



1 against several defendants, only one of whom, Mark S. Totty, is  
2 before the Court on appeal. In a divided opinion, the Court of  
3 Appeals sustained the defendant's pleas of res adjudicata and  
4 collateral estoppel and pretermitted all other issues. The  
5 dissenting judge would have found that the trial court erred in  
6 severing and dismissing the plaintiff's claim against the defendant  
7 Totty and would have remanded the case for retrial. This Court  
8 finds that the trial court erred but the determinative issues were  
9 not preserved on appeal. Consequently, the judgment dismissing the  
10 suit is affirmed.

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12 **I**

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14 The plaintiff, Douglas E. Samuelson, in a representative  
15 capacity, sued the defendants, Dr. Cecil E. McMurtry, Dr. William  
16 A. Holland, Jr., Dr. Mark S. Totty and Hospital Corporation of  
17 America (HCA) for the wrongful death of Kevin L. Samuelson, who, on  
18 August 2, 1988, died from pneumonia.

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20 For the purposes of this appeal, the facts are not  
21 disputed. On July 21, 1988, the deceased, who was 28 years of age,  
22 was treated by Dr. Holland, a physician, at the HCA hospital at  
23 Donelson, Tennessee for a boil under his right arm. The next day,  
24 Samuelson returned to the hospital with a fever and inflammation  
25 around the boil and was treated by Dr. McMurtry, a physician.  
26 Eight days later, on July 30, Samuelson went to the hospital  
27 emergency room with complaints of back pain, for which he was

1 treated by Dr. McMurtry. The following day, July 31, he twice  
2 returned to the emergency room with the same symptoms. On his  
3 first visit, he was seen by Dr. Holland, but on his second visit  
4 he was discouraged by the hospital personnel from seeing a  
5 physician. On August 1, he went to the office of Dr. Totty, a  
6 chiropractor, with complaints of intense back and chest pain and  
7 was treated twice that day by Dr. Totty. The next day, Samuelson  
8 died from pneumonia, which had not been diagnosed by any of the  
9 health care providers. Expert medical evidence showed that the  
10 chest and back pain were caused by pneumonia and that the  
11 deceased's condition could have been treated successfully within 6  
12 to 12 hours prior to his death.

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14 The complaint charged that the physicians, Drs. Holland  
15 and McMurtry, failed to diagnose properly the deceased's condition;  
16 that HCA wrongfully refused him treatment; and that Dr. Totty, the  
17 chiropractor, failed to refer the deceased to a physician for  
18 treatment.

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20 The trial court granted Dr. Totty's motion for summary  
21 judgment upon the finding that "there exists a genuine issue of  
22 material fact with respect to the issue of negligence, but not as  
23 to the issue of proximate causation." On appeal, the Court of  
24 Appeals reversed the summary judgment, finding disputed evidence  
25 concerning the proximate causes of Samuelson's death and remanded  
26 the case for trial.



1           As stated, the Court of Appeals found on the first appeal  
2 that affidavits filed on behalf of the plaintiff created material  
3 issues of fact regarding Dr. Totty's negligence and proximate  
4 causation and remanded the case for trial against all defendants.  
5 No useful purpose would be served by discussing in this opinion the  
6 plaintiff's expert's qualifications or the standard of care owed  
7 the plaintiff by the defendant Totty under the circumstances of the  
8 case. For the purposes of this appeal, this Court finds that the  
9 trial court erred in dismissing the plaintiff's suit against Dr.  
10 Totty rather than allowing the case to proceed to trial as ordered  
11 by the Court of Appeals.  
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13           The issue, then, is whether the trial court erred in  
14 severing for trial the claim against Dr. Totty. Rule 19.01, Tenn.  
15 R. Civ. P., provides, "[a] person who is subject to the  
16 jurisdiction of the court shall be joined as a party if (1) in the  
17 person's absence complete relief cannot be accorded among those  
18 already parties. . . ." This portion of the rule would compel the  
19 joinder of Dr. Totty, because complete relief in this action, which  
20 is governed by comparative fault, could not be accorded all parties  
21 unless Dr. Totty was a party. However, the rule contains the  
22 further provision: "This rule shall be construed to allow joint  
23 tort-feasors and obligors on obligations that are joint and several  
24 to be sued either jointly or severally." The application of this  
25 portion of the rule obviously has been affected by the adoption of  
26 comparative fault.  
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1 Judge Koch, dissenting in the Court of Appeals,  
2 succinctly summarized the rules regarding the apportionment of  
3 fault under comparative fault:  
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5 [T]he Court has articulated four principles  
6 with regard to the apportionment of fault or  
7 awarding damages against non-parties. First,  
8 fault may be apportioned only to persons  
9 against whom the plaintiff has a cause of  
10 action. Owens v. Truckstops of Am., 915 S.W.2d  
11 at 428; Ridings v. Ralph M. Parsons Co., 914  
12 S.W.2d at 83. Second, fault may be apportioned  
13 to both parties and non-parties. Volz v.  
14 Ledes, 895 S.W.2d at 680. Third, the plaintiff  
15 bears the risk of not joining a potentially  
16 liable tortfeasor against whom it has a cause  
17 of action. Ridings v. Ralph M. Parsons Co.,  
18 914 S.W.2d at 83; Volz v. Ledes, 895 S.W.2d at  
19 680. Fourth, failure to identify potentially  
20 liable tortfeasors who are not already parties  
21 as required by Tenn. Code Ann. § 20-1-119(a)  
22 will prevent defendants from attributing fault  
23 to these non-parties. Ridings v. Ralph M.  
24 Parsons Co., 914 S.W.2d at 84.  
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28 The effect of comparative fault principles on joint and  
29 several liability was considered in Owens v. Truckstops of Am., 915  
30 S.W.2d 420 (Tenn. 1996). There the Court concluded that "where the  
31 separate, independent negligent acts of more than one tortfeasor  
32 combine to cause a single, indivisible injury, each tortfeasor will  
33 be liable only for that proportion of the damages attributable to  
34 its fault." Id. at 430. And, further, "when liability is based on  
35 negligence, each of the defendants is severally liable only for the  
36 percentage of damages caused by its negligence." Id. at 433. Rule  
37 8.03, Tenn. R. Civ. P., requires that comparative fault, including  
38 the identity or description of any other alleged tortfeasors, be  
39 pled by a defendant as an affirmative defense. Also, Tenn. Code

1 Ann. § 20-1-119(a)(1994) has been amended to allow additional time  
2 for other persons to be made defendants in cases of comparative  
3 fault. This Court has stated that, "Rule 8.03, Tenn. R. Civ. P.,  
4 insures that the rights and liabilities of the parties subject to  
5 suit be resolved in one action. Section 20-1-119 provides the  
6 procedure for joining additional defendants . . . ." Ridings v.  
7 Ralph M. Parsons Co., 914 S.W.2d 79, 83 (Tenn. 1996). The  
8 conclusion to be drawn from these decisions is, where the separate,  
9 independent negligent acts of more than one tortfeasor combine to  
10 cause a single, indivisible injury, all tortfeasors must be joined  
11 in the same action, unless joinder is specifically prohibited by  
12 law.<sup>1</sup> Here, the complaint alleged that the separate and  
13 independent acts of Dr. Totty combined with the separate and  
14 independent acts of the other defendants to cause a single,  
15 indivisible injury. Consequently, since Dr. Totty and the other  
16 defendants would not be jointly liable for the decedent's death,  
17 that provision in Rule 19 which allows joint tortfeasors to be sued  
18 either jointly or severally is not applicable.

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20 The procedure required under Tennessee's comparative  
21 fault formulation retains the efficiency of joint liability and the  
22 fairness of comparative fault. It also conserves judicial  
23 resources and eliminates inconsistent judgments. It resolves  
24 fairly the competing interests of full recovery for the plaintiff  
25 and the equitable allocation of liability for the defendants.

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<sup>1</sup>See Turner v. Jordan, \_\_\_\_\_ S.W.2d \_\_\_\_\_ (Tenn. 1998) (joinder of negligent and intentional tortfeasors would be improper since their "fault" could not be compared).

1     Allowing a plaintiff to sue defendants in separate, consecutive  
2     actions would defeat the efficiency and fairness that are the  
3     objectives of the principles of comparative fault. See John Scott  
4     Hickman, One-Action Rule, 48 Vand. L. Rev. 739, 762 (1995).

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6             In Cogdell v. Hospital Center at Orange, 560 A.2d 1169  
7     (N.J. 1989), which was a medical malpractice suit against several  
8     defendants who were charged with consecutive acts of negligence,  
9     the Supreme Court of New Jersey set forth the policy considerations  
10    upon which that court based its "entire controversy doctrine."  
11    Those considerations support the decision reached in this case.

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13            [T]here can be little doubt that the  
14            participation of all potentially responsible  
15            persons as parties in the original action would  
16            have resulted in a fuller and fairer  
17            presentation of the relevant evidence and would  
18            have enabled the jury to make a more informed  
19            and complete determination of liability. It  
20            would have assured an ultimate determination  
21            that would be comprehensive, just and  
22            conclusive as to all persons implicated in the  
23            controversy.

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25            . . . The failure to have joined these  
26            defendants in the earlier action seems  
27            prejudicial and unfair . . . . [W]hile  
28            technically their interests were not determined  
29            in the earlier action, they do not now have the  
30            same opportunity to persuade a jury that will  
31            be determining their liability that the former  
32            defendants are to be blamed.

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36     Id. at 1178.

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40            The conclusion is that the trial court erred in  
41     dismissing and severing the claim against Dr. Totty. The trial

1 court's errors deprived the plaintiff of the right to proceed  
2 against the defendant Totty in the same trial with the other  
3 defendants and also of the right to have the decedent's fault  
4 compared with the fault of all the defendants. The defendants  
5 other than Dr. Totty were deprived of an opportunity to have fault  
6 apportioned against Dr. Totty. This result could have been  
7 accomplished on remand had the plaintiff appealed the entire case.  
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9           Despite the plaintiff's insistence that relief can be  
10 granted on the record before the Court, the Court finds that the  
11 plaintiff's failure to appeal the judgments against the defendants  
12 other than Dr. Totty was fatal to his right to a new trial.  
13 Perhaps the plaintiff could not have anticipated the precise  
14 decision that would be rendered by the Court on the issues  
15 presented, but the plaintiff chose to accept payment in  
16 satisfaction of the judgment against the defendant Holland, thereby  
17 precluding an appeal that would have allowed the Court to do  
18 justice for all the parties.  
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20           The Court has been referred to no authority that would  
21 allow it to set aside a final judgment against a defendant who is  
22 not a party to the appeal and who has paid the judgment and  
23 received from the plaintiff an acknowledgment of full satisfaction.  
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25           Accordingly, the judgment of the Court of Appeals  
26 dismissing the suit is affirmed, and the case is remanded to the  
27 trial court.

1                   Costs of appeal are taxed to the plaintiff.

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Reid, J.

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Concur:

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Anderson, C.J., Drowota, Birch,

10

and Holder, JJ.