

IN THE COURT OF APPEALS OF TENNESSEE  
EASTERN SECTION

**FILED**  
April 16, 1997  
**Cecil Crowson, Jr.**  
Appellate Court Clerk

GLEND A F. MCDANIEL )  
 ) HAMBL EN COUNTY  
 ) 03A01-9607-CV-00223  
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 ) HON. BEN K. WEXLER,  
 ) JUDGE  
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 JIM W STAMBAUGH )  
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 Defendant - Appellee ) AFFIRMED AND REMANDED

RONALD C. KOKSAL and JOHN W BUTLER OF KNOXVILLE FOR APPELLANT  
DARRYL G. LOWE OF KNOXVILLE FOR APPELLEE

O P I N I O N

Goddard, P. J.

Glenda F. McDaniel, Plaintiff-Appellant, appeals a summary judgment in favor of Jim W Stambaugh, Defendant-Appellee, in a suit seeking damages for legal malpractice. Ms. McDaniel insists that contrary to the Trial Court's ruling, an adverse decision in a previous case against her did not give rise to the defense of collateral estoppel, which would bar the present action.

Ms. McDaniel filed suit alleging that Mr. Stanbaugh was negligent in his representation of her in an underlying lawsuit which arose out of an automobile accident (hereinafter referred to as the "original tort suit"). Mr. Stanbaugh filed a complaint on Ms. McDaniel's behalf seeking \$500,000 in damages. On September 1, 1990, one week prior to the trial date, Ms. McDaniel's discovery deposition was taken by opposing counsel in the original tort suit. That same day, following her deposition, Ms. McDaniel and Mr. Stanbaugh generally discussed the value of her case.

The facts are in dispute as to the settlement discussions between Ms. McDaniel and Mr. Stanbaugh, and the settlement discussions between Mr. Stanbaugh and the opposing counsel in the original tort suit. Ms. McDaniel claims that she casually indicated that she might settle for \$50,000 if paid that day. The defendants in the original tort suit offered to settle for \$35,000, which Mr. Stanbaugh rejected. Ms. McDaniel alleges that she instructed Mr. Stanbaugh to cease further settlement discussions until she went to her next doctor's appointment.

Following her doctor's appointment on September 14, 1990, Ms. McDaniel called Mr. Stanbaugh to inform him that she elected to have back surgery and, according to her, reiterated her instructions that Mr. Stanbaugh was not to discuss settlement until she recovered from surgery. Two weeks later, Mr. Stanbaugh informed Ms. McDaniel that he received a check for \$50,000 along

with settlement documents from opposing counsel in the original tort suit. At Ms. McDaniel's direction, Mr. Stanbaugh returned the check and settlement documents to opposing counsel with a letter stating, "Ms. McDaniel had told me to accept the \$50,000 and two days later she was scheduled for surgery and told me to hold up, that Dr. Bishop found more wrong with her back than he had anticipated, and at this time she was unwilling to accept the \$50,000 and would not sign the release."

Subsequently, the opposing counsel in the original tort suit filed a motion for summary judgment. Relying upon Mr. Stanbaugh's letter, the opposing counsel argued accord and satisfaction on the grounds that Mr. Stanbaugh and the opposing counsel had negotiated a settlement. Mr. Stanbaugh filed a response to the motion for summary judgment. The response states in part as follows:

5. Based upon the medical information the parties had, including the deposition of Dr. Archer Bishop, the parties' attorneys had, during the week of September 9, 1990, agreed on a \$50,000.00 settlement but that your plaintiff had an exam with Dr. Bishop on September 14, 1990 because of continuing intense pain and at that time, Dr. Bishop suggested and scheduled surgery.

Mr. Stanbaugh attached an affidavit by Ms. McDaniel to the response. The affidavit states in part as follows:

I was aware of settlement negotiations being carried on in early to mid-September, 1990, and at that time, not knowing the cause and seriousness of the pain I was still having, I instructed my attorney to agree

to the \$50,000.00. However, I called Dr. Archer Bishop, who had been my specialist throughout this treatment, having been referred to him by Dr. John Kinser, and he made me an appointment for September 14, 1990. This was on a Friday and I instructed my attorney on Monday, not to do anything until after I had surgery.

The motion for summary judgment was never resolved by the Trial Court in the original tort suit. However, the defendants in the original tort suit filed a separate lawsuit for specific performance (hereinafter referred to as the "specific performance suit") seeking to force Ms. McDaniel to accept the settlement offer of \$50,000. Ms. McDaniel retained attorney Ethel Laws to represent her in the specific performance suit. Attorney Laws defended the specific performance suit in part by disputing the accuracy of the above quoted affidavit and alleging that Mr. Stanbaugh prepared and prevailed upon her to sign an inaccurate affidavit. The Trial Court, finding her argument unpersuasive, held that the statements found in the response to the motion for summary judgment and the supporting affidavit were true, that Ms. McDaniel was aware of negotiations, had instructed her attorney to settle the suit for \$50,000 and that she later withdrew the consent to settle after her attorney's acceptance of the settlement. The Chancellor ordered specific performance and Ms. McDaniel was forced to accept the \$50,000 settlement. The case was appealed, and the Court of Appeals affirmed in Kinder v. McDaniel, an unreported opinion of this Court, filed in Knoxville on August 19, 1992.

Subsequently, Ms. McDaniel filed this suit alleging legal malpractice against Mr. Stambaugh for settling the original tort suit for \$50,000 without her consent. The Trial Court in this suit granted Mr. Stambaugh's motion for summary judgment based on the doctrine of collateral estoppel. The Trial Court found that Ms. McDaniel had already litigated in the specific performance suit whether she gave her attorney the authority to settle for \$50,000. As a result, the Court held that she is barred from relitigating that issue in this suit for legal malpractice.

This Court, in reviewing whether the application of collateral estoppel is appropriate, should consider:

(1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.

Morris v. Esmark Apparel, Inc., 832 S.W2d 563, 566 (Tenn. App. 1991).

In the specific performance suit, the issue decided by that Court was whether Ms. McDaniel gave Mr. Stambaugh the authority to settle her lawsuit for \$50,000. The Court found that she did give Mr. Stambaugh this authority. In order for Ms.

McDaniel to recover in this suit she must prove that Mr. Stanbaugh settled without her authority. Since it has already been judicially determined that she did give Mr. Stanbaugh the authority to settle, the first element is satisfied.

The second element has also been satisfied because the prior adjudication did result in a judgment on the merits. The specific performance suit resulted in the opposing party being granted specific performance and Ms. McDaniel being forced to accept the \$50,000.

In this suit, collateral estoppel is being asserted against Ms. McDaniel who was a party in the specific performance suit. Mr. Stanbaugh did not have to be a party in the specific performance suit. See Fourakre v. Perry, 667 S.W2d 483 (Tenn. App. 1983), (holding that mutuality of parties is not necessary for collateral estoppel). Thus, the third element of collateral estoppel has been satisfied.

The final element of collateral estoppel has also been satisfied because Ms. McDaniel was afforded a full and fair opportunity in the specific performance suit to litigate the issue of whether she gave Mr. Stanbaugh the authority to settle the original tort suit for \$50,000.

Ms. McDaniel argues that the response to the motion for summary judgment and the supporting affidavit, both filed by Mr.

Stanbaugh, were critical to the resolution of the case. She also argues that Mr. Stanbaugh induced her to sign an affidavit that was allegedly incorrect. Finally, she claims that her argument is supported by a telephone recording of Mr. Stanbaugh admitting that Ms. McDaniel did not give him the authority to settle the original tort suit wherein he at one point stated, "There was no oral agreement or written agreement. I agree with you wholeheartedly."

The telephone conversation, which occurred on December 2, 1991, played no part in the specific performance trial which occurred some three weeks later, on December 23. Mr. Stanbaugh testifying in the specific performance trial as a witness for Ms. McDaniel stated that, although the affidavit was typed by his secretary, the words were Ms. McDaniel's. Unaccountably, no effort was made to counter his testimony by that of Ms. McDaniel or to refresh his memory by use of the previously recorded telephone conversation.

It thus appears that Ms. McDaniel, then being represented by counsel other than Mr. Stanbaugh, was afforded a full and fair opportunity in the specific performance suit to litigate whether she gave Mr. Stanbaugh authority to settle the original suit for \$50,000. We emphasize, as above mentioned, that the evidence contained in the telephone conversation was available to Ms. McDaniel when she was defending the suit for specific performance.

For the reasons stated above, the judgment of the Trial Court is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged against M. M. Daniel and her surety.

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Houston M. Goddard, P. J.

CONCUR:

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Don T. Murray, J.

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Charles D. Susano, Jr., J.