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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' OPENING BRIEF

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I. ASSIGNMENT OF ERROR

The superior court erred in dismissing the Sweeneys' complaint on summary judgment based on the doctrine of res judicata. CP 250-52; RP 22:21-23:8.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is dismissal of an action based on the statute of limitations "on the merits," as required to give the dismissal res judicata effect?
2. For purposes of applying the doctrine of res judicata, does an action involving negligent medical treatment in 2012 involve a different cause of action and/or subject matter than an action involving negligent medical treatment by the same provider in 2010, where the provider claims that the treatment was "separate and distinct," "unrelated," lacking any "connection," and "was not, in any manner, related"?
3. Is the defendant judicially estopped from claiming that this action for negligent medical treatment in 2012 involves the same cause of action and/or subject matter as a prior action for negligent medical treatment in 2010, where defendant obtained dismissal of the prior action based on claims that the treatment was "separate and distinct," "unrelated," lacking any "connection," and "was not, in any manner, related"?
4. Where dismissal of the prior action resulted from the defendant's misleading plaintiff's lawyer about the nature of his involvement in plaintiffs' treatment, is it inequitable to apply the doctrine of res judicata?

III. STATEMENT OF THE CASE

- A. The Sweeneys' prior lawsuit was limited to negligent medical treatment provided to Lori Sweeney in 2010 by Dunlap and others; the Sweeneys did not initially name Dunlap as a defendant because he misled their lawyer about the nature of his involvement in Lori Sweeney's care, and he was eventually dismissed based on the statute of limitations.**

Plaintiffs-Appellants Lori and Jerold Sweeney (hereafter “Sweeneys”) filed suit in Adams County Superior Court against Adams County Public Hospital District No. 2, doing business as East Adams Rural Hospital, Allen D. Noble, PA-C, and “Jane Doe” Noble, his spouse (collectively “EARH”), for negligently attempting a closed (i.e., non-surgical) reduction of Lori Sweeney’s broken and dislocated shoulder on April 25, 2010. CP 3-11.

The negligent closed reduction was recommended by a physician from Spokane who consulted with EARH by telephone. The Sweeneys did not sue the Spokane physician, James N. Dunlap, MD, or his employer, Providence Health Services, doing business as Providence Orthopedic Specialties (collectively “Dunlap”), because Dunlap misled the Sweeneys’ former lawyer regarding his involvement in Lori Sweeney’s care. Before filing suit, the Sweeneys’ lawyer met with Dunlap to determine the extent of his involvement. During the meeting, Dunlap denied seeing pre-reduction x-rays or advising EARH to attempt the closed reduction. Based on this denial, the Sweeneys initially did not name Dunlap as a defendant

in the prior action. They did not learn that Dunlap had actually seen the pre-reduction x-rays of Sweeneys' and misinformed their lawyer until they obtained discovery in the Adams County action that was unavailable to them beforehand.

Although a chart note from EARH refers to a telephone call between the physician assistant staffing the emergency department and Dunlap to discuss her x-rays *before* the attempted closed reduction of her shoulder, Dunlap's records did not reflect that any such conversation occurred. *See* CP 191 (Declaration of William A. Gilbert, dated April 14, 2014, ¶ 15). Moreover, on one occasion in 2012, when the Sweeneys showed the pre-reduction x-rays of Lori Sweeney's shoulder to Dunlap, it appeared to be the first time Dunlap had ever seen them. CP 190 (¶ 13).

Before filing suit, Sweeney's former lawyer endeavored to meet with Dunlap for the purpose of finding out whether he had or had not seen the pre-reduction x-rays. CP 191. After making several attempts to schedule a meeting, he sent a letter to Dunlap stating in part:

As you know, we represent a patient of yours, Lori A. Sweeney. I have been trying to schedule a meeting with you for some time to discuss Ms. Sween[e]y. As it stands right now, I have a statute of limitations of April 25, 2013, before which I must file a lawsuit on Ms. Sween[e]y's behalf. Before I file that suit, I need to talk to you.

CP 191 & 197 (¶ 16 & Ex. A; brackets added).

Sweeney's lawyer was finally able to meet with Dunlap on April 19, 2013. CP 192-94 (¶¶ 17-24). During the meeting, the lawyer informed Dunlap that he may have some legal culpability based on the EARH note stating that he had seen the pre-reduction x-rays. CP 192 & 194 (¶¶ 18 & 27). In response, Dunlap denied seeing them. CP 192-93 (¶¶ 19-21). He explained that, if he had seen the pre-reduction x-rays, they would be stored in a computer database that he used. However, when he performed a search of the database, they were not there; he only found the *post*-reduction x-rays. CP 192-94 (¶¶ 19, 21 & 26).

Further, Dunlap told Sweeney's lawyer that he did not recall speaking with EARH personnel. He further stated that *he would not have advised them to attempt a closed reduction of Sweeney's shoulder if he had seen her pre-reduction x-rays*. CP 193 (¶ 21). Instead, he would have instructed Noble to transport Sweeney to Spokane immediately for specialized orthopedic care. *Id.*

After the meeting, Sweeney's lawyer sent a letter to Dunlap stating in part:

I wanted to write and thank you for taking the time to meet with me on April 19, 2013. I know your time is limited and valuable. The meeting was very informative for me. The fact that it appears you never reviewed any X-rays or spoke with PA-C Noble from East Adams Rural Hospital prior to his attempts to reduce the shoulder is a critical fact in this case.

CP 193 & 201 (¶ 22 & Ex. C). Sweeney and her lawyer had no reason to doubt the truthfulness or accuracy of Dunlap's statements at the time. CP 194-95 (¶¶ 27-29).

It was not until October 25, 2013, that the Sweeneys received in discovery, for the first time, an "audit trail" for Lori Sweeney's pre-reduction x-rays, revealing that Dunlap had seen them before advising Noble to attempt a reduction of her shoulder. CP 194 (¶ 25). The audit trail was not included in Sweeney's medical records, and it was not readily available to Sweeney or her lawyer. CP 194-95 (¶¶ 27 & 29). It was maintained by a third-party radiology company and made available to users and entities contracting with the company for radiology services. CP 195 (¶ 29).

On October 25, 2013, during Dunlap's deposition, Dunlap reviewed the audit trail and admitted that he had seen the pre-reduction x-rays. Dunlap also produced notes of his April 19, 2013, meeting with Sweeney's lawyer, and confirmed that he had previously denied seeing the pre-reduction x-rays. CP 194 (¶ 26); CP 167-73 (Deposition of James Dunlap, M.D., taken on October 25, 2013, at 105:22-111:18).

Once the extent of Dunlap's involvement in Ms. Sweeney's care was revealed, the Sweeneys promptly amended their complaint to name him as an additional defendant. On summary judgment, the Adams County

Superior Court dismissed the Sweeneys' claims against Dunlap based on the statute of limitations. The Court of Appeals affirmed and the Supreme Court denied review. *See Sweeney v. Adams County Public Hosp. Dist. No. 2*, noted at 196 Wn. App. 1040, 2016 WL 6242855 (Wn. App., Div. 3, Oct. 25, 2016), *rev. denied*, 187 Wn. 2d 1027 (2017).

In order to support his statute of limitations defense, Dunlap distinguished between treatment he provided to Lori Sweeney in 2010 and treatment provided in 2012, because the Sweeneys' complaint would have been timely as to the latter treatment. Specifically, Dunlap stated "Ms. Sweeney returned to Dr. Dunlap's care in the spring of 2012" for "a separate and distinct shoulder injury—a rotator cuff tear" that was "unrelated" to treatment rendered in 2010. CP 212 (Brief of Respondents, at 5). He further stated that "there was no connection between Ms. Sweeney's 2010 treatment and her 2012 treatment." CP 216 (internal p. 9). He noted that the Sweeneys' complaint "alleged no claims related to the 2012 rotator cuff surgery." *Id.*; *accord* CP 226 (internal p.19) (stating "there is no allegation that Dr. Dunlap's April 2012 treatment fell below the standard of care" and "it is undisputed that there was no continuation of care between 2010 and 2012—the two surgeries were unrelated independent medical encounters"); CP 228 (internal p. 21) (stating "there was no continuing course of care between 2010 and 2012"; "the 2012 care was not, in any manner, related to

the 2010 care”; and “all of the negligence allegations relate to the care rendered in 2010. There is no allegation that Dr. Dunlap provided substandard care in 2012”).

The Court of Appeals adopted Dunlap’s arguments, and concluded that the Sweeneys’ “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. In affirming dismissal of the Sweeneys’ complaint against Dunlap, the Court of Appeals held:

- The three-year statute of limitations under RCW 4.16.350 expired, i.e., “Ms. Sweeney was injured on April 25, 2010 and filed an amended complaint, naming Dr. Dunlap as a new defendant on January 15, 2014, more than three years after the date of injury.” 2016 WL 6242855, at *5.
- The amended complaint did relate back to the date of the original complaint under CR 15(c) because: (1) the omission of Dunlap from the original complaint was not the result of “mistake” within the meaning of CR 15(c); (2) Dunlap did not have notice of the action within the limitations period, nor did he have actual or constructive knowledge that, but for a mistake concerning his identity, he was omitted from the original complaint; and (3) the omission of Dunlap from the original complaint was “inexcusable neglect.” *Id.* at 5.
- The statute of limitations was not extended by the continuing course of treatment doctrine because: (1) “[t]here was no continuing course of care between 2010 and 2012; (2) “there is no showing that the 2012 surgery was due to negligence in 2010”; and (3) “the [Sweeneys’] negligence allegations relate to the care provided in 2010.” *Id.* at 6 (brackets added).
- The alternative one-year statute of limitations under RCW 4.16.350 is inapplicable. *Id.* at *6.

B. This lawsuit alleges that Dunlap provided negligent medical treatment to Lori Sweeney in 2012, within the applicable limitations period.

While the appeal of the Sweeneys' first lawsuit was pending, they filed this action against Dunlap in Spokane County Superior Court on June 17, 2014, in order to preserve claims arising from treatment occurring within the applicable statute of limitations, in particular claims arising from treatment he provided in 2012. *See* RCW 4.16.360 (providing “[a]ny action civil action for damages for injury occurring as a result of health care ... shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his or her representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later”; brackets & ellipses added).

An orthopedic surgeon named Steven R. Graboff, M.D., who is certified by the American Board of Forensic Medicine and the American Board of Forensic Examiners and familiar with the standard of care in Washington, opined that Dunlap violated the standard of care with respect to his 2012 treatment of Lori Sweeney, first by failing to recognize that the rotator cuff surgery was predictably likely to fail without using any augmentation material, given the thinning and loss of structural integrity of the cuff; and second by failing to use augmentation material in such repair.

See CP 89 (Declaration of Steven R. Graboff, M.D., Re: Dr. Dunlap, dated May 11, 2018, at 3:18-21). This caused Ms. Sweeney to suffer degeneration and destruction of her shoulder joint, eventually requiring further surgical treatment. CP 89 (internal p. 3:22-25).

Dunlap moved to dismiss this action on grounds of res judicata and/or collateral estoppel. CP 65-67. The superior court granted the motion on grounds of res judicata. RP 22:21-23:8; CP 250-52. From this decision, the Sweeneys have timely appealed. CP 253-58.

IV. ARGUMENT

The superior court's decision dismissing the Sweeneys' complaint on summary judgment based on the doctrine of res judicata is subject to de novo review. *See Fortson-Kemmerer v. Allstate Ins. Co.*, 198 Wn. App. 387, 393, 393 P.3d 849, 853 (2017), *rev. denied*, 189 Wn. 2d 1039, 409 P.3d 1071 (2018) (stating “[r]es judicata is an issue of law, subject to de novo review on appeal”; quotation omitted); *NOVA Contracting, Inc. v. City of Olympia*, 191 Wn. 2d 854, 864, 426 P.3d 685, 689 (2018) (stating “[w]e review a trial court's grant of summary judgment de novo, taking all facts and inferences in the light most favorable to the nonmoving party”). The superior court erred because dismissal based on the statute of limitations is not “on the merits” as required by the doctrine of res judicata,

and the elements of res judicata are not otherwise satisfied. The Court should reverse and remand for trial.

A. The superior court erred in dismissing this action because dismissal of the prior action based on the statute of limitations is not a final judgment *on the merits*, as required by the doctrine of res judicata.

“The 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) (emphasis added). The statute of limitations is a procedural defense based on the time when an action is commenced, and has nothing to do with the merits of the action. *See Deggs v. Asbestos Corp. Ltd.*, 186 Wn. 2d 716, 724, 381 P.3d 32, 36 (2016) (describing the statute of limitations as “a generally procedural extrinsic limitation” on the underlying cause of action); *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn. 2d 515, 538, 326 P.3d 688, 700 (2014) (equating statute of limitations with “procedural mechanism”); *In re Haghghi*, 178 Wn. 2d 435, 452, 309 P.3d 459, 467 (2013) (stating “[a] statute of limitations is considered procedural”; brackets added).

Although there appear to be no Washington cases directly on point, in *State ex rel. Hamilton v. Cohn*, 1 Wn. 2d 54, 62-63, 95 P.2d 38, 42 (1939), the Court held that:

dismissal of an action, on the ground that it was prematurely brought-the cause of action not having yet accrued-is not a bar to another action on the same demand after time has removed the objection. It is not an adjudication on the merits.

(Brackets added.) This authority recognizes that dismissal based on the time when an action is brought is not deemed to be on the merits. It should make no difference whether the action is dismissed because it is too early or too late.

Other jurisdictions have recognized that dismissal based on the statute of limitations is not deemed to be a final judgment on the merits for purposes of res judicata. For example, in *Downing v. Chicago Transit Auth.*, 162 Ill. 2d 70, 77, 642 N.E.2d 456, 460 (1994), the court stated:

We disagree that a summary judgment, “by definition,” means a judgment on the merits. Although a judgment on the merits will oftentimes be the reason for granting summary judgment, this is not always the case. When a summary judgment is granted because the statute of limitations has run, the merits of the action are never examined. To label such an order as an adjudication on the merits would be the quintessential act of exalting form over substance.

Courts cannot ignore the basis on which the summary judgment was granted. If, as in this case, that basis bears no relationship to the actual merits of the case, it would be inappropriate to apply the doctrine of *res judicata*[:]

(Brackets added.)

As another example, in *Walker v. Choudhary*, 425 N.J. Super. 135, 154, 40 A.3d 63, 74-75 (N.J. Super. Ct. App. Div. 2012), *cert. denied*, 211 N.J. 274, 48 A.3d 355 (2012), the court reasoned:

Plaintiff's claims for malpractice and wrongful death were never adjudicated on the actual merits. The basis on which the summary judgment was granted, the statute of limitations, bears no relationship to the actual merits of the case. When summary judgment was granted, the merits were never examined. We agree to label such an order as an adjudication on the merits would be the embodiment of promoting form over substance.

This reasoning is consistent with Washington law requiring a final judgment on the merits and should be followed here.

B. The superior court erred in dismissing this action because Dunlap did not meet his burden to prove all the necessary elements of res judicata have been satisfied.

Res judicata is an affirmative defense, on which Dunlap bears the burden of proof. *See Hisle*, 151 Wn. 2d at 865. Because he has the burden of proof, on summary judgment Dunlap must produce evidence to support every element of the defense, the absence of any genuine issues of material fact, and entitlement to judgment as a matter of law. *See Young v. Key Pharms., Inc.*, 112 Wn. 2d 216, 770 P.2d 182 (1989).

Res judicata does not apply unless two actions are deemed to be “identical” in four respects: (1) cause of action; (2) subject matter; (3) parties; and (4) quality of parties. *See Hisle*, 151 Wn. 2d at 865-66. The actions must be identical in all four respects, and a lack of identity in any one respect is sufficient to preclude application of res judicata. *See id.* at 866. In this case, Dunlap cannot satisfy his burden to establish that res judicata is applicable because identical subject matter and cause of action

are lacking. (The Sweeneys concede that this case involves identical parties and quality of parties.)

1. The causes of action alleged in the two actions are not identical.

There are four factors to be analyzed in determining whether the causes of action asserted in different actions are the same:

- (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
- (2) whether substantially the same evidence is presented in the two actions;
- (3) whether the two suits involve infringement of the same right; and
- (4) whether the two suits arise out of the same transactional nucleus of facts.

Hayes v. City of Seattle, 131 Wn. 2d 706, 713, 934 P.2d 1179 (1997) (quoting *Rains v. State*, 100 Wn. 2d 660, 664, 674 P.2d 165 (1983); brackets in original). These four factors provide a framework for analysis rather than a mechanistic test. *See Rains*, 100 Wn. 2d at 663-64. The superior court and Dunlap did not address any of these factors. None of them support applying res judicata in this case.

In the prior action, the Court of Appeals held that the Sweeneys' claims for injuries arising out of medical treatment received in 2010 were time-barred as to Dunlap. In this action, the Sweeneys do not ask the court to revisit this holding. Instead, the Sweeneys seek to hold Dunlap accountable for negligent medical treatment provided to Lori Sweeney in 2012. This action involves different evidence, i.e., violation of the standard

of care and causation of Ms. Sweeney's injuries in 2012 versus 2010. It involves different rights, i.e., the right to receive proper treatment in 2012 versus 2010. It also involves a different transactional nucleus of fact, i.e., negligent treatment in 2012 versus 2010.

The fact that all of the treatment involved Ms. Sweeney's shoulder is immaterial. She has two different causes of action for two different negligent medical treatments, just as she would have two different causes of action for two different car accidents caused by her neighbor, even if the same car was hit both times. While claims arising from treatment rendered in 2012 "could have been brought" in the prior action, there is no freestanding requirement that they must have been brought in the prior action. Under CR 18, plaintiffs may join multiple claims in the same lawsuit, but they are not required to do so. The Sweeneys' prior lawsuit and this lawsuit involve different causes of action.

2. The subject matter of the two actions is not identical.

Of the four elements of res judicata, identical subject matter has generated "the least discussion and the least guidance as to its meaning." Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 812-13 (1985). The Sweeneys submit that this action involves different subject matter than the prior action because it rests upon the negligence of Dunlap's treatment of Sweeney in

2012 rather than the timeliness of claims arising from treatment rendered in 2010.

3. Dunlap should be judicially estopped from claiming that the cause of action and subject matter of the two actions are identical.

The elements of judicial estoppel were recently summarized in *In re Estate of Hambleton*, 181 Wn. 2d 802, n. 5, 335 P.3d 398 (2014):

“Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wash.2d 851, 861, 281 P.3d 289 (2012) (internal quotation marks omitted) (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wash.2d 535, 538, 160 P.3d 13 (2007)). Three factors guide judicial estoppel: “(1) whether ‘a party’s later position’ is ‘clearly inconsistent with its earlier position’; (2) whether ‘judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled’; and (3) ‘whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.’” *Arkison*, 160 Wash.2d at 538–39, 160 P.3d 13 (internal quotation marks omitted) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750–51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)).

(Citations & quotations in original.)

In this case, Dunlap should be judicially estopped from claiming that the Sweeneys’ claims arising from treatment in 2012 was included in their prior action. In the prior action, Dunlap consistently maintained that the Sweeneys’ claims were limited to treatment provided in 2010, that treatment provided in 2012 was “separate and distinct” and “unrelated,” CP 212; that “there was no connection between Ms. Sweeney’s 2010 treatment

and her 2012 treatment,” CP 216; and that “there was no continuation of care between 2010 and 2012—the two surgeries were unrelated independent medical encounters,” CP 226.

Dunlap further maintained that the prior action “alleged no claims related to the 2012 rotator cuff surgery,” CP 216; that “there is no allegation that Dr. Dunlap’s April 2012 treatment fell below the standard of care,” CP 226; and “all of the negligence allegations relate to the care rendered in 2010,” CP 228.

It was necessary for Dunlap to make these arguments in order to prevail on his statute of limitations defense because the treatment provided in 2012 was within the applicable limitations period. While the Sweeneys contested these arguments, the Court of Appeals disagreed and adopted Dunlap’s position that the Sweeneys’ “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. Under these circumstances, Dunlap should be judicially estopped from claiming that the Sweeneys’ claims arising from treatment in 2012 were part of the prior action.¹

¹ The Sweeneys highlighted Dunlap’s inconsistent statements in their briefing, CP 77, and raised the issue of judicial estoppel in oral argument, RP 12:5-16 & 19:18-21:1.

C. It is inequitable to apply res judicata in this case because Dunlap misled the Sweeneys' former lawyer about the extent of his involvement in Lori Sweeney's treatment.

Res judicata is an equitable doctrine, and principles of equity should act as a check on abuse of the doctrine. *See In re Pearsall-Stipek*, 136 Wn. 2d 255, 262 n.3, 961 P.2d 343, 347 (1998). In this case, it would be inequitable to apply res judicata or collateral estoppel because Dunlap misled the Sweeneys' former lawyer about the extent of his involvement in the treatment of Lori Sweeney.

V. CONCLUSION

The Court should hold that res judicata is inapplicable, reverse the superior court's summary judgment order dismissing the Sweeneys' complaint, and remand this case for trial.

Respectfully submitted this 24th day of January, 2019.

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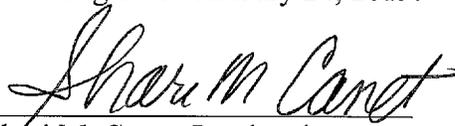
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