IN THE SUPREME COURT OF THE STATE OF NEVADA

HARRISTON LEE BASS, JR., M.D.,
Appellant,
vs.
THE DOCTORS' COMPANY, AN INTERINSURANCE EXCHANGE,
Respondent.

No. 44584

HARRISTON LEE BASS, JR., M.D.,
Appellant,
vs.
THE DOCTORS' COMPANY, AN INTERINSURANCE EXCHANGE,
Respondent.

No. 45002

FILED

SEP 26 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

These are consolidated appeals from a district court summary judgment in an insurance case and from a post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. Appellant Harriston Lee Bass, Jr., M.D., sued respondent The Doctor's Company (TDC) for failing to defend him in an action before the Nevada Board of Medical Examiners (BME) and failing to provide an adequate defense to civil malpractice claims. The district court granted TDC's motion for partial summary judgment on the failure to defend the BME actions but allowed the remaining claims to proceed. Six years later, finding that Dr. Bass had failed to present evidence to support his remaining claims, the district court renewed TDC's summary judgment motion sua sponte and entered final summary judgment in TDC's favor. In a post-judgment order, the district court awarded TDC $116,455 in attorney fees under NRS 18.010(2)(b) and $23,348 in costs under NRS 18.005(5) and NRS 18.020.

06-19745

Genuine issues of material fact remain regarding the adequacy of TDC's defense

The district court erred when it granted TDC's renewed motion for summary judgment.[1] The district court, after a review of the record and all of the pleadings, determined that Dr. Bass had still failed to present any evidence that the jury could consider at trial with regard to his allegations of bad faith against TDC. However, Dr. Bass had filed affidavits, both in his initial and subsequent oppositions to TDC's summary judgment motions, to support his position that TDC had a conflict of interest in representing him and interfered with his appointed counsel's representation. We conclude that these affidavits raise genuine issues of material fact and that TDC did not meet its burden of establishing the non-existence of any genuine issues of material fact.

Further, TDC did not file a written motion and notice of motion to renew its prior summary judgment request.[2] Instead, on the morning that the parties were scheduled to commence trial, the district court renewed the summary judgment motion sua sponte and set argument on the renewed motion for later that day. The district court

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[1]We review orders granting summary judgment de novo. Yeager v. Harrah's Club, Inc., 111 Nev. 830, 833, 897 P.2d 1093, 1094 (1995). Summary judgment is proper only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. NRCP 56(c); see Wood v. Safeway, Inc., 121 Nev. ____, ____, 121 P.3d 1026, 1029 (2005).

[2]Eighth Judicial District Court Rule 2.20.

exceeded the bounds of its discretion by conducting a hearing on summary judgment without proper notice.[3]

The district court erred when it granted TDC's motions in limine

We further conclude that the district court erred when it granted TDC's motions in limine, thereby precluding Dr. Bass from referencing facts and issues decided in ancillary proceedings before the BME and the district court. The motions were based in part under the doctrines of res judicata and collateral estoppel.

"[T]he doctrine of res judicata precludes parties or those in privity with them from relitigating a cause of action or an issue which has been finally determined by a court of competent jurisdiction."[4] For the doctrine to apply, the following three elements must be present:

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; and (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation.[5]

"Collateral estoppel is generally invoked when separate causes of action are presented in the first and second suits. The doctrine provides

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[3]Soebbing v. Carpet Barn, Inc., 109 Nev. 78, 83, 847 P.2d 734, 735 (1993).

[4]University of Nevada v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994).

[5]Id.

that any issue that was actually and necessarily litigated in one action will be estopped from being relitigated in a subsequent suit."[6]

We conclude that the doctrines of res judicata and collateral estoppel do not apply in this case to preclude Dr. Bass from pursuing his cause of action against TDC. The adequacy of TDC's representation in the malpractice actions was not an issue before the BME and, indeed, could not be because the licensing hearing took place prior to their commencement. Further, collateral estoppel does not preclude Dr. Bass from arguing that TDC interfered with or directed attorney John Snow's representation of him. Dr. Bass's stipulation to dismiss with prejudice a separate legal malpractice action he had instituted against Snow is not res judicata and does not affect his right to pursue his claim against TDC.[7] By stipulating to the dismissal, Dr. Bass did not waive his claim regarding the adequacy of Snow's representation. Further, TDC's argument that there was no employer-employee relationship between Snow and TDC, and that TDC was not vicariously responsible for Snow's actions lacks merit.[8] Rather, TDC is bound by alleged negligent representation of its

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[6]Id. at 599, 879 P.2d at 1191.

[7]See In Re Daley, 776 F.2d 834, 838 (9th Cir. 1985) (fraud claim not actually litigated where dismissal entered pursuant to a stipulation, hence no collateral estoppel); Chaney Bldg. Co. v. City of Tucson, 716 P.2d 28, 30 (Ariz. 1986) (nothing is adjudicated between parties to a stipulated dismissal, hence no collateral estoppel).

[8]""The duty to defend is an important and frequently distinguishable part of the insurance contract. Those whom the Insurer selects to execute its promises, whether attorneys, physicians, no less than company-employed adjusters, are its agents for whom it has the customary legal liability."" Continental Ins. Co. v. Bayless & Roberts, Inc., 608 P.2d 281,

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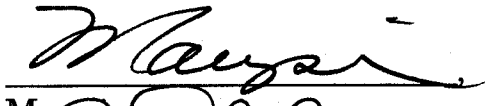
agent, Snow, which may also serve as a basis for Dr. Bass's bad faith claim.

CONCLUSION

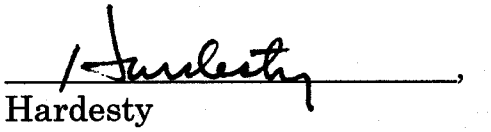
We conclude that because the ancillary proceedings did not involve the identical issues Dr. Bass raised in his claim against TDC, the district court erred in granting TDC's motions in limine to exclude Dr. Bass from referring to evidence and testimony raised in those proceedings.[9] Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



Maupin, J.

Gibbons, J.



Hardesty, J.

cc: Honorable Jackie Glass, District Judge
John H. Cotton & Associates, Ltd.
David Lee Phillips
R. Paul Sorenson
Clark County Clerk

. . . *continued*
294 (Alaska 1980) (quoting Smoot v. State Farm Mutual Automobile Insurance Co., 299 F.2d 525, 530 (5th Cir. 1962)).

[9]Because we reverse the district court's judgment, we vacate the award of costs and attorney fees.