No. 09-6308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL GARDER, Plaintiff-Appellant

v.

UNITED STATES, Defendant-Appellee

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

DISCLOSURE OF CORPORATE AFFILIATION AND FINANCIAL INTEREST

Appellant Michael Gardner, pursuant to 6th Cir. R. 26.1, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned company?

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

No.

Respectfully Submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Michael Gardner respectfully requests oral argument. Appellant believes that oral argument would be appropriate due to the novelty and complexity of the issues presented. At its core, this appeal raises complex questions of health care negligence and tort law (under the substantive law of the State of Tennessee) that few jurisdictions have addressed—i.e. the duty and liability *vel non* with respect to a suicidal/homicidal patient who commits forseeable criminal acts as a result of negligent treatment. The issue of certification to the Supreme Court of Tennessee is also intricately related to the merits of this appeal and the action of the District Court below. Oral argument would assist the Court.

STATEMENT OF JURISDICTION

This is an action under the Federal Torts Claims Act, 28 U.S.C.A. § 2671 *et seq.* (West 2010). Subject matter jurisdiction in the district court was based on 28 U.S.C.A. § 1346(b) (West 2010). The basis of jurisdiction in the Court of Appeals is 28 U.S.C.A. § 1291 (West 2010). A final judgment (granting summary judgment) was entered by the Middle District of Tennessee on September 30, 2009 (*RE 45*, Judgment, ROA). Notice of Appeal was timely filed in the Middle District of Tennessee on November 6, 2009. (*RE 46*, Notice of Appeal, ROA).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred by granting summary judgment on the ground that Appellant was collaterally estopped from pursing a medical malpractice claim for negligent psychiatric care (by a VA employee) because of Michael Gardner's guilty plea in federal court to charges brought when he fired shots at the VA hospital in Murfreesboro, Tennessee.

II. Whether the Sixth Circuit Court of Appeals should certify two questions of state law to the Tennessee Supreme Court:

1. Whether under Tennessee law a Plaintiff may bring a medical malpractice case based upon psychiatric malpractice where it is alleged that as a result of a mental healthcare provider's psychiatric malpractice the Plaintiff committed, while of unsound mind and insane, criminal acts which resulted in incarceration. *Moss v. Mid-South Hosp.*, 1989 WL 134666 (Tenn. Ct. App., Nov. 7, 1989) with *Boruschewitz v. Kirts*, 554 N.E. 2d 1112 (Ill. App. Ct. 1990).

2. Whether under Tennessee law a Plaintiff is collaterally estopped (by virtue of a guilty plea to criminal charges) from pursuing a medical malpractice case based upon psychiatric malpractice where it is alleged that as a result of a mental healthcare provider's psychiatric malpractice the Plaintiff committed, while of unsound mind and insane, criminal acts which resulted in a voluntary guilty plea and incarceration.

STATEMENT OF THE CASE

This is an appeal of a final order of summary judgment granted pursuant to Fed. R. Civ. P. 56 by the Middle District of Tennessee on September 30, 2009. Plaintiff-Appellant filed a Complaint in the Middle District of Tennessee on December 21, 2006. (*RE 1*, Complaint.). The Complaint alleged that agents, employees and/or servants of the United States Government, Department of Veterans Affairs, in the scope and course of their employment, specifically Vicki Bianchi, D. Ph., were negligent in the treatment of Michael Gardner between July 2002 and October, 2003. *RE 1*, Complaint. Due to the negligent treatment and/or negligent acts and/or omissions in providing medical and psychiatric care, Mr. Gardner became suicidal, dangerous and, left untreated, acted violently by firing a weapon on federal premises (the VA hospital in Murfreesboro, Tennessee) resulting in his conviction and imprisonment. He accepted an offer to plead guilty to the crimes in exchange for an eight year prison sentence to avoid a potential sentence of twenty to thirty years in prison without parole. *See RE 21*, Attach. No. 2 (Transcript of Plea Hearing (Dec. 10, 2004), p. 14.

Plaintiff filed a claim under the Federal Torts Claims Act for the VA's medical/psychiatric negligence in failing to treat him despite suicidal and homicidal ideation and direct pleas for treatment. After the FTCA claim was

denied, Appellant timely filed a Complaint in the U.S. District Court for the Middle District of Tennessee on the basis that the VA (United States) was liable under Tennessee law for medical malpractice that *caused* Michael Gardner to "go postal" and fire shots at the VA hospital in Murfreesboro (where he was also employed as a janitor).

The trial court granted summary judgment to Defendant, The United States, on the basis that Mr. Gardner's voluntary federal plea to "intentional" criminal acts associated with the shooting incident precluded a claim for medical malpractice based upon the antecedent negligent psychiatric treatment which Plaintiff claimed caused him to be of unsound mind and commit the criminal acts. (*RE 44*, Order and Memorandum Opinion Granting Summary Judgment, September 30, 2009). The trial court, however, failed to analyze or examine in any fashion: whether, under Tennessee law "intent" was even part of the *prima facie* medical malpractice case; whether the Plaintiff's intentional acts constituted the sole, independent or superceding cause of his losses and injuries or otherwise precluded a finding that the prior malpractice (in failing to treat Mr. Gardner despite his threats and homicidal/suicidal ideation) *caused* his injuries, loss of his job, and incarceration; whether there was an incentive to litigate the affirmative defense of insanity in the criminal case such that the application

of collateral estoppel was legally proper and fair; and whether Tennessee law would consider the criminal acts of Mr. Gardner committed while of unsound mind, while insane and subsequent to medical his negligent treatment at the VA as legally irrelevant to a claim for antecedent medical malpractice (*e.g.* as Tennessee has done where malpractice causes the intentional and criminal act of suicide – where Tennessee *permits* the medical malpractice/death claim to go forward notwithstanding the criminal act of suicide).

STATEMENT OF FACTS

Plaintiff-Appellant Michael Gardner was employed as a janitor at the Veterans Administration Hospital in Murfreesboro, Tennessee. He was being treated for psychiatric problems and depression and, as alleged in the Complaint, was the victim of malpractice by a pharmacist who negligently failed to treat him and negligently failed to recognize his clear and present danger to himself and others. As a result, Mr. Gardner "went postal" at the VA Hospital in Murfreesboro firing a shotgun and scaring employees. No one was injured from the fired shots. *See Affidavit of David L. Raybin*, May 10, 2007 (*RE 21*, Attach. 1). Mr. Gardner lost his job, suffered emotional distress and faced numerous criminal charges. *Id.*

Mr. Gardner was charged in federal court (as the shooting was at the VA hospital in Murfreesboro, Tennessee) with multiple counts of attempted murder of a government employee; carrying and discharging a firearm during assault; and possessing a firearm at a federal facility which he intended to use in the commission of a crime. *See Affidavit of David L. Raybin,* May 10, 2007 (*RE 21*, Attach. 1)[1]. Mr. Gardner faced a sentence of 20 to 30 years without parole. The federal firearm statute violation carried a mandatory consecutive ten (10) year punishment which would have increased the sentence even more. *See Affidavit of David L. Raybin*, p. 2. (*RE 21*, Attach. 1). Mr. Gardner had a very strong mental health defense which he was able to use to reduce the length of his criminal conviction. The May 10, 2007 Affidavit of David L. Raybin makes clear that because of the mental health defense and the mental health issues Mr. Gardner was able to obtain a very favorable plea offer of 96 months (8 years). *See RE 21*, Attach. 2 (Transcript of Plea Hearing (Dec. 10, 2004), p. 14. Thus, Mr. Raybin opines:

> "Mr. Gardner followed my advice based upon all the legal factors involved. Mr. Gardner **had no incentive to litigate** given the plea offer and the mental health defense."

[1] Mr. Raybin was Mr. Gardner's criminal defense attorney in the federal criminal case.

See RE 21, May 10, 2007 *Affidavit of David L. Raybin*, p. 3 (emphasis added). In addition, at his plea hearing the federal judge stated to Mr. Gardner "This plea agreement binds no state authorities or other federal jurisdictions other than this district." *See RE 21*, Attach. 2 (Transcript of Plea Hearing (Dec. 10, 2004), p. 7. Moreover, Mr. Gardner was told that he was waiving in his criminal case the right to *potentially* litigate his *affirmative defenses* based on mental health issues: "And you specifically acknowledge that you're entering into this plea after being advised of and understanding the potential for raising defenses and seeking sentencing departures based upon mental health issues?" *RE 21*, Attach. 2 (Transcript of Plea Hearing (Dec. 10, 2004), pp. 14-15.[2]

Defendant moved below to dismiss Plaintiff's medical malpractice claim for psychiatric malpractice (by a Veterans Administration pharmacist)

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[2] Mr. Gardner accepted in a plea compromise an eight year sentence because he faced a potential twenty to thirty year sentence without parole. *RE 21,* Attach. 1, Affidavit of David L. Raybin, May 10, 2007; *RE 21*, Attach. 2 (Transcript of Plea Hearing (Dec. 10, 2004), pp. 4, 14. His guilty plea to acting with general intent – that he acted with the intent to perform the acts—could potentially have been negated by the insanity defense; however the affirmative defense of insanity/unsound mind was never actually litigated or decided as the Court made clear that this issue could "potentially" have been raised.

under the doctrine of collateral estoppel and on the ground that public policy precluded such a case. *RE 39* (Motion to Dismiss Amended Complaint).

The District granted the motion to dismiss as a matter of law on the basis of collateral estoppel, *RE 44*, Opinion, District Court, Ex. 3. The District Court opined that the Plaintiff was allegedly attacking Mr. Gardner's criminal sentencing (and conviction) which followed a guilty plea to criminal charges.

Defendant, however, cited no cases that involve the issue that this case presents and the Tennessee Supreme Court has not considered this issue: whether collateral estoppel bars bringing a medical psychiatric malpractice case where it is alleged that the malpractice caused a crime to be committed under circumstances of civil insanity with a subsequent guilty plea to criminal charges and conviction and imprisonment.

Under Tennessee Supreme Court Rule 23 it is appropriate to certify a case "where it appears to the certifying court that there is no controlling precedent in the decisions of the Supreme Court of Tennessee." No Tennessee Supreme Court decision has addressed this issue and the authority relied upon by the Defendant United States and briefly cited by the District Court, *Moss v. Mid-South Hosp.*, 1989 WL 134666 (Tenn. Ct. App., Nov. 7, 1989) is an *unreported* case (with is not "controlling authority" under

Tennessee law) which was decided on grounds other than collateral estoppel and has been cited by only one time in a *negative* way by one other case – *Boruschewitz,* -- which distinguished *Moss* on the facts that are present here (the plaintiff alleging unsound mind and insanity at the time the criminal acts were committed). *Boruschewitz* did not follow *Moss* and Appellant asserts neither would the Tennessee Supreme Court.

SUMMARY OF ARGUMENT

The issue before this court is whether Mr. Gardner's claim for medical (psychiatric) malpractice, on the facts in his case, is precluded under the principle of collateral estoppel. In his Complaint Plaintiff asserts Defendant's negligence in failing to timely diagnose, manage, and treat Plaintiff caused Plaintiff to become suicidal, dangerous, and to act violently, prompting a complete mental breakdown which rendered Plaintiff insane and caused him to commit the acts of aggravated assault to which he pled guilty in District Court in the Middle District of Tennessee and is currently serving an eight (8) year sentence. Mr. Gardner was thus a mentally ill patient who sought treatment for his dangerous state of mind and, untreated, committed (and pleaded guilty to) criminal acts that were caused by the antecedent negligence of the mental health care provider under

circumstances where a very favorable plea deal and the surrounding facts provided no incentive to litigate.

Appellant submits that but-for the VA's medical (psychiatric) malpractice Mr. Gardner would have been treated, the criminal acts would never have happened and he would not have lost his job and served time in prison. The lower court judge held that because plaintiff pleaded guilty to intentional criminal acts, this plea precluded a state tort law claim for medical malpractice against the health care provider. (*RE 44*, District Court Order, Sept. 30, 2009).

Plaintiff contends that the underlying psychiatric malpractice of the United States through its employees who rendered medical and psychiatric care to Mr. Gardner, however, was never litigated as part of the criminal proceeding. Nor was Mr. Gardner's mental state (intent) an element of the plaintiff's prima facie medical malpractice case. Moreover, under Tennessee law a finding of causation is not precluded where there is a criminal act and self-harm (*e.g*. suicide) where there was medical/psychiatric malpractice that *foreseeably* led to the criminal act (*e.g.* suicide). In fact Tennessee law recognizes an "exception" based upon the duty of the healthcare/psychiatric provider to prevent foreseeable harm. *See Stewart v. Fakhruddin*, No. M2009-2010-COA-R3-CV, slip op., 2010 WL 2134150

(Tenn. Ct. App. April 15, 2010); *White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn. 1998); *Rains v. Bend of the River*, 124 S.W.3d 580, 588, 596 (Tenn. Ct. App. 2003); *Drake v. Williams*, No. M2007-00979-COA-R3-CV, 2008 WL 1850872 (Tenn. Ct. App., Feb. 5, 2008). In other words although Mr. Gardner pleaded guilty to the crimes of assaulting federal employees and weapons charges, there was never any litigation of the underlying psychiatric malpractice that Plaintiff claims caused him to have a mental breakdown in the first place and to then, foreseeably, commit the acts at issue. Nor does a guilty plea foreclose a finding of proximate or legal cause due to the medical/psychiatric malpractice. On this record collateral estoppel is legally and factually improper.

STANDARD OF REVIEW

Defendant sought Summary Judgment under Federal Rule of Civil Procedure Rule 56. The standard of review for Rule 56 is *de novo*. The court must consider all facts and inferences drawn in the light most to the non-moving party. *Davis v. Sodexho*, 157 F.3d 460 (6th Cir. 1998). The role of the judge at the summary judgment is not to weigh the evidence, but to determine whether there is a genuine issue for trial. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is mere colorable or is not

significantly probative, summary judgment may be granted. *Talley v. Bravo Pitino Rest.*, 61 F.3d 1241 (6th Cir. 1995).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE BASIS OF COLLATERAL ESTOPPEL.

Plaintiff does not dispute that federal law and procedure governs the collateral estoppel issue; however, the law of collateral estoppel is the same (same elements) whether federal or Tennessee collateral estoppel law or procedure is applied.[3] The controlling legal issue on this appeal is substantive and relates to lower court's decision that collateral estoppel precluded a state law mental health negligence lawsuit because of the guilty plea in Mr. Gardner's federal criminal case where he accepted a plea to 8 years in prison when he faced a twenty to thirty year sentence if found guilty at trial. Mr. Gardner submits in this appeal that the federal criminal plea was not in any way material (or part of the *prima facie* malpractice case) so as to preclude the state law tort claim. Intent or state of mind (certainly an element of the federal crimes that Mr. Gardner pleaded guilty to) is simply

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[3] *Compare Schreiber v. Philips Display Components Co.*, 580 F.3d 355 (6th Cir. 2009) with *Morris v. Esmark Apparel, Inc.,* 832 S.W.2d 563 (Tenn. Ct. App. 1991) (same elements).

not an issue in the tort/malpractice claim (where duty, breach of duty, proximate cause and damages are the elements).

The lower court's implied reasoning process appears to have been that pleading guilty to a crime of intent somehow foreclosed proof of causation with respect to the VA's prior negligent treatment. This reasoning was fallacious because in Tennessee a health care provider's duty extends to liability for foreseeable harm caused by the patient to himself (herself) and does not defeat causation. In other words even if at trial the jury found that Mr. Gardner's acts were intentional and criminal the Defendant's duty to prevent these specific foreseeable acts was actionable malpractice under Tennessee law and causation for the malpractice case could still be established. *White*, 975 S.W.2d at 531-32:

> We join a number of courts in holding there can be no comparative negligence where the defendant's duty of care includes preventing the self-abusive or self-destructive acts that caused the plaintiff's injury. (Citation omitted.) Clearly, the duty of care that the defendants owed to an institutionalized patient such as [the plaintiff] included taking reasonable steps to prevent her suicide when it was a known or foreseeable risk. To allow the defense of comparative negligence in these circumstances would render meaningless the duty of the hospital to act reasonably in protecting the patient against self-harm.
>
> . . .
>
> The same principles that were found to preclude comparison of fault in *Turner* apply with equal force to the instant case. The defendant's liability may not be reduced by comparing his

> negligent conduct with the decedent's intentional act of committing suicide since the intentional act was a foreseeable risk created by the defendant's negligence.
>
> In summary, on the record before the Court, reasonable minds can differ on whether the decedent's act of suicide was an independent intervening cause of the decedent's death, and the decedent's intentional act of committing suicide may not be considered in assessing the defendant's fault.

Id.

Importantly because Tennessee law provides the rule of decision on the medical/psychiatric malpractice claim it was necessary for the trial court to decide whether litigation of the malpractice claim would even involve re-litigation of any issue (*e.g.* "intent") supposedly decided in the federal plea. None of the cases cited or relied upon by the Court below or by Defendant dealt in any way with the factual circumstances in which a crime is committed as a direct result of psychiatric malpractice for the failure to treat a mentally ill individual who is alleged to have been insane or of unsound mind at the time of the criminal acts and as a result of medical/psychiatric malpractice.

Mr. Gardner submits that under Tennessee law simply because an intentional/criminal act occurs, is proven or a criminal defendant pleads guilty to a criminal offense, this does not preclude a psychiatric malpractice action under Tennessee law and the doctrine of collateral estoppel is not

applicable because under Tennessee tort law the Defendant had a duty to protect the patient from self harm. Tennessee state tort law clearly *allows* medical malpractice liability cases to proceed where psychiatric malpractice leads the patient to commit a foreseeable criminal act (such as suicide). *See Stewart,* 2010 WL 2134150; *White,* 975 S.W.2d at 529; *Rains*, 124 S.W.3d at 588, 596. *Drake, 2008 WL 1850872*. A finding of causation (but-for and legal or proximate cause) *vis-à-vis* the antecedent medical/psychiatric negligence is not precluded under Tennessee law by the subsequent fact that a patient commits a foreseeable/intentional criminal act (for example suicide) and the medical malpractice claim is viable. *Id.*

Other jurisdictions have also recognized that collateral estoppel does not apply to this fact pattern. In *Talarico v. Dunlap*, 685 N.E.2d 325 (Ill. 1997), a patient brought a medical malpractice action against a physician and clinic claiming negligent prescription of medicine (the drug Accutane) caused him to engage in criminal conduct. The basic allegation was that because of the physician's negligent prescription of Accutane this caused mental problems which resulted in the plaintiff being arrested for aggravated battery, aggravated unlawful restraint, armed violence and aggravated sexual abuse. The plaintiff entered into a plea agreement whereby he pleaded guilty to two counts of misdemeanor battery. He further stipulated that he

intentionally and acted without legal justification. Nevertheless, the Supreme Court of Illinois allowed his medical malpractice case to go forward and found the doctrine of collateral estoppel did not apply. In his guilty plea in the criminal proceeding, the plaintiff admitted to having committed the crimes "intentionally and knowingly." *Talarico*, 685 N.E.2d at 325. The issue in the subsequent civil case was whether Accutane, a drug prescribed to the plaintiff by one of the defendants in the civil suit, "instead contributed to cause [the plaintiff's] criminal conduct." *Id*. The court held that collateral estoppel did not apply. In explanation, the court pointed to the circumstances in which the plaintiff pleaded guilty in the criminal proceeding, and found that these circumstances "combine[d] to rebut the inference that [the plaintiff's] admission on the issues of intent and knowledge was treated by him with entire seriousness." *Id*. In the court's view, the plaintiff could not realistically be said to have conceded these issues.

The *Talarico* court's reasoning was whether the plaintiff (against whom estoppel was being urged) had a full and fair opportunity to contest the prior determination. *Talarico,* 685 N.E.2d at 327-30. The Court carefully explained that the incentive to litigate formulas set forth in the Restatement (Second) of Judgments § 28(5)(c) (1982) and found that even

though there was prior determination of intentional and knowing conduct as part of the plea, this was not truly a finding that could not be rebutted in subsequent litigation:

> "We have been provided and have reviewed the record of the proceedings in Talarico's criminal case. As a result of that review, we conclude that only in the most technical sense was Talarico's guilty plea an admission that his criminal conduct was knowing and intentional. The record makes apparent that the plea was a compromise: never is it conceded that Accutane was not the contributing factor to Talarico's criminal conduct. In fact, it appears that both the trial court and the state's attorney were made aware of the use of Accutane and Talarico's theory concerning its effects."

Id. at 196-197. (emphasis added).

Talarico is just like the instant case. Michael Gardner and his counsel never conceded that psychiatric malpractice or improper medical care was not a contributing factor to Mr. Gardner's criminal conduct. *Transcript of Plea Proceedings, United States v. Michael Gardner,* No. 3:04-00171 (Dec. 10, 2004) (*RE 21*, Ex. 2). The mitigating circumstances of Mr. Gardner's mental condition and the lack of an incentive to litigate given the very favorable compromise plea he was offered do not preclude the doctrine of collateral estoppel on these facts. Mr. Gardner took the opportunity for a comparatively light sentence and under these circumstances collateral

estoppel cannot fairly be applied. *See State Farm Ins. Co. v. Travelers Indem. Co*., slip op., 2009 WL 3851619 at *4. (N.D.N.Y.,2009).[4]

The Court of Appeals of Kentucky has also considered a case of psychiatric malpractice against physician for negligence in prescribing anti-depressant medication (Prozac and Xanax) that led to criminal misconduct and a conviction and held the plaintiff's case was not precluded as to most elements of damages. In *Gossage v. Roberts*, 904 S.W.2d 246 (Ky. Ct. App. 1995), the Court held that although a plaintiff might be collaterally estopped by virtue of a criminal conviction for assault under extreme emotional disturbance from litigating his malpractice action against the physicians who prescribed anti-depressant medication on the issue for causation for damages

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[4] " . . [T]he record contains at least some evidence that even Defendant Myles did not have an incentive to fully litigate the issue of his intent in the criminal proceeding under the circumstances. [FN6] See Allstate Ins. Co. v. Kovar, 363 Ill.App.3d 493, 299 Ill.Dec. 916, 842 N.E.2d 1268, 1277 (Ill.App. 2 Dist.2006) ("[I]t does not appear that Daniel had a strong incentive to litigate the battery issue in the earlier proceeding. Daniel himself said that he pleaded guilty only because doing so gave him the opportunity for a light sentence and a clean record.") (**relying on *Talarico v. Dunlap*,** 177 Ill.2d 185, 226 Ill.Dec. 222, 685 N.E.2d 325, 329-32 [Ill.1997]). The lack of such an incentive constitutes a circumstance that so undermines confidence in the original determination as to render the application of the doctrine of collateral estoppel impermissibly unfair. See SEC v. Monarch Funding Corp., 192 F.3d 295, 304 (2d Cir.1999)."

State Farm Ins. Co. v. Travelers Indem. Co, No. 5:06-CV-1473 (GTS/GJD), slip op. 2009 WL 3851619 at *4. (N.D.N.Y. Nov. 17, 2009). (emphasis added).

caused by incarceration, the doctrine did not apply to the plaintiff's claims for lost wages, pain and suffering, emotional distress and loss of enjoyment of life inasmuch as they were distinct element of damages immaterial to the determination of the criminal proceeding.

The cases cited by the United States and the District Court below simply do not involve an underlying claim that medical or psychiatric malpractice caused the crime itself under circumstances where the plaintiff (patient) was insane or of unsound mind and the defendant was charged with the specific duty to prevent self-harm. What is at issue here is a narrow exception to the general principle that a criminal conviction collaterally estops a defendant from contesting in a subsequent civil proceeding the facts established and the issues decided in the criminal proceeding. *Gray v. Burke*, No. 05C59, 2007 WL 2688447 at *3 (N.D. Ill. Sept. 11, 2007). ("*Talarico* involved "an exception" to the general principle that a criminal conviction collaterally estops a defendant from contesting in a subsequent civil proceeding the facts established and the issues decided in the criminal proceeding.").

Mr. Gardner's case is distinguishable from the circumstances in, for example, a criminal legal malpractice action against an attorney where the case is that legal malpractice caused or exacerbated the conviction. Here,

the underlying conviction or the validity of the conviction is not the issue. The issue is the psychiatric malpractice that is alleged to have caused the crimes themselves and under Tennessee law the VA's mental health care provider may be charged with the duty to prevent the very harm that occurred.

Under Tennessee law there may be more than one proximate cause of an occurrence. "There can be more than one proximate cause of an injury." *Stokes v. Leung*, 651 S.W.2d 704, 708 (Tenn. Ct. App. 1982); *see also Roberts v. Robertson County Bd. of Educ.,* 692 S.W.2d 863, 871 (Tenn. Ct. App. 1985). "There is no requirement that a cause, to be regarded as the proximate cause of an injury, be the sole cause, the last act, or the one nearest to the injury, provided it is a substantial factor in producing the end result." *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991). Importantly in the federal case there was no litigation as to whether negligent treatment (non-treatment) by the VA caused Mr. Gardner to commit the shooting at the VA. Because that issue was not litigated collateral estoppel should not apply. *Cf. Donovan v. Thames,* 105 F.3d 291, 295-96 (6th Cir. 1997) (under Kentucky law issue preclusion did not restrict excessive force claim in federal court despite criminal conviction).

Moss was cited in fleeting fashion by the trial court; however, the District Court did not rely on the rationale or holding in *Moss* in granting summary judgment. In *Moss* the plaintiff received psychiatric treatment and was released from the hospital in May 1987. In August he committed auto theft and murder. He was convicted and then filed a malpractice suit in connection with negligent psychiatric treatment. The Court of Appeals in *Moss* affirmed a summary judgment for the defense, reasoning:

> According to our research, this is the first time a Tennessee appellate court has had an opportunity to address the issue of whether a mental health care provider is subject to liability for injury to a former patient caused by the former patient's conviction of a crime. Very few courts throughout this country have addressed this issue. *See* ANNOTATIOn, *Malpractice Liability Based on Prior Treatment of Mental Disorder Alleged to Relate to Patient's Conviction of Crime,* 28 A.L.R.4th 712 (1984).
>
> One case that has addressed this issue is *Cole v. Taylor*, 301 N.W.2d 766 (Iowa 1981). The plaintiff there sued her psychiatrist for failing to prevent the plaintiff from murdering her former husband. The Iowa Supreme Court rejected the plaintiff's theories of recovery, "not because they cannot be rationalized, but because they cannot be justified." Id. at 768. The court stated that the general rule is that a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party, or to maintain a claim for damages based on his own wrong or caused by his own neglect, ... or where he must base his cause of action, in whole or in part, on a violation by himself of the criminal or penal laws.... *Id.* at 768. See 1A C.J.S. Actions § 30(a) (1985) and 1 Am.Jur.2d Actions § 51 (1962). Tennessee recognizes this general rule. *Martin v. Morris*, 163 Tenn. 186, 42 S.W.2d 207

> (1931); 1 TENN.JURIS. Actions, § 6 (1982). Relying on the same principle, the court in *Glazier v. Lee*, 171 Mich.App. 216, 429 N.W.2d 857 (1988), held that the plaintiff's claim was barred. In that case plaintiff sued his psychologist for causing plaintiff to commit voluntary manslaughter. The court in *Glazier v. Lee* stated that, "[t]o allow plaintiff to proceed in the present civil action would allow plaintiff to shift the responsibility for his crime from himself to defendant. This we cannot do." *Id.* at 860.
>
> *Moss,* 1989 WL 134666 at * 2.

No application for permission to appeal to the Tennessee Supreme Court was filed in *Moss*. Plaintiff asserts that the Tennessee Supreme Court would not apply *Moss* (and its "illegal and immoral act" analysis) to these facts and would recognize the foreseeability/duty analysis in *White* and or the "exception" set forth in *Talarico* and *Boruschewitz* and would apply and follow Tennessee law that places a duty on health and mental health care providers to be responsible for negligent treatment that causes self-harm or injury to patients even if intentional or criminal. Again, in this case the trial court did not rely on *Moss* or the public policy "illegal and immoral act" analysis in granting summary judgment but instead looked to the law of collateral estoppel under the mistaken notion that the elements of the prima facie case for medical malpractice were somehow the same or similar to the intent element in the federal guilty plea.

In *Boruschewitz,* the Illinois Court of Appeals refused to follow *Moss* on the grounds that *Moss* was distinguishable because the plaintiff alleged in the *Boruschewitz* case that plaintiff was insane at the time she committed the killings and, thus, while her conviction was based upon a plea of guilty and could be admitted in the case, it only established a prima facie case that the underlying acts took place and did not conclusively establish that an illegal or immoral act had taken place:

> We find the above cases [*Moss* (Tenn. Ct. App.) *Glazier* (Mich. Ct. App.) and *Cole* (Iowa Sup. Ct.)])distinguishable in one important respect. In each of the above cases, the plaintiff alleged in his or her complaint that he or she committed a criminal act (murder, voluntary manslaughter, and murder and auto theft respectively). However, in the case at bar, plaintiff has alleged that she was insane at the time she committed the killings.[5] She has not based her claim against Kirts and The Center on her own violation of the Criminal Code as the plaintiffs in the above-cited cases did. While her conviction upon her plea of guilty may be admitted in this case, it only establishes a prima facie case that the underlying acts took place. (See Rockford Mutual Insurance Co. v. Shattuck (1989), 188 Ill.App.3d 787, 790, 136 Ill.Dec. 157, 544 N.E.2d 843**.) It does not conclusively establish that an illegal or immoral act was committed. Plaintiff has alleged in her complaint that she was insane, and we must accept this allegation as true.** An insane person is not held to be responsible for his acts. (Ill.Rev.Stat.1987, ch. 38, par. 6-2(a); People v. Clark (1981), 102 Ill.App.3d 414, 417, 57 Ill.Dec. 892, 429 N.E.2d 1255.) Plaintiff is allowed an opportunity to rebut the prima facie case and prove that she was criminally insane. In other words, she should be allowed to demonstrate that she did not commit an

[5] [Mr. Gardner's amended complaint also alleges unsound mind and insanity at the time he acted]. *RE 28, 37.*

> intentional act and thus was not guilty of a crime. This is a question of fact. Whether she can maintain her burden of proof on the issue is not our concern at this juncture.

Boruschewitz, 554 N.E. 2d at 1114 (emphasis added).

Boruschewitz is material in holding that although the public policy exception generally bars a person from establishing a cause of action based upon violation of criminal laws, the public policy exception or principle is inapplicable if a person is insane or of unsound mind as a result of psychiatric malpractice. Here Plaintiff specifically alleged he was insane and of unsound mind as a result of psychiatric malpractice at the time the crime in question were committed. (*RE 37*, Amended Complaint). Moreover, as the affidavit of attorney David Raybin attests, in Tennessee there is a difference between the insanity defense in a criminal case versus a civil case. *RE 35*, June 27, 2007 Affidavit of David Raybin, Attach. 1.

Tennessee law recognizes that an action can be brought for psychiatric malpractice that causes the criminal act of suicide and Tennessee also recognizes the *Tarasoff* doctrine that a psychiatrist may be sued if psychiatric malpractice causes a crime that causes self-harm or injures third persons. *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334 (Cal. 1976); *Turner v. Jordan,* 957 S.W.2d 815, 818 (Tenn.,1997); *White,* 975 S.W.2d at 525. In *Turner*, the Tennessee Supreme Court held that "a duty

of care may exist where a psychiatrist, in accordance with professional standards, knows or reasonably should know that a patient poses an unreasonable risk of harm to a foreseeable, readily identifiable third person." *Id.* at 820-21. The appellant in *Turner* was a hospital nurse who was attacked by a hospitalized mentally ill patient. *Id.* at 816. The nurse sued the patient's attending psychiatrist, arguing that her injuries were caused by the psychiatrist's failure to use reasonable care in his treatment of the patient. *Id.* at 817.

In fact Tennessee, by statute, recognizes duty as a matter of law of in this situation:

> 33-3-206. Predict, warn of, or take precautions to provide protection
> IF AND ONLY IF
> (1) a service recipient [Michael Gardner] has communicated to a qualified mental health professional or behavior analyst an actual threat of bodily harm against a clearly identified victim,
> AND
> (2) the professional, using the reasonable skill, knowledge, and care ordinarily possessed and exercised by the professional's specialty under similar circumstances, has determined or reasonably should have determined that the service recipient has the apparent ability to commit such an act and is likely to carry out the threat unless prevented from doing so,
> THEN
> (3) **the professional shall take reasonable care to predict, warn of, or take precautions to protect the identified victim from the service recipient's violent behavior**.

Tenn. Code Ann. § 33-3-206 (West 2010) (emphasis added).

In Tennessee where psychiatric malpractice causes a person who is insane or of unsound mind to harm himself or others, there is an action for the ensuing self-harm. *White,* 975 S.W.2d at 525. Here the recoverable damages to the injured patient included loss of job, lost wages, pain and suffering, emotional distress, loss of enjoyment of life and damages a lengthy imprisonment. *See Talarico* at 325 (1997) and *Boruschewitz,* 554 N.E.2d at 1112; *Gossage,* 904 S.W.2d at 246. Plaintiff submits, in accordance with the above cases that: 1) there was no full, fair or complete opportunity to decide or litigate the state of mind "intent" issue in federal court; 2) this "intent" or state of mind issue is not the "same" or identical" in a civil case under Tennessee law; 3) the supposed "collateral estoppel" issue(s) of "intent", insanity, or state of mind is (are) actually immaterial and would not be even litigated in the state court malpractice suit.

Mr. Gardner's "intent" or state of mind is not an element of the *prima facie* case for psychiatric malpractice under Tennessee law and it cannot be fairly said that he litigated the issue of causation by pleading guilty to intentional crimes. The District Court never examined whether the malpractice suit under Tennessee law would even raise the issue of Mr. Gardener's "intent", sanity or state of mind and erroneously assumed Mr. Gardner would have "to relitigate the question of his intent." District

Court Memorandum/Order, *RE 44*, p. 5. Likewise the court below failed to analyze the mitigating/incentive circumstances at issue in the federal plea (where he was being offered via a compromise guilty plea a reduction of 12-22 years in prison time – serving 8 years instead). The District Court also failed to consider how Tennessee state tort law would examine the materiality *vel non* of the subsequent criminal acts related to the causation issue especially where the Plaintiff alleged he was insane at the time of the shooting because he had not been properly medicated and treated as a consequence and direct result of psychiatric mental health malpractice.

Plaintiff submits even if the federal plea could somehow be taken as foreclosed proof of an intentional act or crime, that does not preclude a malpractice suit under Tennessee law because there was a duty to foresee such conduct and thus the subsequent intentional act is immaterial. *Turner* 957 S.W.2d at 815 (duty to foresee patient's intentional act); *White,* 975 S.W.2d at 529; *Stewart,* 2010 WL 2134150 at * 1.

II. APPELLANTS' MOTION FOR CERTIFICATION TO THE TENNESSEE SUPREME COURT SHOULD BE GRANTED

In *Moss* the Tennessee Court of Appeals held as a matter of "public policy" that an immoral/criminal act precludes a suit for malpractice (in causing the criminal act). Neither the *Moss* case nor its "public policy" rationale was the basis for the District Court's decision. The District Court

cited *Moss* only in passing at the conclusion of its decision (page 6) for the incorrect proposition that Mr. Gardner's injury "was caused by his own intentional actions." As noted, the intentional acts of suicide or the intentional acts of an actor under Tennessee law do not preclude suit or constitute an intervening cause if the psychiatrist had a duty to foresee that the patient would be violent.

Plaintiff-Appellant relies on the above arguments made above in Section I *supra* in support on his Motion for Certification of Questions of Law to the Tennessee Supreme Court.

CONCLUSION

The lower court incorrectly and unfairly applied the doctrine of collateral estoppel to grant Defendant summary judgment to preclude Michael Gardner from bringing a medical malpractice case against the VA for negligent treatment by a pharmacist who failed to treat or respond to his suicidal and violent thoughts and pleas for mental health treatment. That Mr. Gardner pleaded guilty to federal crimes (and general intent to commit these acts) does not close the door under Tennessee law on a medical malpractice suit where the claim is that these very acts, crimes and self-harm were the foreseeable result of a breach of duty by the VA mental health provider. Collateral estoppel is erroneous as a matter of law because of

Tennessee's law relative to the duty of mental heath care providers to foresee and prevent intentional criminal acts of self-harm and harm to others. Collateral estoppel is also inapplicable to the facts in Mr. Gardner's case where he had no real incentive to litigate an affirmative defense (insanity) and pleaded guilty to the general intent to commit the Acts under a very favorable compromise plea offer that implicitly recognized the strength of his mental health defense.

RELIEF SOUGHT

Appellant prays this court find that the lower court erred in not conducting a proper legal and factual analysis of the collateral estoppel issue and Tennessee medical/psychiatric malpractice law and REVERSE the grant of summary disposition and REMAND for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 8th day of June, 2010, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all counsel of record indicated on the electronic filing receipt. All other counsel of record will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

s/David Randolph Smith
David Randolph Smith

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RE 45. Final judgment (granting summary judgment) entered by the Middle District of Tennessee on September 30, 2009.

RE 46. Notice of Appeal (November 6, 2009).

RE 1. Complaint (December 21, 2006).

RE 21, Attach. 1. Affidavit of David L. Raybin (May 10, 2007).

RE 21, Attach. 2. Transcript of Plea Hearing (December 10, 2004).

RE 44. Order and Memorandum Opinion Granting Summary Judgment (September 30, 2009).

RE 39. Motion to Dismiss Amended Complaint (August 15, 2007).

RE 28: Amended Motion to Amend/ Complaint (June 14, 2007).

RE 37. Amended Complaint (August 1, 2007).

RE 35, Attach. 1. Affidavit of David Raybin (July 10, 2007).