dr. Creagh and AMISUB in the current litigation. Ms. Orlowski has acted in compliance with the first principles of negligence law which, as cited above, recognize that an injury can have multiple proximate causes. These two positions are not incompatible or contradictory. See Black's Law Dictionary 834 (9th ed. 2009)(defining "inconsistent" as "not compatible with another fact or claim"). They can be simultaneously true, and their assertion in the same or different lawsuits comports with South Carolina substantive negligence law and the South Carolina Rules of Civil Procedure.

Respondents also claim Ms. Orlowski "wishes to changer her position now." Respondent's Brief (AMISUB) at 18. When the issues in question are properly understood, it is clear Respondents' argument is not possible. Ms. Orlowski took no position on Dr. Creagh or AMISUB's alleged deviations from the standard of care and proximate causation in the Taylor case. Before filing the current suit, Ms. Orlowski had never taken a position on these issues. There is no change in position because there was

[5] Dr. Creagh has adopted AMISUB's judicial estoppel argument in full and incorporated it by reference in his brief. Respondent's Brief (Creagh) at 14. Accordingly, Appellant refers to the judicial estoppel arguments in AMISUB's brief as Respondents' claims.

no previous position from which Ms. Orlowski could change. See City of N. Myrtle Beach v. E. Cherry Grove Realty Co., LLC, 397 S.C. 497, 725 S.E.2d 676 (2012)(refusing judicial estoppel where order from previous litigation "fail[ed] to demonstrate a definition position taken" by party to whom estoppel was to be applied"). Respondents' judicial estoppel claim never gets off the ground since it does not meet the first required element. Since the first judicial estoppel element is not present here, then the fifth element is not either. There are no inconsistent claims and, therefore, Respondents cannot meet their burden of showing the claims are completely inconsistent.

The third element of judicial estoppel requires two things. The party to be estopped "must have been successful in maintaining the position" and must have "received some benefit" from taking the position. Cothran, 357 S.C. at 216, 592 S.E.2d at 632. Assuming for the sake of argument that Respondents could meet their burden of showing Ms. Orlowski has presented inconsistent positions, Respondents cannot make the required showing on this third element. Respondents' brief argues Ms. Orlowski was successful in the Taylor case notwithstanding a defense verdict. Respondent's Brief (AMISUB) at 19. There is no South Carolina authority to support this position. The only authority Respondents cite for this argument are two federal cases from distant jurisdictions.

There are several factors that militate against applying these cases to the present case. Both cases Respondents cite are federal cases. Federal cases sitting in diversity and ruling on issues of judicial estoppel apply federal law. Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 602 (9th Cir. 1996). Federal judicial estoppel jurisprudence does include a success/benefit element and the U.S. Supreme Court's

discussion on the requirements for this element is instructive. In New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001), the Court held that one factor in applying judicial estoppel is whether the party to be estopped was successful "in persuading a court to accept that party's earlier position." Additionally, the Rissetto court acknowledged that not all federal courts hold that a settlement meets the success/benefit element. 94 F.3d at 605 n. 6 (citing Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982)("If the initial proceeding results in settlement, the position cannot be viewed as having been successful"). Many other federal courts have found that a court must affirmatively accept the party's position for the success/benefit element to apply.[6]

In the Taylor case, Dr. Taylor was the successful party. The jury rendered a defense verdict and the benefit of that verdict belongs to Dr. Taylor. The high/low agreement does not meet the success/benefit element of judicial estoppel. No court adopted a position inconsistent with the position Ms. Orlowski takes in the present case. The absence of judicial estoppel's third element is an additional basis to not to apply the doctrine here.

II. The Circuit Court's ruling conflicts with important civil procedure principles.

Judge Kimball's order applied collateral estoppel after noting "there is no reason Creagh and Amisub could not have been named" as defendants in the Taylor case. (R. p. 10). Respondents also take up this argument in their briefs. See Respondent's Brief

[6] See e.g. Bates v. Long Island R.R. Co., 997 F.2d 1028, 1038 (2nd Cir. 1993)("prior inconsistent position must have been adopted by the court in some manner"); U.S. v. 49.01 Acres of Land, More or Less, 802 F.2d 387, 390 (10th Cir. 1986)("The integrity of the court is not threatened if the court failed to adopt the party's prior position"); Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980)("A settlement neither requires nor implies any judicial endorsement of either party's claims or theories, and thus a settlement does not provide the prior success necessary for judicial estoppel"); Original Appalachian Artworks, Inc. v. S. Diamond Associates, Inc., 44 F.3d 925, 930 (11th Cir. 1995)(citing Konstantinidis and suggesting settlement would not meet success/benefit element under Georgia law).

(AMISUB) at 14; Respondent's Brief (Creagh) at 8. The implication from this argument is that since Ms. Orlowski could have joined AMISUB and Dr. Creagh as parties to the Taylor case, she should face dismissal of her claims against these parties for choosing not to join them. The joinder Judge Kimball mentions in his order would fall within Rule 20, SCRCP. Rule 20 governs "Permissive Joinder of Parties" and clearly uses discretionary language. See Rule 20(a)("All persons may be joined in one action as defendants..."). In other words, a party may choose to join multiple parties as defendants but joinder is not required. A party's decision not to join multiple parties in the same suit is also permissible, and a party who chooses this litigation tactic should not be punished for it.

AMISUB also claims collateral estoppel should be applied against Ms. Orlowski, "a plaintiff who has been in control of the course of her own litigation." Respondent's Brief (AMISUB) at 14. As a plaintiff, Ms. Orlowski should be allowed to control the course of her claims within the bounds of the rules of civil procedure. It is the plaintiff who has "the sole right" to determine the parties she chooses to sue. Chester v. S.C. Dep't of Pub. Safety, 388 S.C. 343, 344, 698 S.E.2d 559, 560 (2010). The Circuit Court's estoppel ruling wrestles some of that control away from Ms. Orlowski by terminating her claims against Dr. Creagh and AMISUB notwithstanding Ms. Orlowski's compliance with the rules of civil procedure. Ms. Orlowski is allowed to sue parties to the same transaction or occurrence in separate suits. She is allowed to claim that multiple parties are proximate causes for her injuries. Judge Kimball's ruling lays a heavy blow to a plaintiff's power to control her claim and a return to the established norm for plaintiff control requires reversal.

III. Ms. Orlowski's claims were filed within the statute of limitations.

Respondents briefs state substantially the same argument on the statute of limitations as they assert in their initial briefs for the their cross-appeal on that issue. Accordingly, Appellant hereby adopts and incorporates by reference the statute of limitations argument in her initial brief on the cross-appeal. Based on this argument, it is evident that the Circuit Court was correct in its conclusion that Ms. Orlowski's suit was filed within the statute of limitations. Appellant recognizes Respondents still have the opportunity to file reply briefs in the cross-appeal and Appellant will reply to any arguments Respondents might make in their reply briefs in the cross-appeal.

CONCLUSION

Based on the arguments above and those in Appellant's Initial Brief, Plaintiff respectfully that the Court issue an order reversing the Circuit Court's ruling on estoppel and affirm the Circuit Court's ruling on the statute of limitations.

Respectfully submitted,

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April 23, 2013
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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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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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