

Appeal No. 2005AP1407

Cir. Ct. No. 2003CV606

**WISCONSIN COURT OF APPEALS
DISTRICT II**

**THE ESTATE OF FRANK P. RILLE, BY ITS PERSONAL
REPRESENTATIVE, SUSAN RILLE, AND SUSAN RILLE,**

PLAINTIFFS-RESPONDENTS,

**TOMMY THOMPSON, SECRETARY, DEPARTMENT OF
HEALTH & HUMAN SERVICES,**

INVOLUNTARY-PLAINTIFF-RESPONDENT,

V.

FILED

**PHYSICIANS INSURANCE COMPANY, MEDICAL COLLEGE
OF WISCONSIN, AFFILIATED HOSPITALS, INC., AND
SHEILA GALBRAITH, M.D.,**

APR 19, 2006

Cornelia G. Clark
Clerk of Supreme Court

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-APPELLANTS,**

V.

**ALBERTSON'S, INC., OSCO DRUG, INC., AND ABC
INSURANCE COMPANY,**

THIRD-PARTY DEFENDANTS-RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Nettesheim and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in
this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

In light of this court's decision in *Precision Erecting, Inc. v. M&I Marshall & Ilsley Bank*, 224 Wis. 2d 288, 592 N.W.2d 5 (Ct. App. 1998), what is the extent of a tort litigant's responsibility to appear and object to a motion for summary judgment filed against another party to the tort action, but not against the litigant, when the litigant seeks to preserve a potential claim for contribution against a party to the motion?

FACTS

The Estate of Frank P. Rille, by its Personal Representative, Susan Rille, and Susan Rille filed this medical malpractice action against, among others, Sheila Galbraith, M.D., and Osco Drug, Inc. The complaint stated that Galbraith's and Osco Drug's negligence caused Frank's injuries and death. Galbraith allegedly issued a prescription for a drug to treat Frank's psoriasis condition that exceeded the maximum dosages for that drug and an Osco Drug pharmacy allegedly filled the prescription.

In December 2003, Osco Drug filed a motion for summary judgment based on the fact that the Rilles had failed to provide expert testimony to support their contention that Osco Drug was negligent. In her response, Galbraith noted her intention not to oppose Osco Drug's motion for summary judgment. Galbraith, however, indicated that she may have a right to a potential cross-claim and/or a claim for contribution against Osco Drug. She therefore requested that the court's summary judgment order, in fairness, specifically reference (1) "[t]hat such order is not determinative of any claims of ... Galbraith" and (2) "[t]hat such claims are preserved."

At the summary judgment motion hearing, Galbraith reiterated that even though she was not opposing the motion, she reserved the right to pursue a claim for contribution against Osco Drug. The trial court dismissed on the merits the Rilles' claims against Osco Drug. The court ultimately signed Galbraith's proposed order which stated that "this order is no way intended to affect the rights of other parties to pursue claims under appropriate statutory and/or case law."

In November 2004, Galbraith filed a third-party complaint against Osco Drug seeking indemnity and/or contribution. In January 2005, Osco Drug filed a motion to dismiss Galbraith's third-party complaint on issue preclusion grounds. The trial court granted Osco Drug's motion to dismiss the third-party complaint.

DISCUSSION

This case presents the supreme court with the opportunity to address anew the responsibilities of a litigant to closely examine any exposure he or she might have whenever one of the other parties to the action files a motion for summary judgment against another party but not against the litigant. In ***Precision Erecting***, we weighed in on that recurring question, holding that the litigant who is not the subject of the motion for summary judgment must appear and object to the motion or he or she will be bound by the facts underlying that judgment as a matter of issue preclusion. See *id.* at 292-93. This case, however, tests the boundaries of that decision and, given the legal and policy ramifications of establishing the parameters of a litigant's duty, we respectfully ask the supreme court for definitive guidance.

Precision Erecting. In order to understand the premise for this certification, it is necessary to describe in some detail the pertinent portions of

Precision Erecting. In that case, we concluded the circuit court properly exercised its discretion in applying issue preclusion to prevent a party to an action, Nambe Mills, Inc., from litigating an issue in the same action that had already been decided adversely to it by summary judgment. ***Id.*** at 310.

The motion for summary judgment had been brought by AFW Foundry, Inc., against other parties in the multiple-party action. ***Id.*** at 294. AFW's contractual relationship with Antonic, another party to the action, was at issue in the summary judgment proceedings. *See id.* at 294-95. AFW claimed that Antonic was a general contractor and not its agent. *See id.* Although Nambe had an interest in the determination of Antonic's status and was noticed about the motion, Nambe did not appear or in any way participate in the summary judgment proceedings. ***Id.*** at 294. In granting the motion for summary judgment, the circuit court declared that Antonic was a general contractor. ***Id.*** at 294-95.

By the time the case reached this court, the issue was framed as "whether the summary judgment to AFW against Antonic precludes Nambe from arguing that Antonic was an agent of AFW rather than a general contractor." ***Id.*** at 300. We determined that issue preclusion barred any further litigation regarding the relationship between AFW and Antonic. ***Id.*** at 304-09. An important part of our issue preclusion analysis hinged on the fact that Nambe could have "asserted itself at the summary judgment stage if it felt material facts regarding Antonic's status were in dispute." ***Id.*** at 301. We explained, "The very fact that a summary judgment motion was made alerted Nambe that someone was alleging that there were no facts in dispute." ***Id.*** at 309. We further wrote:

If a litigant who is not the subject of the motion for summary judgment nonetheless has reason to dispute the facts supporting the motion, it is that litigant's duty to appear and object to the motion. If not, and summary

judgment is granted, the facts underlying that judgment are binding on all other parties to the suit as a matter of issue preclusion.

Id. at 292-93. We were concerned that if we did not apply issue preclusion in that case we would encourage parties in Nambe’s position to “sit on their hands and wait to see what happens instead of opposing summary judgment on an issue crucial to their claims. Then, if other parties who put forth the effort to oppose fail, the waiting parties are allowed a second kick at the cat.” *Id.* at 309.

Precision Erecting’s Application. Here, unlike Nambe, Galbraith appeared during the summary judgment stage. While she did not oppose Osco Drug’s summary judgment motion, she urged the circuit court to protect her potential contribution claim against Osco Drug. Therefore, the question becomes whether Galbraith’s actions prevent the application of issue preclusion to her contribution claim.

On the one hand, Osco Drug convincingly maintains that when one party in a tort action obtains dismissal on summary judgment, issue preclusion bars a subsequent third-party action for contribution by another party to the tort action unless the party seeking contribution protected his or her interests by vigorously opposing the summary judgment motion. According to Osco Drug, merely appearing at the summary judgment proceeding and attempting to preserve a claim for contribution does not overcome the application of issue preclusion.

Osco Drug’s position finds support in the public policy underlying issue preclusion. The general rule of issue preclusion was created to ward off endless litigation thereby upholding judicial efficiency and finality, ensure the stability of judgments and guard against inconsistent decisions on the same set of facts. *See id.* at 301-02.

Osco Drug argues that when a litigant in a negligence action files a third-party complaint for contribution against another party dismissed on summary judgment, the complaint raises an issue already settled by the summary judgment—the dismissed party’s alleged negligence. As in *Precision Erecting*, by virtue of the motion for summary judgment, the defendant seeking contribution knew that the dismissed party was arguing that no material facts were in dispute concerning his or her negligence in the case. *See id.* at 309. If the litigant had felt material facts were in dispute regarding the dismissed party’s negligence, he or she should have asserted himself or herself in the summary judgment stage and opposed the motion. *See id.* at 301. According to Osco Drug, to hold otherwise would allow the litigant, who sat on his or her hands, “a second kick at the cat.” *See id.* at 309. This contravenes the policy of finality in litigation and raises the prospect of inconsistent judgments in the same lawsuit.

On the other hand, Galbraith claims that her actions were sufficient. She maintains that she “specifically and repeatedly” objected to Osco Drug’s motion for summary judgment in an effort to protect her contribution claim.

Public policy concerns also support Galbraith’s position. This is because the goals of issue preclusion must be balanced against the right to litigate one’s claims. *See id.* at 304. Due process requires that a person have a fair opportunity procedurally, substantively and evidentially to pursue the claim before a second litigation will be precluded. *Id.* at 305.

Galbraith persuasively argues that to apply issue preclusion when a tort litigant actively attempts to preserve his or her right to contribution through appearances and the filing of briefs during the summary judgment stage would be fundamentally unfair. In such a case, the litigant is not sitting on his or her hands,

simply waiting for a “second kick at the cat.” *See id.* at 309. Rather, he or she is vigorously opposing the summary judgment motion to the extent that it could be construed as concluding his or her rights against a party subject to the motion. According to Galbraith, this is all that ***Precision Erecting*** and the doctrine of issue preclusion require. Furthermore, in a multiple-defendant tort action, a prior summary judgment in favor of one defendant adjudicates the liability of that defendant to the plaintiff; it does not necessarily determine the issue of the defendants’ liability inter se. Thus, the public policy favoring finality in litigation and consistency of judgments may not be implicated.

CONCLUSION

The basic procedural predicate presented in this case occurs with frequency in multiple-defendant tort actions. This case, therefore, raises a question concerning the reach of ***Precision Erecting*** that is likely to recur if left unresolved. The parties both offer reasonable interpretations of ***Precision Erecting***, a court of appeals decision, and applications of public policy to support their arguments. The supreme court, as the law-declaring and law-defining court, is the proper judicial authority to resolve the competing interpretations and to define public policy on this issue. Accordingly, we respectfully request that our supreme court accept jurisdiction over this appeal.

