STATE OF MICHIGAN

COURT OF APPEALS

SAMUEL RANDALL,

Plaintiff-Appellant,

v

ANTHONY POLAZZO and METROPOLITAN HEALTH CORPORATION,

Defendants-Appellees.

UNPUBLISHED
March 11, 2021

No. 351374
Kent Circuit Court
LC No. 19-004816-NH

Before: REDFORD, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Plaintiff, Samuel J. Randall, appeals as of right the trial court's order granting summary disposition in favor of defendants, Anthony Polazzo and Metropolitan Health Corporation (Metro Health), and dismissing plaintiff's complaint alleging claims for medical malpractice. We now reverse and remand for additional proceedings consistent with this opinion.

The question at issue in this case is whether plaintiff is legally barred from pursuing medical-malpractice claims against defendants as the consequence of his actions in an earlier lawsuit. The parties do not dispute that the factual allegations supporting plaintiff's medical-malpractice claims closely tracked an earlier complaint filed by plaintiff against the same defendants that only alleged ordinary negligence. In the earlier action, we granted leave for interlocutory appeal and subsequently issued a published decision recognizing plaintiff's right to pursue ordinary-negligence claims against defendants under the concussion-protection statute, MCL 333.9156. See *Randall v Mich High Sch Athletic Ass'n*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket Nos. 346135 and 346476, issued 11/19/2020). While recognizing that both Metro Health and Polazzo were also "subject to medical-malpractice liability," we held that such liability was irrelevant for purposes of that case because—in that case—plaintiff was pursuing only ordinary-negligence claims. *Id*. at ___; slip op at 14. As that appeal remained pending, however, plaintiff filed the instant action. Before the trial court, plaintiff's counsel explained that his position had "been consistent from the beginning in saying that this is an ordinary negligence case and that it's not a medical malpractice case" but because of the impending expiration of the

applicable limitations period for a medical-malpractice action, he needed to preserve his client's ability to bring a claim in the event that this Court held ordinary-negligence claims against defendants unviable under the concussion-protection statute because of defendants' status as healthcare providers. Relying on its decision in the earlier case that plaintiff's claims sounded in ordinary negligence, the trial court held that collateral estoppel barred plaintiff's medical-malpractice claims.

The applicability of collateral estoppel is a question of law that this Court reviews de novo. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000). "Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 528; 866 NW2d 817 (2014). "To be actually litigated, a question must be put into issue by the pleadings, submitted to the trier of fact, and determined by the trier." *Id*. As defendants admit, plaintiff's ordinary-negligence claims were never actually litigated and never culminated in a final judgment. Therefore, collateral estoppel did not bar plaintiff's claims.

Although defendants acknowledge that collateral estoppel did not apply, they argue that we should affirm for a different reason that the trial court did not address.[1] They point out that they moved for summary disposition pursuant to MCR 2.116(C)(6), which provides a ground for summary disposition when "[a]nother action has been initiated between the same parties involving the same claim." This rule "is designed to stop parties from endlessly litigating matters involving the same questions and claims as those presented in pending litigation" or, stated differently, "its purpose is to prevent litigious harassment involving the same questions as those in pending litigation." *Fast Air, Inc v Knight*, 235 Mich App 541, 546; 599 NW2d 489 (1999) (quotation marks and citation omitted). It is apparent from the record that plaintiff filed this second complaint in anticipation of the need to preserve his rights in the event that this Court held that plaintiff could not sustain a claim for ordinary negligence against defendants. We do not believe that counsel's anticipatory response to this potential risk was meant in any way to harass defendants who, notably, had maintained in the first action (and on appeal) that plaintiff's negligence claims could *only proceed* under a medical-malpractice theory and argued in that case that summary disposition was appropriate because plaintiff had not complied with the procedural requirements for maintaining a medical-malpractice action. Moreover, MCR 2.116(C)(6) applies only when the second action "has been initiated between the same parties *involving the same claim*." (Emphasis added.) Although the factual underpinnings are the same (as plaintiff concedes), ordinary negligence and medical malpractice are distinct legal claims. See *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 420-422; 684 NW2d 864 (2004) (distinguishing ordinary-negligence and medical-malpractice claims).

[1] "A decision granting summary disposition may be affirmed on the basis of reasoning different from the reasoning employed by the trial court." *Otero v Warnick*, 241 Mich App 143, 147 n 2; 614 NW2d 177 (2000).

Defendants also argue that the trial court seemingly confused the concept of collateral estoppel with judicial estoppel, and that judicial estoppel could apply to bar plaintiff's medical-malpractice claims. "Judicial estoppel precludes a party from adopting a legal position in conflict with a position taken earlier in the same or related litigation." *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 537; 847 NW2d 657 (2014) (quotation marks and citation omitted). "The doctrine protects the integrity of the judicial and administrative processes." *Id.* (quotation marks and citation mitted). We acknowledge that the trial court suggested in a footnote that "[t]he case could be made that [plaintiff] should be judicially estopped from making a claim under medical malpractice as that argument is wholly inconsistent with the position he took" in the earlier case. But, for the same reasons MCR 2.116(C)(6) should not bar plaintiff's medical-malpractice claims, we find persuasive plaintiff's explanation that his purpose in filing was simply to preserve his right to bring *any* claim in the event that we held that his ordinary-negligence claims were not viable under the concussion-protection statute. There is no indication that plaintiff was attempting to play "fast and loose." See *id.* (quotation marks and citations omitted). Moreover, if plaintiff had brought both his ordinary-negligence and medical-malpractice claims in the same action, he would have been permitted to plead in the alternative. See MCR 2.111(A)(2)(b) (permitting a party to "state as many separate claims or defenses as the party has, regardless of consistency and whether they are based on legal or equitable grounds or both"). Given our order staying the earlier action and granting leave to appeal on an interlocutory basis, plaintiff was not able to seek leave to amend his first complaint to include the medical-malpractice claims while the appeal remained pending. Defendants do not present any caselaw or rule that would have required plaintiff to bring his medical-malpractice claims simultaneously with his ordinary-negligence claims.[2]

Finally, we consider plaintiff's argument that the trial court erred by refusing to consolidate the two cases. "Decisions regarding consolidation rest in the sound discretion of the trial court." *Bordeaux v Celotex Corp*, 203 Mich App 158, 163; 511 NW2d 899 (1993). "MCR 2.505(A) permits consolidation of actions when 'substantial and controlling common questions of law or fact are pending' before the court." *Id.* at 163, quoting MCR 2.505(A). "Considerations of judicial economy often favor consolidation." *Bordeaux*, 203 Mich App at 163. However, "[i]f either party is prejudiced by the act of consolidation, then consolidation should not be granted." *Blumenthal v Berkley Homes*, 342 Mich 36, 41; 69 NW2d 183 (1955). In this case, the trial court's denial was simply the effect of its decision to grant summary disposition and dismiss the entire complaint. Given the common factual questions involved, these cases would seem to be strong candidates for consolidation. However, we direct the trial court to exercise its own discretion to decide in the first instance whether consolidation is appropriate. See *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 210; 920 NW2d 148 (2018).

[2] Defendants do not argue, for example, that MCR 2.203(A) (the compulsory joinder rule) serves to bar plaintiff from bringing his medical malpractice claim in this action. And, as noted, the record reflects that plaintiff brought this action to preserve his rights after defendants argued in the earlier case that plaintiff should have filed a medical malpractice claim.

Reversed and remanded for additional proceedings consistent with this opinion. As the prevailing party, plaintiff may tax his costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ James Robert Redford
/s/ David H. Sawyer
/s/ Mark T. Boonstra