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ARKANSAS COURT OF APPEALS

DIVISIONS I & II
No. CV-17-839

WHITE RIVER HEALTH SYSTEM, INC., d/b/a WHITE RIVER MEDICAL CENTER, ET AL. APPELLANTS V. MADELINE LONG, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF DANIELLE TOTH, DECEASED APPELLEE	**Opinion Delivered** May 2, 2018 APPEAL FROM THE INDEPENDENCE COUNTY CIRCUIT COURT [NO. 32CV-12-26] HONORABLE MAUREEN HARROD, JUDGE DISMISSED WITHOUT PREJUDICE

LARRY D. VAUGHT, Judge

Appellant White River Health System, Inc., d/b/a White River Medical Center (WRMC), appeals from the order entered by the Circuit Court of Independence County on September 13, 2017, denying its motion for summary judgment based on the affirmative defense of charitable immunity. On appeal, WRMC argues that it presented prima facie evidence demonstrating its entitlement to summary judgment as a charitable entity immune from liability and suit in tort and that appellee, Madeline Long, as special administratrix of the estate of Danielle Toth, deceased (Estate), failed to meet proof with proof to show a genuine issue of material fact. Because WRMC has not appealed from a final order, we lack jurisdiction and must dismiss without prejudice.

On January 20, 2012, Randall Johnson, as special administrator of the estate of Danielle Toth, deceased, filed this action against multiple defendants, including WRMC, asserting claims for wrongful death and medical negligence.[1] WRMC answered the complaint, denied the allegations of negligence, and pled that it was a charitable, nonprofit organization entitled to immunity from liability and suit.

In June 2012, WRMC filed a motion for summary judgment based on the charitable-immunity doctrine. To the motion, WRMC attached a copy of its articles of incorporation as a nonprofit corporation and an affidavit by Gary L. Bebow, the chief executive officer of WRMC. In July 2012, in further support of its motion for summary judgment, WRMC filed its 2009 federal-income-tax records as an organization exempt from income tax. In December 2012, the circuit court held an unrecorded hearing on WRMC's motion for summary judgment; however, no written order was entered disposing of the matter.

On August 18, 2017, the Estate filed a motion for sanctions against WRMC. The motion alleged that WRMC had committed discovery violations from 2012 to 2017 by repeatedly failing and refusing to provide the Estate with a complete set of Toth's medical records and by providing inaccurate information regarding its liability coverage. The Estate requested that it be granted both a default judgment against WRMC and a jury trial on the issue of damages.

On September 8, 2017, a hearing on both WRMC's motion for summary judgment and on the Estate's motion for sanctions was held. At the conclusion of the hearing, the circuit

[1]In July 2015, the appellee Madeline Long was substituted as the special administratrix of the estate.

court orally denied WRMC's motion for summary judgment and granted the Estate's motion for sanctions. On September 13, 2017, the circuit court entered an order denying WRMC's motion for summary judgment. The court found

> that there are disputed facts as to whether the organization's goal is to break even; whether the organization depends upon contributions and donations for its existence; whether the organization provides its services free of charge to those unable to pay; and whether its directors receive and officers receive any compensation.

Importantly, the court's order bifurcated trial: a trial on the charitable-immunity issue was to be immediately followed by a trial on the medical-malpractice claims.[2] This appeal followed.

On appeal, WRMC argues that the circuit court erred in denying summary judgment because it presented prima facie evidence to demonstrate its entitlement to charitable immunity from liability and suit as a matter of law and that the Estate failed to meet proof with proof to show a genuine issue of material fact on the issue. We are unable to reach the merits of this argument because WRMC has not appealed from a final order.

Our rules of appellate procedure require that an order be final to be appealable. *Muntaqim v. Hobbs*, 2017 Ark. 97, at 2, 514 S.W.3d 464, 466 (citing Ark. R. App. P.–Civ. 2 (2016); *Denney v. Denney*, 2015 Ark. 257, at 4, 464 S.W.3d 920, 922). Generally, the denial of a motion for summary judgment is neither reviewable nor appealable. *Ark. Elder Outreach of Little Rock, Inc. v. Thompson*, 2012 Ark. App. 681, at 4, 425 S.W.3d 779, 783. However, our court has routinely reviewed and decided orders in cases where the circuit court refused to grant a summary-judgment motion based on the defense of charitable immunity. *Id.* at 4, 425 S.W.3d

[2] In this order, the circuit court also granted the Estate's motion for sanctions, ordering WRMC to pay the Estate's costs and attorney's fees associated with the taking of the depositions of Toth's treating physicians and of all expert witnesses through September 8, 2017.

at 783; *Gain, Inc. v. Martin*, 2016 Ark. App. 157, at 2, 485 S.W.3d 729, 731–32; *Progressive Eldercare Servs.-Saline, Inc. v. Cauffiel*, 2016 Ark. App. 523, at 2, 508 S.W.3d 59, 61–62; *Progressive Eldercare Servs.-Bryant, Inc. v. Price*, 2016 Ark. App. 528; *Progressive Eldercare Servs.-Saline, Inc. v. Garrett*, 2016 Ark. App. 518.

In these cases, appellate jurisdiction was based on Arkansas Rule of Appellate Procedure–Civil 2(a)(2), which provides that an appeal may be taken from "an order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action." Ark. R. App. P.–Civ. 2(a)(2) (2017). Based on Rule 2(a)(2), our court has held that it had jurisdiction in cases where the refusal to grant a summary-judgment motion had the effect of determining that the appellant was not entitled to its defense of charitable immunity from suit, as the right of immunity from suit is effectively lost if a case is permitted to go to trial. *Thompson*, 2012 Ark. App. 681, at 4, 425 S.W.3d at 783; *Gain, Inc.*, 2016 Ark. App. 157, at 2, 485 S.W.3d at 731–32; *Cauffiel*, 2016 Ark. App. 523, at 2, 508 S.W.3d at 61–62; *Price*, 2016 Ark. App. 528; *Garrett*, 2016 Ark. App. 518.[3]

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[3]In *Robinson v. Beaumont*, the interplay between qualified immunity and Rule 2(a)(2) was discussed:

> The principle defense was that the appellants were entitled to a "good faith" or qualified immunity from suit. There would be no further proceedings if the appellants were entitled to the claimed immunity. The refusal to grant the motion amounted to a denial of appellants' claimed defense which would have, if allowed, discontinued the action. The qualified immunity claim is a claim of right which is separable from, and collateral to, rights asserted in the complaint. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 1225, 93 L. Ed. 1528 (1948). The refusal to grant this summary judgment motion had the effect of determining that the appellants were not entitled to immunity from suit. The right of qualified immunity from suit is effectively lost if a case is permitted to go to trial. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed.2d 411 (1985).

In *Thompson*, *Gain*, *Cauffiel*, *Price*, and *Garrett*, the orders denying summary judgment on charitable immunity did not bifurcate trial on the issues of charitable immunity and liability; therefore, it appeared on the record in those cases that the charitable-immunity issue and the merits of the action were to be tried together, in which case the appellants/defendants would have "effectively lost" their rights to immunity from suit if their cases were permitted to go to trial. Therefore, our court had jurisdiction in those cases. Ark. R. App. P.–Civ. 2(a)(2).

There is a significant distinction in the case at bar. Here, the circuit court's order denying summary judgment found that there were questions of fact regarding the charitable-immunity issue *and* it bifurcated trial. The court's order provided: "The issue of charitable immunity will proceed to trial. The Court orders that the charitable immunity issue be bifurcated, with a separate trial on that issue to proceed immediately preceding the commencement of the trial on the malpractice action."

Based on this bifurcation language, it is clear that the charitable-immunity issue and the malpractice claims will not be tried together. It is also clear that—on the charitable-immunity issue—the circuit court's order has not determined the action or prevented a judgment from which an appeal might be taken. In other words, WRMC's right of immunity from suit has not been "effectively lost"—because a jury must first resolve disputed questions of fact regarding the factors that the circuit court must consider when determining whether WRMC

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291 Ark. 477, 482–83, 725 S.W.2d 839, 842 (1987). In *Low v. Insurance Co. of North America*, 364 Ark. 427, 440, 220 S.W.3d 670, 680 (2005), our supreme court held that a charitable entity is immune from suit as well as liability. *See also Seth v. St. Edward Mercy Med. Ctr.*, 375 Ark. 413, 418, 291 S.W.3d 179, 183 (2009).

is entitled to charitable immunity.[4] Therefore, we do not have an "order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action" as required in Rule 2(a)(2). Ark. R. App. P.–Civ. 2(a)(2). Accordingly, the general rule applies, and WRMC's appeal from the denial of a motion for summary judgment is neither reviewable nor appealable. We do not have jurisdiction under Rule 2(a)(2), and we must dismiss WRMC's appeal without prejudice.

Dismissed without prejudice.

GRUBER, C.J., and ABRAMSON and VIRDEN, JJ., agree.

HARRISON and WHITEAKER, JJ., dissent.

BRANDON J. HARRISON, Judge, dissenting. I respectfully disagree with the majority's decision to dismiss this appeal. This court has, despite good intentions, mistakenly elevated a discretionary circuit court point of procedure (bifurcation) to one of appellate-jurisdictional importance. The consequence of this decision is that the circuit courts and parties who deal with charitable-immunity issues face a new appellate-jurisdiction rule that has the potential to be unevenly applied across the state.

Long asked this court to dismiss this appeal in her appellee's brief. The majority has done so. But a dismissal is not warranted. The circuit court—perhaps as a matter of convenience and efficiency—bifurcated the immunity question from the merits questions in the same order. In the majority's view, that the circuit court bifurcated the trial process

[4]Whether an entity is entitled to charitable immunity is a question of law for the circuit court. *Carnell v. Ark. Elder Outreach of Little Rock, Inc.*, 2012 Ark. App. 698, at 7, 425 S.W.3d 787, 792 (holding that the issue of whether a party is immune from suit is purely a question of law).

in the same order as the summary-judgment denial means that we lack a final decision on charitable immunity.

But for years this court has been allowing appeals from the denial of motions for summary judgment that sought charitable immunity. In four recent cases we asked whether jurisdiction existed over the denial of a motion for summary judgment seeking charitable immunity, found it, and decided the merits of the appeals:

- *Progressive Eldercare Services-Saline, Inc. v. Cauffiel*, 2016 Ark. App. 523, 508 S.W.3d 59 (reviewed and decided an appeal that involved a circuit court's decision to deny a defendant summary judgment based on charitable immunity because one or more factual issues were disputed)

- *Gain, Inc. v. Martin*, 2016 Ark. App. 157, 485 S.W.3d 729 (allowed an appeal after expressly addressing the appealability of an order that denied summary judgment in the charitable-immunity context)

- *Arkansas Elder Outreach of Little Rock, Inc. v. Nicholson*, 2013 Ark. App. 758 (denial of summary judgment was reviewed on appeal and a distinction was made between the usual denial of a summary judgment and one that comes in the charitable-immunity area)

- *Arkansas Elder Outreach of Little Rock, Inc. v. Thompson*, 2012 Ark. App. 681, 425 S.W.3d 779 (allowed an appeal after expressly addressing the appealability of an order that denied summary judgment in the charitable-immunity context)

An appeal is of course allowed when a circuit court grants a motion for summary judgment based on charitable immunity. *Neal v. Davis Nursing Ass'n*, 2015 Ark. App. 478, 470 S.W.3d 281 (allowing appeal from grant of summary judgment on charitable immunity). *See also Carnell v. Ark. Elder Outreach of Little Rock, Inc.*, 2012 Ark. App. 698, 425 S.W.3d 787; *Watkins v. Ark. Elder Outreach of Little Rock, Inc.*, 2012 Ark. App. 301, 420 S.W.3d 477. The important point is that whether a request for charitable immunity was denied or granted at the summary-judgment stage, the losing party has been allowed to appeal.

The decision to separate the charitable-immunity issue from the merits issue is currently a discretionary one for the circuit courts. *See* Ark. R. Civ. P. 42(b) (2017); *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992). That circuit courts may currently consider bifurcation on a case-by-case basis is a main reason why elevating a circuit court's decision to bifurcate to appellate-jurisdictional heights is a problem. My understanding of the majority's decision is that denials of a summary judgment can still be immediately appealed—if bifurcation isn't simultaneously ordered with the summary-judgment denial. This is so because the majority doesn't overrule the prior cases in which this court has allowed appeals from the denials of motions for summary judgment based on the charitable-immunity defense. Instead, it has unpersuasively tried to distinguish them from this one. It would be more appropriate for the majority to have pronounced: "From today forward, every motion for summary judgment seeking charitable immunity that is denied because material facts are disputed can no longer be immediately appealed; and to the extent *Cauffiel*, *Martin*, *Nicholson*, and *Thompson* have expressly held or suggested otherwise, they are hereby overruled on this jurisdictional point." This rule would not turn on whether, or when, a circuit court decides to bifurcate.

Now there are at least two tracks to this court: orders denying summary judgments that are also silent on bifurcation can be immediately appealed; but orders that deny summary judgment and bifurcate immunity questions from the merits can't be appealed—although the same reason for the denial of the Rule 56 motion (disputed material facts exist) is present in both cases. Stated simply, when a party can appeal an immunity decision has become less, not more, certain.

Because the circuit court's decision to bifurcate the trial process lacks jurisdictional significance for this court's purposes, we should review White River's appeal now and decide whether the court erred when it denied the motion for summary judgment.

WHITEAKER, J., joins.

Friday, Eldredge & Clark, LLP, by: *William M. Griffin III* and *Tyler D. Bone*, for appellant.

Scholtens & Averitt, PLC, by: *Chris A. Averitt*, for appellee.