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Spokane County Superior Court No. 14-2-02242-0

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

LORI A. SWEENEY, and JEROLD L. SWEENEY,
husband and wife,

Plaintiffs-Appellants,

vs.

JAMES N. DUNLAP, M.D. and JANE DOE DUNLAP,
husband and wife and the marital community
composed thereof; and PROVIDENCE HEALTH
SERVICES, d/b/a PROVIDENCE ORTHOPEDIC
SPECIALTIES, a Washington corporation,

Defendants-Respondents.

APPELLANTS' REPLY BRIEF

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I. REPLY STATEMENT OF THE CASE

Defendants-Respondents James N. Dunlap and Providence Health Services (“Dunlap”) do not dispute that this lawsuit is timely as to negligent treatment of Lori Sweeney in 2012 because it was filed on June 17, 2014, well within the applicable three-year statute of limitations, RCW 4.16.350.

Dunlap does not dispute that he obtained dismissal of the Sweeneys’ prior lawsuit by convincing the Court that it was limited to negligent treatment in 2010, which was outside the applicable limitations period. Specifically, Dunlap argued that the prior lawsuit “alleged no claims related to the 2012 rotator cuff surgery,” CP 216; that there was “no allegation that Dr. Dunlap’s April 2012 treatment fell below the standard of care,” CP 226; that “all of the negligence allegations [in the prior lawsuit] relate to the care in 2010,” and that “[t]here is no allegation that Dr. Dunlap provided substandard care in 2012,” CP 228 (brackets added). The Court adopted these arguments and held the statute of limitations was not extended by Dunlap’s subsequent treatment of Ms. Sweeney because “the negligence allegations relate to the care provided in 2010. There is no allegation Dr. Dunlap provided substandard care in 2012.” *Sweeney v. Adams Cty. Pub. Hosp. Dist. No. 2*, noted at 196 Wn. App. 1040, 2016 WL 6242855, at *6 (Wn. App., Div. 3, Oct. 25, 2016).

Dunlap does not dispute that he misled the Sweeneys' former lawyer about the nature and extent of his treatment in 2010, although he characterizes his conduct as unintentional rather than malicious. *See* Dunlap Resp. Br., at 27. He also does not dispute that his conduct led the Sweeneys' former lawyer not to add him in the prior lawsuit until after the applicable limitations period expired.

II. REPLY ARGUMENT

A. Dunlap does not address the authority cited by the Sweeneys holding that dismissal of a lawsuit based on the statute of limitations is not “on the merits” as required to invoke res judicata.

At some points, Dunlap seems to acknowledge that res judicata requires a final judgment on the merits. *See* Dunlap Resp. Br., at 12, 13 & 16. At other points, however, he seems to suggest that all final judgments give rise to res judicata, regardless of whether they are on the merits. *See id.* at 12 & 15. There is no room to dispute that “[t]he threshold requirement of res judicata is a final judgment *on the merits* in the prior suit.” *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn. 2d 853, 865, 93 P.3d 108, 114 (2004) (brackets & emphasis added). The question before the Court is, what is the meaning of “on the merits?”

Dismissal based on the statute of limitations should not be considered “on the merits” because it relates to the timeliness of the claim rather than the merits of the claim. The Sweeneys noted the lack of

controlling Washington authority and cited out-of-state case law supporting this common-sense proposition. *See* Sweeneys App. Br., at 11-12 (quoting *Downing v. Chicago Transit Auth.*, 162 Ill. 2d 70, 77, 642 N.E.2d 456, 460 (1994), and *Walker v. Choudhary*, 425 N.J. Super. 135, 154, 40 A.3d 63, 74-75 (N.J. Super. Ct. App. Div.), *cert. denied*, 211 N.J. 274, 48 A.3d 355 (2012)). *Downing* reasoned that “the merits of the action are never examined” when a lawsuit is dismissed based on the statute of limitations. 642 N.E.2d at 460. *Walker* relied on similar reasoning and further stated that treating dismissal based on the statute of limitations “would be the embodiment of promoting form over substance.” 40 A.3d at 75. Inexplicably, Dunlap does not acknowledge these cases, let alone address their reasoning, and he cites no contrary authority.

The Sweeneys also pointed out how these cases are consistent with Washington case law holding that dismissal of a lawsuit based on issues of time of filing is not deemed to be “on the merits.” *See* Sweeney App. Br., at 10-11 (quoting *State ex rel. Hamilton v. Cohn*, 1 Wn. 2d 54, 62-63, 95 P.2d 38, 42 (1939)). Dunlap does not cite or discuss *Hamilton* either.

Dismissal based on the statute of limitations is consistently distinguished from judgment “on the merits” in other contexts. *See, e.g., Powers v. W.B. Mobile Servs., Inc.*, 182 Wn. 2d 159, 165, 339 P.3d 173, 176 (2014) (distinguishing notice of an action within the limitations period

from notice sufficient to maintain a “defense on the merits” in the context of fictitious defendants); *In re Disciplinary Proceeding against Starczewski*, 177 Wn. 2d 771, 780, 306 P.3d 905, 909 (2013) (“Starczewski told Singh that the court dismissed his case on the merits rather than that the court had dismissed his case on procedural grounds [i.e., the statute of limitations]”; brackets added); *Segaline v. State, Dep't of Labor & Indus.*, 169 Wn. 2d 467, 477, 238 P.3d 1107, 1112 (2010) (distinguishing notice of an action with the limitations period from notice sufficient to make a “defense on the merits” in the context of party amendments under CR 15(c)); *Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn. 2d 509, 518, 946 P.2d 760, 765 (1997) (distinguishing timeliness under the statute of limitations from the merits of indemnification claim); *Trimen Dev. Co. v. King Cty.*, 124 Wn. 2d 261, 276, 877 P.2d 187, 195 (1994) (“statute of limitations applies to a plaintiff's allegations that imposition of impact mitigation fees constitutes an illegal tax, regardless of a claim's ultimate merits”); *City of Seattle v. Hesler*, 98 Wn. 2d 73, 86, 653 P.2d 631, 638 (1982) (“As applied in civil cases, the ‘relation back doctrine’ protects a party from what would otherwise be the bar of the statute of limitations, in order to foster the determination of controversies on the merits rather than on procedural niceties”); *Vern J. Oja & Associates v. Washington Park Towers, Inc.*, 89 Wn. 2d 72, 77, 569 P.2d 1141, 1144 (1977) (“the dismissal

of the respondent's claims against the two construction companies was based upon the statute of limitations rather than the merits"); *State v. O'Connell*, 83 Wn. 2d 797, 840, 523 P.2d 872, 898, *supplemented*, 84 Wn. 2d 602, 528 P.2d 988 (1974) ("Since the jury found against the State on the merits on its claims against the respondents O'Connell and Faler, however, it is reasonable to conclude that its verdict as to the other appellants was also based upon the merits, and not upon the running of the statute of limitations"); *Evans v. Yakima Valley Grape Growers Ass'n*, 52 Wn. 2d 634, 641, 328 P.2d 671, 676 (1958) ("The statute of limitations is not a defense to the merits of the cause of action; it is a procedural rule enacted and applied to prevent fraud and error and to promote the speedy settlement of disputes"; Finley, J., dissenting); *Philbrick v. Steve*, 45 Wn. 2d 335, 336, 274 P.2d 351, 351–52 (1954) ("We do not reach the merits of this action for the reason that the statute of limitations has run against it").

There is no reason why the same distinction between the timeliness and the merits of an action should not be recognized in the context of res judicata. The distinction is in accordance with the ordinary meaning of the phrase "on the merits." See *Black's Law Dictionary*, s.v. "merits" (10th ed. 2014) (defining as "[t]he elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, esp. of procedure"); *Merriam-*

Webster Online, s.v. “merits” (defining as “the substance of a legal case apart from matters of jurisdiction, procedure, or form”; available at m-w.com; viewed May 24, 2019). The Court should hold that dismissal based on the statute of limitations is not “on the merits” for purposes of applying res judicata.

B. The cases cited by Dunlap are inapplicable.

Rather than addressing the authorities cited by the Sweeneys, Dunlap argues that “[r]es judicata applies to dismissals based upon procedural defaults.” Dunlap Resp. Br., at 14 (brackets added). He does not explain what he means by “procedural default,” although he appears to equate it with timeliness under the statute of limitations. In support of his argument, he cites *Emeson v. Department of Corrections*, 194 Wn. App. 617, 376 P.3d 430 (2016). *Emeson* is distinguishable because the case does not involve the res judicata effect of dismissal based on the statute of limitations. The dismissal in *Emeson* was based on the merits and the plaintiff was deemed to have admitted that his claim was without merit. The defendant filed a motion for summary judgment in the first action. *See Emeson*, 194 Wn. App. at 624. The plaintiff did not respond, but rather attempted to voluntarily withdraw his complaint without prejudice. *See id.* The court denied the plaintiff’s motion to withdraw the complaint, and determined that his failure to file a meaningful response to the summary

judgment motion was tantamount to an admission that the motion had merit. *See id.* The court granted the defendant's summary judgment motion and dismissed the first action with prejudice. *See id.* This dismissal was given res judicata effect in a subsequent action because the summary judgment order was on the merits. *See id.* at 627. The facts and issues presented in *Emeson* are not remotely comparable to this case, and do not support an argument that dismissal of a claim based on the statute of limitations should be considered "on the merits."

Dunlap next argues that "[r]es judicata applies to stipulated dismissals." Dunlap Resp. Br., at 15 (brackets added). The relevance of this argument is unclear and unexplained by Dunlap. In support of the argument, he cites *Berschauer Phillips Constr. Co. v. Mutual of Enumclaw Ins. Co.*, 175 Wn. App. 222, 308 P.3d 681 (2013). Like *Emeson*, *Berschauer* is distinguishable because the case does not involve the res judicata effect of dismissal based on the statute of limitations. The dismissal in *Berschauer* was based on a stipulation to dismiss the first action with prejudice. *See* 175 Wn. App. at 226-27. The stipulation specifically recited that "all claims of all parties in this lawsuit are resolved and this order constitutes final judgment in this matter." *Id.* While *Berschauer* addressed the res judicata effect of this order, the case did not separately address whether the stipulated dismissal was on the merits. As with *Emeson*, the facts and issues

presented in *Berschauer* are not comparable to this case, and do not support an argument that dismissal of a claim based on the statute of limitations should be considered “on the merits.”

C. Dunlap improperly limits his focus to the allegations of the complaint and ignores the arguments and evidence submitted in response to his motion for summary judgment.

In arguing that dismissal of the Sweeneys’ claims in the first action, which is based on negligent treatment in 2010, precludes this action, which is based on negligent treatment in 2012, Dunlap focuses solely on the allegations of the complaints in the two actions. *See* Dunlap Resp. Br., at 18-21. This is improper because Washington is a notice pleading state, and the complaints are supposed to be liberally construed. Even if the precise theory was inartfully pled or unclear in the complaint, it is fleshed out by the summary judgment pleadings. *See State v. Adams*, 107 Wn. 2d 611, 620, 732 P.2d 149, 156 (1987) (stating “initial pleadings which may be unclear may be clarified during the course of summary judgment proceedings”); *State v. Adams*, 107 Wn. 2d 611, 620, 732 P.2d 149, 156 (1987) (same); *Puget Sound Sec. Patrol, Inc. v. Bates*, 197 Wn. App. 461, 474, 389 P.3d 709, 716 (2017) (same). In this case, the summary judgment pleadings submitted on behalf of the Sweeneys make it abundantly clear that Dunlap was negligent in 2012, and that such negligence caused new and additional

injuries beyond those resulting from his treatment of Lori Sweeney in 2010.

See Sweeneys App. Br., at 8-9 (citing CP 89).

D. Contrary to Dunlap, the superior court granted summary judgment based on res judicata rather than collateral estoppel.

Dunlap claims that the trial court dismissed this action on grounds of collateral estoppel as well as res judicata. *See Dunlap Resp. Br.*, at 3 n.2. In support of this claim, Dunlap cites CP 50-63 & 250-52. *Id.* The citation to CP 50-63 refers to Dunlap's memorandum in support of its motion for summary judgment. While Dunlap made a collateral estoppel argument, CP 57-61, the memorandum does not reveal the basis of the superior court's decision. Dunlap's citation to CP 250-52 refers to the superior court's summary judgment order, which, likewise, does not reveal the basis for the court's decision. Nonetheless, as noted in the Sweeneys' opening brief, the court explained in its oral ruling that the basis for its decision was res judicata, not collateral estoppel. *See Sweeney App. Br.*, at 9 (citing RP 22:21-23:8). The court specifically stated, "I would have to grant the motion of the defendant that I do believe it is res judicata at this point." RP 24:3-5. The court referenced res judicata three separate times. RP 23:7-8 ("I agree that is what res judicata means"); RP 23:16 ("this is exactly what res judicata says"); RP 24:3-5 (quoted above). The court never mentioned collateral estoppel. *See RP 22:21-24:8.*

The superior court's summary judgment order should be interpreted in light of its oral ruling. *See, e.g., Hurlbert v. Gordon*, 64 Wn. App. 386, 396 n.7, 824 P.2d 1238, 1243 n.7, *rev. denied*, 119 Wn. 2d 1015 (1992). Judicial restraint counsels against reaching issues not decided by the superior court on summary judgment. *See Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 4 n.1, 277 P.3d 679, 681 n.1 (2012), *rev. denied*, 175 Wn. 2d 1015 (2012). Because the superior court did not grant summary judgment on grounds of collateral estoppel, the issue is not before the Court.

E. In any event, the requirements of collateral estoppel are not satisfied because the Sweeneys' prior lawsuit was dismissed based on the statute of limitations rather than the merits, and the issue of Dunlap's negligence in 2012 was not actually litigated and necessarily decided.

Dunlap contends that this Court may consider collateral estoppel as an alternate basis to affirm. *See Dunlap Resp. Br.*, at 3 n.2. Dunlap limits his argument regarding collateral estoppel to a single footnote. *See Dunlap Resp. Br.*, at 21-22 n.9. While he acknowledges that collateral estoppel requires a final judgment, he elides the fact that, like *res judicata*, collateral estoppel requires a final judgment **on the merits**. *See Afoa v. Port of Seattle*, 191 Wn. 2d 110, 131, 421 P.3d 903, 914 (2018) ("Collateral estoppel requires proof that ... the prior action ended in a final judgment on the merits"; ellipses added); *Sprague v. Spokane Valley Fire Dep't*, 189 Wn. 2d 858, 899, 409 P.3d 160, 183 (2018) (same). Dunlap has

cited no authority supporting the proposition that dismissal based on the statute of limitations is deemed to be on the merits in the context of collateral estoppel. For the same reasons that dismissal of the Sweeneys' prior lawsuit is not a final judgment on the merits for purposes of res judicata, it should not be considered a final judgment on the merits for purposes of collateral estoppel.

Dunlap also fails to acknowledge that “the issues to be precluded must have been *actually litigated and necessarily decided* in the first proceeding” to invoke collateral estoppel. *Sprague*, 189 Wn. 2d at 899 (emphasis added). “The party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issues in the first proceeding.” *Id.* The collateral estoppel effect of a dismissal based on a statute of limitations defense is limited to the defense itself. *See Gausvik v. Abbey*, 126 Wn. App. 868, 885, 107 P.3d 98, 107, *rev. denied*, 155 Wn. 2d 1006 (2005).

Claims arising from Dunlap's negligent treatment in 2012 were not actually litigated or necessarily decided in the Sweeneys' prior lawsuit. As noted above, Dunlap argued “all of the negligence allegations [in the prior lawsuit] relate to the care rendered in 2010. There is no allegation that Dr. Dunlap provided sub-standard care in 2012.” CP 228. The Court adopted Dunlap's argument, and held the statute of limitations was not extended by

the continuing course of treatment doctrine because “the negligence allegations relate to the care provided in 2010. There is no allegation Dr. Dunlap provided substandard care in 2012.” *Sweeney*, 2016 WL 6242855, at *6. Accordingly, the issue of Dunlap’s negligence in 2012 was not actually litigated or necessarily decided in the prior lawsuit.

Dunlap states “[t]he Court of Appeals held that Mrs. Sweeney failed to make a prima facie showing of negligence based on the 2012 care” he provided. *See* Dunlap Resp. Br., at 4 & n.3 (citing CP 39 n.2). The cited support for this claim is footnote 2 of the Court’s decision in the prior appeal, in which the Court states:

Even if the issue had been presented, the affidavits of the plaintiff’s experts do not satisfy *Keck* [*v. Collins*, 184 Wn. 2d 358, 357 P.3d 1080 (2015)]. There is no showing what a reasonable doctor would or would not have done during the 2012 surgery, or that Dr. Dunlap failed to meet those standards.

2016 WL 6242855, at *6 n.2 (brackets added). The “even if” clause that begins this footnote only serves to confirm that the issue of Dunlap’s negligence in 2012 was not actually litigated or necessarily decided in the prior action. Collateral estoppel is simply inapplicable here.

Respectfully submitted this 28th day of May, 2019.

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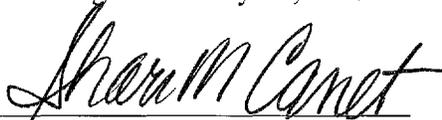
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