

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA12-148

MERCY HEALTH SYSTEM OF
NORTHWEST ARKANSAS

APPELLANT

V.

DR. LISA MCGRAW

APPELLEE

Opinion Delivered JANUARY 30, 2013

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT,
[NO. CV2006-610-2]HONORABLE JON B. COMSTOCK,
JUDGE

DISMISSED

WAYMOND M. BROWN, Judge

Mercy Health System of Northwest Arkansas brings this appeal from a judgment entered in favor of appellee Dr. Lisa McGraw in the sum of \$350,000. We cannot reach the merits and must dismiss this appeal for lack of a final order.

This appeal has its origin in a medical-negligence case filed against Dr. McGraw.¹ After a default judgment in the amount of \$500,000 was entered against Dr. McGraw in the underlying action, she filed suit against Mercy, alleging causes of action for negligence, promissory estoppel, violation of the deceptive trade practices act, breach of fiduciary duty, and indemnification. She also sought punitive damages. The basis for Dr. McGraw's suit was her assertion that Mercy's office manager and supervisor assumed the duty to respond to the

¹See *Jones v. McGraw*, 374 Ark. 483, 288 S.W.3d 623 (2008); *McGraw v. Jones*, 367 Ark. 138, 238 S.W.3d 15 (2006).

complaint in the underlying action. Mercy answered, denying that it owed any duty to Dr. McGraw.

Mercy filed a motion for summary judgment, alleging that, as a matter of law, Mercy did not owe Dr. McGraw any duty to handle the lawsuit or report the matter to her insurance carrier. Mercy also asserted that Dr. McGraw had breached her contractual duties to report any lawsuits to Mercy within ten days of receipt of a summons and to report any lawsuits to her insurer. The court granted the motion as to the deceptive trade practices act and the punitive damages claims, but denied the motion as to Dr. McGraw's claims for negligence, promissory estoppel, breach of fiduciary duty, and indemnification.

The case was tried before a jury over two days in May 2011. At the conclusion of Dr. McGraw's proof, Mercy moved for a directed verdict on each of her claims. The circuit court denied the motion. Dr. McGraw took a nonsuit on her claim for indemnification. Mercy renewed its motion for directed verdict at the close of all of the proof. The court again denied the motion. The case was submitted to the jury on interrogatories:

INTERROGATORY NO. 1: Do you find from a preponderance of the evidence that Cynthia Bosley made an oral promise to plaintiff Dr. Lisa McGraw that the lawsuit filed by Scott and Lizabeth Jones would be taken care of by Mercy Health System of Northwest Arkansas? ANSWER: yes. The interrogatory was signed by the jury foreperson.

INTERROGATORY NO. 2: Do you find from a preponderance of the evidence that defendant Mercy Health System of Northwest Arkansas held out Cynthia Bosley as having authority to bind it to an oral promise to plaintiff Dr. Lisa McGraw that the lawsuit filed by Scott and Lizabeth Jones would be taken care of by Mercy Health System of Northwest Arkansas? ANSWER: yes. The interrogatory was signed by the jury foreperson.

INTERROGATORY NO. 3: Do you find from a preponderance of the

evidence that Dr. Lisa McGraw has proven her claim for negligence? ANSWER: yes. The interrogatory was signed by the jury foreperson.

INTERROGATORY NO. 4: Do you find from a preponderance of the evidence that Dr. Lisa McGraw has proven her claim for promissory estoppel? ANSWER: yes. This interrogatory was also signed by the jury foreperson.

INTERROGATORY NO. 5: Do you find from a preponderance of the evidence that Dr. Lisa McGraw has proven her claim for breach of fiduciary duty? ANSWER: yes. This interrogatory was signed by the jury foreperson.

INTERROGATORY NO. 6: Do you find from a preponderance of the evidence that there was fault on the part of Dr. Lisa McGraw that was a proximate cause of any damages she sustained as a result of the lawsuit filed against her by Scott and Lizabeth Jones? ANSWER: yes. This interrogatory was signed by the jury foreperson.

INTERROGATORY NO. 7: Using 100% to represent the total responsibility for the damages proximately caused the fault by both parties, apportion the responsibility between the parties. ANSWER: 30% Dr. Lisa McGraw; 70% Mercy Health System of Northwest Arkansas.

Judgment was entered awarding Dr. McGraw \$350,000. After Mercy's motion for judgment notwithstanding the verdict was deemed denied, this appeal followed.

The problem necessitating dismissal of the appeal arises because Dr. McGraw took a nonsuit of her indemnification claim at the close of her case. However, there is no order dismissing this claim. Our supreme court has held that "a court order is necessary to grant a nonsuit and that the judgment or decree must be entered to be effective."² The circuit court's judgment does not in and of itself specifically dismiss the indemnification claim. Moreover, we have held that a judgment entered on a jury's verdict that does not dispose of the plaintiff's

²*Blaylock v. Shearson Lehman Bros.*, 330 Ark. 620, 624, 954 S.W.2d 939, 941 (1997).

claim that was nonsuited at the close of his case is not final for purposes of appeal.³ Therefore, the circuit court's judgment left the indemnification claim unresolved, and the judgment was not a final order.⁴ Without a final order, we must dismiss the appeal. Our dismissal is without prejudice to another appeal after the nonsuited claim has been adjudicated on the merits,⁵ or the circuit court certifies the existing judgment pursuant to Ark. R. Civ. P. 54(b).⁶

Appeal dismissed.

HIXSON and WOOD, JJ., agree.

Wright, Lindsey & Jennings, LLP, by: *Edwin L. Lowther, Gary D. Marts, Jr., and Caley*

B. Vo, for appellant.

Shemin Law Firm, PLLC, by: *Kenneth R. Shemin*; and *Cullen & Company, PLLC*, by:

Tim Cullen, for appellee.

³*Pro Transp., Inc. v. Volvo Trucks N. Am., Inc.*, 96 Ark. App. 166, 239 S.W.3d 537 (2006).

⁴*Bevans v. Deutsche Bank Nat'l Trust Co.*, 373 Ark. 105, 281 S.W.3d 740 (2008).

⁵*E.g., South County, Inc. v. First Western Loan Co.*, 315 Ark. 722, 725, 871 S.W.2d 325, 326 (1994).

⁶*Pro Transp., Inc., supra.*