

IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED
November 24, 1998
Cecil Crowson, Jr.
Appellate Court
Clerk

JOEL J. TROY, Individually and as next) C/A NO. 03A01-9707-
CV-00271

and as next friend of Laureen Elizabeth)
Troy and Joel James "Jake" Troy, III,)

Plaintiffs,

) WASHINGTON LAW

)

) HON. G. RICHARD JOHNSON,

) CHANCELLOR

v.)

)

CHARLES T. HERNDON, IV,)

Administrator-ad-Litem of the Estate of)

Clifton B. Graham, deceased, and the)

Estate of Ward G. Wilson, deceased,) REVERSED

) AND

Appellee.

) REMANDED

JOHN T. MILBURN ROGERS and KENNETH N. BAILEY, JR., ROGERS,
LAUGHLIN, NUNNALLY, HOOD & CRUM, P.C., Greeneville, for Appellant.

ROBERT D. ARNOLD, ARNOLD, HAYNES & SANDERS, Johnson City, for
Appellee.

OPINION

Franks, J.

This is a Rule 9, T.R.A.P. Appeal, which arises from an automobile
accident that occurred on October 2, 1991. Plaintiff Joel J. Troy was involved in a
collision with a truck owned by defendant, Ward Wilson, and driven by defendant
Clifton Graham.

Troy was taken to Johnson City Medical Center and treated in the
emergency room by Doctor Davis. On September 30, 1992, Johnson filed suit on
behalf of himself and his minor children. The defendants filed their answers and

during the pendency of this suit both defendants died. Plaintiff revived this suit against their estates, and on February 20, 1997, four days prior to the trial date, defendant, administrator ad litem, attempted to amend his answer, and alleged that Dr. Davis negligently treated Joel Troy for injuries sustained in the accident. On July 15, 1997, the Court allowed defendant to amend the answer and granted an Interlocutory Appeal.

Appellant contends that the amendment is contrary to the common law rule which has not been altered by Tennessee's adoption of comparative fault. In support of his position, appellant cites *Atkinson v. Hemphill*, 1994 WL 456349 (Tenn. App.) In *Atkinson*, the defendant attempted to amend his answer to allege that the negligence of non-party medical practitioner had worsened the plaintiff's injuries. This Court was faced with the effect of Tennessee's adoption of comparative fault on this issue.

The Court first stated the traditional common law rule:

[I]f one is injured by the negligence of another, and these injuries are aggravated by medical treatment (either prudent or negligent), the negligence of the wrongdoer causing the original injury is regarded as the proximate cause of the damage subsequently flowing from the medical treatment.

Id. At *2 (citing *Transports, Inc. V. Perry*, 414 S.W.2d 1(Tenn. 1967)). See also Restatement (Second of Torts §457 (1967)).

The rationale for this rule is that “the tortfeasor whose negligence caused the injured party to require medical attention should bear all the foreseeable risks resulting from the injury, including risks derived from the medical provider's human fallibility.” *Id.* at *2. The *Atkinson* Court noted that this rule did not immunize a negligent third party from liability, since the defendant could implead the third party or sue under a theory of subrogation or indemnity. See *Owens v. Truck Stops of America*, 915 S.W.2d 420 (TN 1996).

The Court then considered the effect of *McIntyre v. Balentine*, 833

S.W.2d 52 (Tenn. 1992) upon this common law rule, and determined that the adoption of comparative fault did not alter the traditional rule. It was noted that abolishing the rule would penalize injured parties:

Abolition of the common law rule would effectively shift the burden of proving medical negligence (or its absence) from the defendant to the plaintiff. To protect themselves, plaintiffs in future cases would feel compelled to timely name medical providers as defendants in any suit where the negligence of the original tortfeasor led to the necessity for medical care, whether or not medical negligence was actually suspected. In cases like the present one, where this was not done, and the one year statute of limitations for filing medical malpractice claims passed, allowing the defendant to allege medical negligence as an affirmative defense would unfairly prejudice the plaintiff's right to a full recovery for her injuries. By retaining the common law rule, as other jurisdictions that have adopted comparative negligence have apparently done, we do not penalize the injured plaintiff, nor do we eliminate any remedies previously available to the defendant. Though he may not assert the negligence of a subsequent medical provider as an affirmative defense to reduce his liability to the plaintiff, the defendant may still file a third party claim or a separate suit in subrogation to redeem his own rights against the negligent practitioner.

Id. at *3 (citations omitted).

This reasoning is persuasive. Since *Atkinson* was decided, at least one additional jurisdiction has reached the same conclusion. See *Edwards v. Sisler*, 691 N.E.2d 1252 (Ind.Ct.App. 1998).

The Appellee counters that *Atkinson* is not dispositive and that the Tennessee Supreme Court's decision in *Gray v. Ford Motor Co.*, 914 S.W.2d 464 (Tenn. 1996) is controlling. In *Gray*, the Supreme Court accepted a question of law certified from the Sixth Circuit Court of Appeals concerning whether comparative fault principles should apply in Tennessee medical malpractice cases to allow apportionment of damages between the estate of a decedent who acted negligently in causing the initial injury and a physician who negligently treated the decedent. The court determined that comparative fault principles would apply.

While *Gray* is a well-reasoned opinion, it did not address the issue presented in the instant case.¹ Nowhere in the opinion is there any suggestion that the common law rule

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The *Gray* Court stated the issue:

Whether principles of comparative fault should apply in Tennessee medical malpractice

concerning a tortfeasor's liability for subsequent medical negligence has been abolished. While the opinion clearly allows the introduction of comparative fault into certain medical negligence issues, it does not resolve the issue in this case. In the absence of controlling authority to the contrary, we find no reason to abolish the common law rule. Thus, we conclude the Trial Court erred in allowing the amendment.

The parties have also raised the issue of whether the Trial Court erred in allowing amendment when the statute of repose had expired and Dr. Davis could no longer be held liable by the appellant. In light of the disposition of the first issue, there is no need to resolve this question.

The amendment is disallowed and the cause remanded with the cost of the appeal assessed to appellee.

Herschel P. Franks, J.

CONCUR:

Don T. McMurray, J.

Charles D. Susano, Jr., J.

actions so as to result in the apportionment of damages between the estate of a decedent who acted negligently in causing an initial injury and a physician who negligently treated the decedent for that injury.