

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-540

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

DONALD M. BOLES,

Plaintiff,

v.

Moore County
No. 03 CVS 1332

URGENT CARE PHARMACY, INC.;
R. KEN MASON, JR.; W. RAY
BURNS; FIRSTHEALTH OF THE
CAROLINAS, INC., (d/b/a
First Health Pain Management
Clinic and FirstHealth Moore
Regional Hospital),

Defendants.

ANNIE W. MCGILL,

Plaintiff,

v.

Moore County
No. 03 CVS 1341

URGENT CARE PHARMACY, INC.;
R. KEN MASON, JR.; W. RAY BURNS;
FIRSTHEALTH OF THE CAROLINAS,
INC. (d/b/a FirstHealth Pain
Management Clinic and First
Health Moore Regional Hospital),

Defendants.

Appeal by plaintiffs from orders entered 26 October 2004 and 6 December 2004 by Judge Ronald E. Spivey in Moore County Superior Court. Cross-appeal by defendants FirstHealth of the Carolinas, Inc., R. Ken Mason, Jr., and Urgent Care Pharmacy, Inc. from the

order entered on a date uncertain¹ by Judge Ronald E. Spivey in Moore County Superior Court. Heard in the Court of Appeals 7 February 2006.

Marie D. Lang and Maxwell, Freeman & Bowman, P.A., by James B. Maxwell, for plaintiff-cross-appellees.

Poyner & Spruill LLP, by Randall R. Adams and Timothy W. Wilson, for Urgent Care Pharmacy, Inc., defendant-cross-appellant.

Smith Moore LLP, by Samuel O. Southern and Bradley M. Risinger, for FirstHealth of the Carolinas, Inc., defendant-cross-appellant.

Young Moore and Henderson, P.A., by David M. Duke and Robert C. DeRosset, for R. Ken Mason, Jr., defendant-cross-appellant.

PER CURIAM.

We note initially that plaintiffs moved to dismiss their appeal in this matter on 3 May 2005, and that this motion was granted on 10 May 2005. We discuss plaintiffs' appeal only as it relates to the procedural history and in context of defendants' cross-appeals.

On 17 October and 21 October 2003, Donald Boles and Annie McGill ("plaintiffs") filed complaints alleging that they developed serious health problems as a result of receiving injections of contaminated methylprednisolone. The contaminated methylprednisolone had been compounded by Urgent Care Pharmacy,

¹ Defendants' cross-appeals do not state the specific order from which they appeal. The record does not contain a copy of an order that addresses the issues detailed in their Notices of Appeal.

Inc. ("Urgent Care"), and sold to FirstHealth of the Carolinas, Inc. ("FirstHealth") for use in FirstHealth's hospital and pain clinic. As alleged by plaintiffs, Urgent Care's compounded methylprednisolone injections had been contaminated with a fungus which caused individuals receiving the injections to contract fungal meningitis and other serious health conditions.

Plaintiffs' complaints contained multiple claims against defendants Urgent Care and FirstHealth, Urgent Care's president Ray Burns ("Burns"), and Urgent Care's head pharmacist Ken Mason ("Mason"). Plaintiffs' claims included: (1) negligence on the part of Urgent Care; (2) negligence *per se* on the part of Urgent Care; (3) gross negligence on the part of Urgent Care; (4) Urgent Care's breach of the implied warranty of merchantability; (5) Urgent Care's breach of the implied warranty of fitness for a particular purpose; (6) negligence on the part of Burns and Mason; (7) negligence *per se* on the part of Burns and Mason; (8) gross negligence on the part of Burns and Mason; (9) negligence on the part of Burns and Mason; (10) FirstHealth's breach of an express warranty; (11) FirstHealth's breach of the implied warranty of merchantability; (12) FirstHealth's breach of the implied warranty of fitness for a particular purpose; and (13) *res ipsa loquitur*.

Defendants answered plaintiffs' claims, and asserted numerous affirmative defenses and moved to dismiss plaintiffs' claims for multiple reasons including plaintiffs' failure to comply with Rule 9(j) of our Rules of Civil Procedure, and lack of subject matter and personal jurisdiction over defendant Burns. All defendants

filed motions for summary judgment against plaintiffs. Plaintiffs' actions were consolidated, and on 22 July 2004, plaintiffs filed motions for summary judgment against all defendants. Plaintiffs' motion for summary judgment against defendant FirstHealth was for plaintiffs' negligence claims only. Each plaintiff sought to amend the complaints such that their claims against defendants now would include claims for corporate negligence against defendant FirstHealth, negligence *per se* on the part of FirstHealth, and claims for negligence of a corporate officer on the part of defendant Burns. All of the parties' motions were heard on 2 August, 3 August, and 4 August 2004.

At the hearing held 2 August 2004, the trial court partially granted plaintiffs' motions for leave to amend their complaints, and allowed plaintiffs to amend their complaints to allege claims of negligence of a corporate officer on the part of defendant Burns. However, the trial court denied each of plaintiffs' additional proposed amendments to their complaints, including their proposed amendments adding claims for the negligence *per se* of defendant FirstHealth, and their attempts to reallege their claims for breaches of the implied warranties.

At the 3 August 2004 hearing, the trial court granted defendant Burns' motion to dismiss based on Rule 12(b)(2) finding that defendant Burns lacked sufficient contacts with North Carolina such that the trial court could not exercise personal jurisdiction over him as an individual. Following a thorough review of the arguments of all parties, and the applicable caselaw, the trial

court ruled orally that based on the plain language of plaintiffs' complaints, plaintiffs' complaints did not allege medical malpractice actions, but instead alleged actions based on ordinary negligence. Defendant FirstHealth then withdrew its request for summary judgment against plaintiffs, based on the trial court's ruling that plaintiffs' claims involved ordinary negligence rather than medical malpractice. The trial court then granted summary judgment in favor of plaintiffs against defendant Urgent Care as to liability on plaintiffs' negligence claims only, with the issue of damages remaining for trial.

Plaintiffs abandoned their claims against all defendants on the issues of negligence *per se*, gross negligence, and *res ipsa loquitur*. Also, plaintiffs' claims for breach of implied warranties alleged against defendant FirstHealth had been previously dismissed at a 15 July 2004 hearing, and in an order entered 6 December 2004. Thus, following the trial court's oral ruling that plaintiffs' complaints alleged claims for ordinary negligence and not medical malpractice, plaintiffs were granted summary judgment on the following claims: their liability claims for negligence and breach of implied warranties against defendant Urgent Care, and their negligence claims against defendant Mason. The trial court also granted defendants Urgent Care and Burns' motions to dismiss plaintiffs' claims against defendant Burns for negligence of a corporate officer. Thus, the only claims remaining for trial included plaintiffs' claims for damages against

defendants Urgent Care and Mason, and their claims of negligence against defendant FirstHealth.

At the 4 August 2004 hearing, plaintiffs gave Notice of Appeal of the trial court's dismissal of defendant Burns for lack of personal jurisdiction. Defendant FirstHealth, joined by defendant Urgent Care, asked that the trial court certify for immediate appeal the trial court's ruling that plaintiffs' complaints alleged claims for ordinary negligence rather than medical malpractice, arguing that the trial court's ruling affected a substantial right of the defendants. The trial court orally certified the issue for immediate appeal as it related to defendants Urgent Care, FirstHealth, and Mason.

Defendants Urgent Care, FirstHealth, and Mason cross-appealed the trial court's ruling and entry of summary judgment against them. Defendant Mason subsequently withdrew his cross-appeal. As noted earlier, plaintiffs also withdrew their appeal, and further moved for this Court to dismiss defendants' appeals as interlocutory. However, plaintiffs subsequently abandoned their motion to dismiss defendants' appeals as interlocutory during oral arguments.

Assuming *arguendo* we determined that defendants' cross-appeals were appealable immediately, we still are unable to address the merits of defendants' appeals due to violations of our Rules of Appellate Procedure which have failed to provide this Court with jurisdiction to review defendants' cross-appeals.

Defendants FirstHealth and Urgent Care assign as error the trial court's rulings that plaintiffs' claims for negligence against defendants involved ordinary negligence rather than medical malpractice, and the denial of defendants' motions for summary judgment against plaintiffs on their various claims. In the instant case, all parties stipulated that the record on appeal was one that was agreed upon by the parties. Rule 9 of our Rules of Appellate Procedure sets forth the function and composition of the record on appeal, and it provides that "[t]he record on appeal in civil actions . . . shall contain . . . a copy of the judgment, order, or other determination from which appeal is taken[.]" N.C. R. App. P. 9(a)(1)(h) (2005). However, the record on appeal in the instant case does not contain a copy of the trial court's order declaring plaintiffs' claims to be based on ordinary negligence and also denying defendants' motions for summary judgment.

The record and exhibits before us include a transcript from the 3 August 2004 hearing in which the trial court made these rulings, however there is no written order entered by the trial court in which these rulings were reduced to writing. An order is not entered until it has been "reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2005); see also *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 (1997). The record does contain orders which set forth the trial court's various other rulings from the hearings held on 15 July, 2 August, and 3 August 2004, but none of these pertain to the issues that are before us now.

As this Court has stated previously:

The [appellants'] failure to submit a copy of the purported order from which [they] appeal[] is a violation of Appellate Rule 9(a)(1)(h), which states in clear language that the record on appeal in civil actions shall contain "a copy of the judgment, order or other determination from which appeal is taken." In this case, submission of the transcript of the trial court's statements as to what he will find and order is not sufficient.

Beneficial Mortgage Co. v. Peterson, 163 N.C. App. 73, 79, 592 S.E.2d 724, 728 (2004) (quoting *Sessoms v. Sessoms*, 76 N.C. App. 338, 339, 332 S.E.2d 511, 512-13 (1985)); see also *Buckingham v. Buckingham*, 134 N.C. App. 82, 91, 516 S.E.2d 869, 876 ("Because the record in this case does not contain a written order denying plaintiff's motions, such order was not entered by the trial court."), *disc. review denied*, 351 N.C. 100, 540 S.E.2d 353 (1999). Further, as we held in *Abels*, "[t]his Court is without authority to entertain appeal of a case which lacks entry of judgment. Announcement of judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment." 126 N.C. App. at 803, 486 S.E.2d at 737 (internal citations omitted); see also *Searles v. Searles*, 100 N.C. App. 723, 726, 398 S.E.2d 55, 57 (1990). Thus, the omission from the record on appeal of any order denying summary judgment precludes our review of the matter. A trial court's failure "to enter an order . . . is not a matter to be addressed on an appeal from that inaction, but instead is to be addressed through a writ of mandamus filed with this Court." *Stevens v. Guzman*, 140 N.C. App. 780, 783, 538 S.E.2d 590, 593 (2000), *review dismissed*, 354 N.C. 214, 552 S.E.2d 140 (2001).

Since a written order was not entered in the instant case, defendants' proper method for addressing this issue was to have filed a writ of mandamus with this Court, seeking entry of an order by the trial court detailing the trial court's specific rulings.

Therefore, as we are without jurisdiction to address defendants' appeals, the appeals must be dismissed.

Appeals dismissed.

Report per Rule 30(e).

Panel Consisting of:

Judges MCGEE, HUNTER, and JACKSON