

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

**PATRICK McMATH AND
JULIANNE McMATH,**

Plaintiffs-Appellants,

Vs.

DR. DAVID SHARFMAN,

Defendant-Appellee,

FROM THE CIRCUIT COURT
OF SHELBY COUNTY,
No.49236

The Honorable James M. Tharpe,
Judge
C.A. No. 02A01-9501-CV-00010

Law Office of Don Owens,
Andrew Hume Owens of Memphis
For Appellants

David M. Cook and W. Timothy
Hayes, Jr., of Memphis
For Appellee

VACATED AND REMANDED

MEMORANDUM OPINION¹

CRAWFORD, J.

FILED

April 17, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

This is a medical malpractice case dismissed by the trial court primarily via the operation of T.C.A. § 29-26-116 (a)(3), the three year statute of repose for medical malpractice actions.

On August 23, 1988, plaintiffs, Patrick McMath and Julianne McMath, filed suit in state court against Dr. David M. Sharfman, Prudential Health Plan, Inc., and Prudential Insurance Company of America, alleging medical malpractice and breach of fiduciary duty discovered by plaintiffs on August 24, 1987. After the case was removed to federal court, it was subsequently dismissed without prejudice on February 25, 1992. On October 12, 1992, plaintiffs refiled their case against only Dr. Sharfman. The refileing was within one year of the voluntary dismissal in federal court, but more than three years from the date of the alleged malpractice.

Defendant filed a Motion to Dismiss/Motion for Summary Judgment asserting that plaintiffs' action was barred by T.C.A. § 29-26-116 (a)(3), the three-year statute of repose for medical malpractice actions. On October 24, 1994, the trial court entered an order granting

¹Rule 10 (Court of Appeals). Memorandum Opinion. -- (b) The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

defendant's Motion to Dismiss/Motion for Summary Judgment relying primarily on *Bruce v. Hamilton*, No. 02A01-9301-CV-0008, 1993 WL 541072 (Tenn. App. W.S. Dec. 30, 1993), *permission to appeal denied*, May 9, 1994. Plaintiffs have appealed, and the sole issue on appeal is whether the trial court erred in granting summary judgment and dismissing plaintiffs' suit.

Although the Supreme Court denied permission to appeal in *Bruce*, the Court granted permission to appeal in a subsequent Court of Appeals case from the Eastern Section of the Court, *Cronin v. Howe*, and on September 5, 1995, the Supreme Court filed its opinion in *Cronin*, 906 S.W.2d 910 (Tenn. 1995). The determinative issue in the case at bar is precisely the same as the issue in *Cronin*:

The issue in this appeal is whether the Tennessee Savings Statute [T.C.A. §28-1-105 (a)(1980) and (Supp. 1994)] operates to save a medical malpractice action which was initially filed within the three-year statute of repose, but which was voluntarily dismissed and refiled beyond the three year statute of repose.

906 S.W.2d at 911.

In resolving this issue, the Supreme Court stated:

Accordingly, we conclude that where, as here, a medical malpractice action is timely filed, within both the statute of limitations and the statute of repose, a plaintiff who voluntarily non-suits the initial action may rely upon the savings statute and refile within one year of the non-suit, even if the non-suit and the refiling occur beyond the three-year statute of repose.

906 S.W.2d at 914-915. *Cronin v. Howe* is controlling as to the timeliness of plaintiffs' suit.

Plaintiffs also present the following issue for our review:

3. Whether the trial court erred in dismissing, as a matter of law, the breach of fiduciary duty cause of action in the complaint.

The only reference in plaintiffs' complaint regarding breach of fiduciary duty is the general allegation that plaintiffs suffered damages "due to the negligence, breach of fiduciary duty, and breach of implied contract, all committed by the defendants." Neither in the summary judgment motion, nor in the supporting memoranda filed therewith, is there any argument advanced concerning the dismissal of an alleged cause of action for breach of fiduciary duty. We note from the transcript of the hearing on the summary judgment motion that plaintiffs

argued that Dr. Sharfman did not perform a CT (computerized tomography) scan on Mr. McMath because the cost of the test was not covered by Dr. Sharfman's employer's insurance plan through Prudential Insurance Company of America. Plaintiffs asserted that the cost of the test would have been borne entirely by Dr. Sharfman's employer, and that therefore, Dr. Sharfman had a financial "disincentive" to perform the test. The plaintiffs argue that Dr. Sharfman's failure to perform the test because of the cost of the test to his employer, breached Dr. Sharfman's fiduciary duty to Mr. McMath.

Defendant asserts that Dr. Sharfman's affidavit which, in essence, states that he did not violate any fiduciary duty constitutes the only sworn proof on this issue and therefore is conclusive. However, we have reviewed this record and find no such affidavit. It appears from the record before us that we have merely an argument of defendant's counsel in support of the summary judgment motion. It is well settled that arguments of counsel do not constitute evidence. *Perkins v. Sadler*, 826 S.W.2d 839 (Tenn. App. 1991). Counsel was essentially arguing that plaintiffs had no evidence to support their breach of fiduciary duty claim, but this argument was a mere conclusory assertion. Such a conclusory assertion is insufficient to establish the absence of a genuine issue of material fact. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993).

Accordingly, the order of the trial court granting summary judgment is vacated, and the case is remanded to the trial court for such further proceedings as are necessary. Costs of the appeal are assessed against appellee.

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

DAVID R. FARMER, JUDGE

HOLLY KIRBY LILLARD, JUDGE