

**No. 05-00-00000-CV**

**IN THE COURT OF APPEALS  
FOR THE FIFTH JUDICIAL DISTRICT OF TEXAS  
DALLAS, TEXAS**

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**JOHN SMITH,**

**Appellant,**

**vs.**

**BIGAIRLINE, INC., SUCCESSOR-IN-INTEREST  
TO SMALLAIR, INC. and  
JAMES MADISON, M.D.,**

**Appellees.**

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**APPELLANTS' BRIEF AND APPENDIX**

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**Attorneys for Appellant**

**ORAL ARGUMENT REQUESTED**

## **IDENTITY OF PARTIES AND COUNSEL**

Appellant certifies that the following is a complete list of the parties, attorneys, and any other person who has any interest in the outcome of this lawsuit:

## **STATEMENT OF THE CASE**

### **ISSUES PRESENTED**

1. Did the Trial Court Err by Entering Summary Judgment Because SmallAir and Madison Did Not Establish All the Elements of Res Judicata as a Matter of Law?
2. Did the Trial Court Err by Entering Summary Judgment Because SmallAir and Madison Did Not Establish That the Doctrine of Collateral Estoppel Bars Smith's Claims?
3. Did the Trial Court Err by Entering Summary Judgment Because Smith's Intentional-Tort Claims Against SmallAir and Madison Are Not Barred by the Workers' Compensation Act?
4. Did the Trial Court Err by Entering Summary Judgment Because Smith's Claims Are not Barred by Limitations?
5. Did the Trial Court Err by Granting Summary Judgment Because Smith has Pointed to Evidence in the Record Supporting his Claim That SmallAir and Madison Committed Actual or Constructive Fraud?

## **STATEMENT OF FACTS**

## **SUMMARY OF THE ARGUMENT**

## ARGUMENT

### A. Standard of Review

Because the granting of summary judgment is a question of law, this Court reviews the trial court's decision de novo. *Natividad v. Alexis, Inc.*, 875 S.W.2d 695, 699 (Tex.1994). When the trial court has granted summary judgment without stating the grounds for doing so, as it has done here, the Court must consider all grounds for judgment presented in the motion and affirm if any has merit. *Weiner v. Wasson*, 900 S.W.2d 316, 317 (Tex.1995).

Under the standard of review for a traditional summary judgment, the moving party has the burden of establishing that no material fact issue exists and it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *M.D. Anderson Hosp. and Tumor Institute v. Willrich*, 28 S.W.3d 22, 23 (Tex.2000). Summary judgment for a defendant is proper when the summary judgment evidence negates an essential element of the plaintiff's cause of action as a matter of law or establishes all the elements of an affirmative defense as a matter of law. *American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex.1997). In determining whether a disputed material fact issue precludes summary judgment, the Court must take evidence favorable to the non-movant as true and indulge every reasonable inference in favor of non-movant. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex.1985).

The Court may not grant a no-evidence summary judgment unless the movant shows that an adequate time for discovery has passed and there is no evidence to support one or more essential elements of the non-movant's claim or defense. Tex. R. Civ. P. 166a(i). The non-movant "is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements." Notes & Comments to Tex. R. Civ. P. 166a(i); *Saenz v. Southern Un. Gas Co.*, 999 S.W.2d 490, 493 (Tex. App. – El Paso 1999, pet. denied). In response to a no-evidence summary judgment motion, the non-movant must present summary-judgment evidence raising a genuine issue of material fact on the element attacked, or the motion must be granted. *In re Mohawk Rubber Co.*, 982 S.W.2d 494, 498 (Tex. App. – Texarkana 1998, orig. proceeding). To defeat the motion, the non-movant must only produce more than a scintilla of evidence to raise a genuine issue of material fact. Tex. R. Civ. P. 166a(i); *Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 164 (Tex. App. – Houston [14th Dist.] 2000, pet. denied) A court must resolve all reasonable doubts about the facts in favor of the non-movant. *Lehrer v. Zwernemann*, 14 S.W.3d 775, 777 (Tex. App. – Houston [1st Dist.] 2000, pet. denied).

**POINT I THE TRIAL COURT ERRED BY ENTERING SUMMARY JUDGMENT BECAUSE SMALLAIR AND MADISON DID NOT ESTABLISH ALL THE ELEMENTS OF RES JUDICATA AS A MATTER OF LAW.**

**A. Res Judicata, or Claim Preclusion, Only Applies if the Claims Made by a Party Were or Could Have Been Finally Adjudicated on the Merits in a Prior Action Involving the Same Parties or Their Privies.**

Res judicata, or claim preclusion, "precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action." *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex.1996). To invoke res judicata, a party must establish the following: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action. *Id.*

Res judicata is an affirmative defense, and SmallAir had the burden to prove conclusively all elements of that affirmative defense. *Dardari v. Texas Commerce Bank Nat'l Ass'n*, 961 S.W.2d 466, 470 (Tex. App. – Houston [1st Dist.] 1997, no pet.).

Smith does not dispute that a final judgment was entered in *Smith v. BigAirline*. SmallAir has failed to establish that it that it was in privity with

BigAirline or that Smith's claims against SmallAir could or should have been raised in the previous case.

**B. SmallAir and Madison Did Not Establish That They are in Privity With BigAirline.**

Res judicata only binds those who were parties to the previous litigation or their privies. *Amstadt*, 919 S.W.2d at 652-53.

“People can be in privity in at least three ways: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action.” *Amstadt*, 919 S.W.2d at 653.

Privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same state of facts. *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex.1971).

The record establishes that SmallAir and BigAirline were wholly separate and distinct corporations. (SmallAir SJ Motion at 4 n.2.)

There is nothing in record demonstrating that SmallAir or Madison controlled the litigation in *Smith v. BigAirline*.

SmallAir does not contend that it is a successor in interest to BigAirline or is otherwise in privity with BigAirline.

SmallAir and Madison cannot establish that BigAirline represented their interests in *Smith v. BigAirline*. Neither Madison' nor SmallAir's liability was ever in issue in the previous case, and there has been no showing that BigAirline in any way advocated the interests of SmallAir or Madison.

Indeed, BigAirline arguably took positions that were contrary to those advanced by SmallAir and Madison. Specifically, BigAirline argued that it was not Smith's employer and thus owed him no duty and that because no doctor-patient relationship existed between Smith and the doctors employed by BigAirline, BigAirline could not be held liable. These positions can be construed to support the argument that if anyone was liable to Smith, it was his actual employer, SmallAir. When parties take conflicting positions, they cannot be considered to be in privity. *Cluett v. Med. Prot. Co.*, 829 S.W.2d 822, 826 (Tex. App. – Dallas 1992, writ denied) (where respective positions of insured and insurer were in conflict, no privity existed between the parties).

**C. SmallAir and Madison Did Not Establish That Smith's Claims in This Case Were Raised or Could Have Been Raised in *Smith v. BigAirline*.**

SmallAir has also failed to establish the third element of res judicata – identity of claims. Under Texas law, claim preclusion extends to any claim that was brought or could have been brought in the previous litigation. *Amstadt*, 919 S.W.2d at 652. In this case, Smith has sued his actual employer, SmallAir, for

its actions in fraudulently concealing and misrepresenting the results of medical tests and sued Madison for his conduct in failing to disclose information to Smith. In *Smith v. BigAirline*, Smith sued BigAirline in its capacity as the entity that actually performed the medical examinations. BigAirline claimed it was not Smith's employer and could therefore not be held liable. Smith's claims against SmallAir are based on independent duties SmallAir owed directly to Smith as his employer. Similarly, Smith's claims against Madison, who examined the medical records, are based on whether Madison had his own obligation to disclose information to Smith.

In analyzing whether claims could have been brought in a previous litigation, Texas follows the transactional approach to res judicata. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 630-31 (Tex.1992). Entry of a final judgment bars a party's right to file other suits on the transaction or series of transactions involved in that litigation, and when determining whether the transactions are identical, the court considers "whether the facts are related in time, space, origin, or motivation; whether they form a convenient trial unit; and whether their treatment as a trial unit conforms to the parties' expectations or business usage." *Musgrave v. Owen*, 67 S.W.3d 513, 519 (Tex. App. – Texarkana 2002, n.p.h.). A court should look at the factual basis for the claims presented in the two cases. *See Kenneco Energy, Inc. v. Johnson & Higgins of Texas*,

*Inc.*, 921 S.W.2d 254, 260 (Tex. App. – Houston [1st Dist.] 1995), *modified on other grounds and remanded*, 962 S.W.2d 507 (Tex.1998). Neither SmallAir nor Madison were parties to the *Smith v. BigAirline* lawsuit, and no authority has been offered for the proposition that Smith should have been required to bring his claims against SmallAir in the first lawsuit. While some of the basic facts are shared by the two cases, the issue of SmallAir’s liability based on its status as Smith’s employer is completely separate from the issues addressed by the court in the previous case.

**D. The Decision in *Smith v. BigAirline* Exonerating SmallAir’s Agent, BigAirline, From Liability Does not Foreclose Smith’s Claims Against SmallAir.**

SmallAir’s reliance incorrectly relies on *Soto v. Phillips*, 836 S.W.2d 266 (Tex. App. – San Antonio 1992, writ denied), for the proposition that because BigAirline, acting as SmallAir’s agent was exonerated in *Smith v. BigAirline*, SmallAir may not be held liable. SmallAir selected Smith as a pilot, contingent on completing the required medical examination. Smith underwent the exam, and SmallAir then informed him that he would be a pilot for the airline, leading Smith to reasonably assume that he had passed the physical examination. SmallAir’s employee records for Smith demonstrate, however, that SmallAir knew Smith did not successfully complete the examination and was medically unfit to fly, but SmallAir did not disclose that information to Smith. SmallAir’s duty to disclose the information in its files that it received

from BigAirline is completely separate from the issue of whether BigAirline had any duty to make its own disclosures. The findings in *Smith v. BigAirline* exonerating BigAirline do not free SmallAir from liability.

**POINT II THE TRIAL COURT ERRED BY ENTERING SUMMARY JUDGMENT BECAUSE SMALLAIR DID NOT ESTABLISH THAT THE DOCTRINE OF COLLATERAL ESTOPPEL BARS SMITH'S CLAIMS.**

**A. Collateral Estoppel Only Applies if the Issues in the Two Cases are Identical.**

Collateral estoppel, or issue preclusion, applies when the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in a prior suit. *See Tarter v. Metropolitan Sav. & Loan Ass'n*, 744 S.W.2d 926, 927 (Tex.1988). In deciding whether or not the doctrine applies, a court must also consider equitable issues of fairness. *See Sysco Food Services, Inc. v. Trapnell*, 890 S.W.2d 796, 804 (Tex.1994).

In Texas, to invoke the doctrine of collateral estoppel, a party must demonstrate that (1) the facts sought to be litigated in the second action were fully and fairly litigated in a prior action; (2) the facts were essential to the judgment in the first action; and (3) the parties who litigated the issue in the first action were cast as adversaries in the first action. *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex.1984).

Whether collateral estoppel applies is a question of law for the court to decide. *Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 25 S.W.3d 863, 870 (Tex.

App. – Houston [14th Dist.] 2000, no pet.); *Domingues v. City of San Antonio*, 985 S.W.2d 505, 507 (Tex. App. – San Antonio 1998, pet. denied).

The doctrine of collateral estoppel is used to prevent a party from re-litigating an issue that it "previously litigated and lost." *Quinney Elec., Inc. v. Kondos Entertainment, Inc.*, 988 S.W.2d 212, 213 (Tex.1999)

**B. The Issues Decided in *Smith v. BigAirline* are not Identical to The Issues in This Case.**

It is axiomatic that a previous judgment in another case can bar relitigation of an issue only "where the *identical* issue was litigated in the prior suit." See *Getty Oil Co. v. Ins. Co. of N. America*, 845 S.W.2d 794, 801 (Tex. 1992).

When the parties in the previous case did not litigate the issue presented in the current case, collateral estoppel cannot be applied. See *Byrd v. Woodruff*, 891 S.W.2d 689, 699 (Tex. App. – Dallas 1994, writ dism'd by agr.) (because parties did not litigate issue regarding lawyer's representation in prior suit, collateral estoppel did not apply in subsequent suit regarding that issue)

In *Smith v. BigAirline*, the Court addressed two issues – whether Smith's fraud claims against BigAirline were, instead, medical malpractice claims, and whether BigAirline had a duty to Smith. None of those issues are present in this case. Instead, Smith has asserted claims against SmallAir based on

SmallAir's duties to Smith as his employer. Specifically, given the information in its personnel files, was SmallAir obligated to disclose Smith's medical problems to him. Smith has also asserted claims against Madison directly based on their relationship. Whether BigAirline had a duty to disclose information to Smith is irrelevant to whether either SmallAir or Madison were obligated to disclose information to Smith.

**C. Collateral Estoppel Does Not Apply to Issues of Law Such as the Issue of Whether Fraud Claims Like Smith's Are Actually Medical-Malpractice Claims.**

In asserting collateral estoppel, SmallAir ignores the well-recognized exception, applied by numerous courts, that collateral estoppel is simply inapplicable to pure issues of law where the party asserting collateral estoppel was not a party to the prior litigation. *See* Restatement (Second) of Judgments § 29(7); *Tankersley v. Durish*, 855 S.W.2d 241, 245 (Tex. App. – Austin 1993, writ denied); *Chicago Truck Drivers, Helpers & Warehouse Union (Independent) Pension Fund v. Century Motor Freight*, 125 F.3d 526, 530 (7th Cir. 1997).

Section 29 of the Restatement (Second) of Judgments sets forth certain circumstances in which the collateral estoppel doctrine does not apply where, as here, the party arguing for collateral estoppel was not a party to the previous action. In such cases, collateral estoppel does not apply when “the

issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it is based.” Restatement (Second) of Judgments § 29(7).

In *Tankersley v. Durish*, 855 S.W.2d 241 (Tex. App. – Austin 1993, writ denied), the court, without determining whether the elements of collateral estoppel were proven, held that collateral estoppel would not preclude it from reviewing a pure issue of law. In *Tankersley*, the plaintiffs attempted to bar an employer from relitigating the validity of workers’ compensation policies by relying on a judgment rendered in an out-of-state case in which the plaintiffs were not involved. *Tankersley*, 855 S.W.2d at 244-45. Citing the Restatement, the *Tankersley* court recognized that “courts disfavor applying collateral estoppel in the context of a pure question of law.” *Id.* at 246.

The court in *Smith v. BigAirline* held that BigAirline could not be held liable because Smith’s claims, as a matter of law, were not actionable fraud claims, and no medical malpractice claims could be pursued as a matter of law. The court’s rulings on these issues of law has no collateral-estoppel effect.

**POINT III THE TRIAL COURT ERRED BY ENTERING SUMMARY JUDGMENT BECAUSE SMITH'S INTENTIONAL-TORT CLAIMS AGAINST SMALLAIR AND MADISON ARE NOT BARRED BY THE WORKERS' COMPENSATION ACT.**

The Texas Workers Compensation Act does not bar Smith's claims against SmallAir. In the trial court, SmallAir relied on *Lotspeich v. Chance Vought Aircraft*, 369 S.W.2d 705 (Tex. App. – Dallas 1964, writ ref'd n.r.e.) for the proposition that the Workers' Compensation Act bars an employee's claim based on an employer's failure to disclose information revealed in a pre-employment medical examination. In fact, *Lotspeich* is inapplicable.

As the *Lotspeich* court itself recognized, the Workers' Compensation Act does not completely bar claims resulting from an employer's intentional or willful conduct, such as Smith's fraud claims. *Lotspeich*, 369 S.W.2d at 708. The Workers' Compensation law does not bar an employee from pursuing a claim based on an employer's intentional tort, and an employee may elect to pursue claims based on intentional torts under the Workers' Compensation scheme or by means of a common-law claim. *Medina v. Herrera*, 927 S.W.2d 597, 600 (Tex.1996) (Workers' compensation law does not affect employee's right to pursue common law remedy for intentional tort). Indeed, Smith was unable to seek any remedy under the Workers' Compensation Act for his injuries.

Smith presented evidence establishing genuine issues of material fact regarding his claims for fraud based on SmallAir and Madison' conduct. The record demonstrates that SmallAir and Madison' decision not to disclose information in their possession was intentional and based on corporate policy, a policy not disclosed to Smith.

**POINT IV THE TRIAL COURT ERRED BY ENTERING SUMMARY JUDGMENT BECAUSE SMITH'S CLAIMS ARE NOT BARRED BY LIMITATIONS.**

While SmallAir and Madison attempt to recharacterize Smith's claims as claims for negligence, governed by a two-year limitations period, in fact, Smith has alleged claims for fraud and fraudulent concealment that are timely.

Smith's heart attack occurred on June 9, 1996. He learned that SmallAir knowingly refused to disclose information to him in or about November of 1997. Smith filed his lawsuit on June 15, 1999, within two years of his discovery that SmallAir and Madison had knowingly concealed information from him.

Smith pled causes of action for fraud and fraudulent concealment in June of 1999, and fraud claims are governed by a four-year limitations period. Tex. Civ. Prac. & Rem. Code § 16.004.

A claim for fraudulent concealment does not accrue until the plaintiff learns of facts, conditions, or circumstances that would cause a reasonably prudent person to make an inquiry that, if pursued, would lead to discovery of the concealed cause of action. *Borderlon v. Peck*, 661 S.W.2d 907, 909 (Tex. 1983).

**POINT V THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT BECAUSE SMITH HAS POINTED TO EVIDENCE IN THE RECORD SUPPORTING HIS CLAIM THAT SMALLAIR AND MADISON COMMITTED ACTUAL OR CONSTRUCTIVE FRAUD.**

To defeat a no evidence summary-judgment motion, the non-movant must only produce more than a scintilla of evidence to raise a genuine issue of material fact. Tex. R. Civ. P. 166a(i); *Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 164 (Tex. App. – Houston [14th Dist.] 2000, pet. denied) A court must resolve all reasonable doubts about the facts in favor of the non-movant. *Lehrer v. Zwernemann*, 14 S.W.3d 775, 777 (Tex. App. – Houston [1st Dist.] 2000, pet. denied).

SmallAir knowingly made material misrepresentations regarding Smith's medical fitness to fly; the and misrepresentations were false when they were made, based on information in SmallAir's personnel files. SmallAir does not dispute that this information was in its files or that it rendered Smith unfit to

fly under the airlines own guidelines. The record also includes evidence that SmallAir operated under an established policy of nondisclosure towards its pilots.

Fraud claims may also be maintained against a physician. *See, e.g. Rotella v. Pederson*, 144 F.3d 892, 895 (5th Cir. 1998) (medical liability provisions do not apply to fraud claim against physician); *Shannon v. Law-Yone*, 950 S.W.2d 429, 433 (Tex. App. – Fort Worth 1997, pet. denied) (fraud claim may be maintained against physician).

#### **CONCLUSION AND PRAYER**

Plaintiff prays that this Court reverse the judgment of the trial court entering summary judgment, remand the case for further proceedings, and grant plaintiff such other and further relief to which he may be justly entitled.

Respectfully submitted,