NO. COA08-721

NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2009

THE ESTATE OF DONNA S. RAY, BY THOMAS D. RAY AND ROBERT A. WILSON, IV, ADMINISTRATORS OF THE ESTATE OF DONNA S. RAY, AND THOMAS D. RAY, INDIVIDUALLY,

Plaintiffs,

v. Burke County
No. 04 CVS 291

KEITH FORGY, M.D., P.A., INDIVIDUALLY AND AS AGENT/ APPARENT AGENT OF GRACE HOSPITAL, INC. [sic], AND/OR GRACE HEALTHCARE SYSTEM, INC. [sic], AND/OR BLUE RIDGE HEALTHCARE SYSTEMS, INC. [sic], AND/OR CAROLINAS HEALTHCARE SYSTEM, INC. [sic], AND AS AN AGENT/APPARENT AGENT, EMPLOYEE AND SHAREHOLDER OF MOUNTAIN VIEW SURGICAL ASSOCIATES, [sic] AND GRACE HOSPITAL, INC., AND/OR GRACE HEALTHCARE SYSTEM, INC., AND/OR BLUE RIDGE HEALTHCARE SYSTEM, INC. [sic] AND/OR CAROLINAS HEALTHCARE SYSTEM, INC. [sic],

Defendants.

Appeal by plaintiffs from an order entered 21 December 2007 by Judge Robert C. Ervin in Burke County Superior Court. Heard in the Court of Appeals 28 January 2008.

The Law Offices of David A. Sims, by C. Sue Holvey; Crowe & Davis, P.A., by H. Kent Crowe; Hill, Peterson, Carper, Bee & Deitzler, P.L.L.C., by C. Michael Bee; and Poyner Spruill, LLP

by E. Fitzgerald Parnell, III, and Cynthia L. Van Horne, for plaintiffs-appellants.

Dameron, Burgin, Parker & Jackson, P.A., by Phillip T. Jackson, for Grace Hospital, Inc., Blue Ridge HealthCare System, Inc., Grace HealthCare System, Inc. [sic], Carolinas HealthCare System, Inc. [sic], defendants-appellees.

General Counsel Linwood L. Jones, for North Carolina Hospital Association, Amicus Curiae.

Bennett & Gutherie, PLLC, by Richard V. Bennett and Joshua H. Bennett, for the North Carolina Association of Defense Attorneys, Amicus Curiae.

JACKSON, Judge.

The Estate of Donna S. Ray, by Thomas D. Ray and Robert A. Wilson, IV, Administrators of the Estate of Donna S. Ray, and Thomas D. Ray, individually ("plaintiffs") appeal the trial court's granting of summary judgment in favor of Grace Hospital, Inc., Blue Ridge HealthCare System, Inc., Grace HealthCare System, Inc., and Carolinas HealthCare System, Inc. ("defendants"). Defendants B. Keith Forgy, M.D., P.A. and Mountain View Surgical Associates ("Dr. Forgy defendants") are not parties to this appeal.[1] For the reasons stated below, we affirm.

On 7 August 2003, Donna S. Ray ("decedent"), then forty-three years old, sought medical treatment from Burke Primary Care ("Burke") where she had been a patient since 1998, complaining of abdominal pain, nausea, and vomiting. Burke physicians decided to admit decedent to Grace Hospital. After treating decedent for

[1] Dr. Forgy defendants petitioned this Court for a writ of *certiorari*. That petition was denied.

several days, on 12 August 2003, Burke physicians sought a surgical consultation from Dr. B. Keith Forgy ("Dr. Forgy").

After extensive testing, on 14 August 2003, Dr. Forgy determined that the most likely problem was gallbladder disease and recommended laparoscopic cholecystectomy (gallbladder removal) surgery. Burke physicians concurred. With decedent's consent, Dr. Forgy performed the surgery on 14 August 2003. Decedent's condition improved and she was released from Grace Hospital on 16 August 2003.

Between 16 August and 9 September 2003, decedent sought additional treatment from Dr. Forgy at his private office on three occasions. On 26 August 2003, Dr. Forgy released decedent from his care and returned her to Burke's care unless she had problems related to her cholecystectomy.

On 9 September 2003, decedent again experienced abdominal pain, nausea, and vomiting and her husband took her to Grace Hospital. Burke physicians admitted her on 10 September 2003. On 12 September 2003, Dr. Forgy again was consulted on decedent's condition. Her tests suggested a biliary leak or biloma. Dr. Forgy performed a laparotomy, an examination of the biliary tree, an attempted cholangiography, and a needle liver biopsy on 14 September 2003.

Following decedent's second surgery, her condition rapidly deteriorated. She was transferred to Frye Regional Medical Center ("Frye") on 16 September 2003 in order to obtain a level of care unavailable at Grace Hospital. On 30 October 2003, decedent was

transferred from Frye to the hospital at UNC-Chapel Hill. She died on 11 July 2004 of sepsis and candida peritonitis due to laparoscopic cholecystectomy.

Plaintiffs filed a complaint on or about 25 August 2004 and an amended complaint on 10 July 2006 alleging claims of, *inter alia*, (1) medical malpractice, (2) negligent supervision and related claims, (3) vicarious liability or *respondeat superior*, (4) estoppel by agency, (5) unfair and deceptive trade practices ("UDTP"), and (6) negligent or intentional misrepresentation. On 11 January 2007, defendants filed a motion to dismiss, based upon plaintiffs' failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. The motion was denied on 2 February 2007.

Defendants filed a motion for summary judgment on 15 November 2007 alleging, *inter alia*, that (1) Dr. Forgy was neither an employee, agent/apparent agent, nor independent contractor of defendants; (2) they were not subject to the UDTP Act; and (3) there was no evidence that plaintiffs relied on any of their alleged misrepresentations. Dr. Forgy defendants filed a motion for summary judgment on 26 November 2007 alleging that plaintiffs' experts were not qualified to provide expert opinions with respect to the applicable standard of care in plaintiffs' case in violation of Rule 9(j) of the North Carolina Rules of Civil Procedure. On 12 December 2007, plaintiffs filed a motion for partial summary judgment as to the issues of agency/apparent agency and non-delegable duty.

Defendants' motion was granted by order filed 21 December 2007. Dr. Forgy defendants' motion was denied by order filed 6 January 2008. Neither the 21 December 2007 order nor the 6 January 2008 order addressed plaintiffs' motion for partial summary judgment.[2] On 16 January 2008, pursuant to Rule 54 of the North Carolina Rules of Civil Procedure, the trial court certified the 21 December 2007 order for immediate appeal.

Plaintiffs appeal the 21 December 2007 order granting defendants' motion. Defendants cross-assign as error the trial court's 2 February 2008 order denying their Rule 9(j) motion to dismiss.

We note that the 21 December 2007 order is interlocutory in that it does not dispose of the entire case. *See Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.") (citing *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231 (1916)). Such orders ordinarily are not immediately appealable. *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, when "(1) the order represents a final judgment as to one or more claims in a multiple claim lawsuit or one or more parties in a multi-party lawsuit," and (2) the trial court certifies that "there is no just reason to delay the appeal," Rule

[2] Based upon the trial court's granting of defendants' motion, we infer that plaintiffs' motion was impliedly denied.

54 of the North Carolina Rules of Civil Procedure permits an immediate appeal. *Harris v. Matthews*, 361 N.C. 265, 269 n.1, 643 S.E.2d 566, 569 (2007) (citing N.C. Gen. Stat. § 1A-1, Rule 54(b)).

Although we accord great deference to a trial court's certification that there is no just reason to delay the appeal, *see DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998), such certification "cannot bind the appellate courts because 'ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.'" *First Atl. Mgmt., Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (quoting *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984)) (additional citation omitted). Moreover, a grant of partial summary judgment "'is not a final judgment and is generally (unless affecting a "substantial right") not immediately appealable, even if the trial court has attempted to certify it for appeal under Rule 54(b).'" *Id.* (quoting *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993)).

Appellants have the burden of showing that an appeal is proper. *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (per curiam) (2005). When an appeal is of an interlocutory order, "the appellant[s] must include in [their] statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.'" *Id.* (quoting N.C. R. App. P. 28(b)(4)). Further, the appellants must

do more than merely assert that the order affects a substantial right; they must show *why* the order affects a substantial right. *Id.* "Where the appellant fails to carry the burden of making such a showing to the [C]ourt, the appeal will be dismissed." *Id.* (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)).

Here, plaintiffs' brief does not address why there is no just reason to delay the appeal, or what substantial right will be lost absent immediate appeal. At oral argument, the only proffered justification for immediate appeal was that Dr. Forgy no longer has malpractice insurance. Our research has disclosed no authority for the proposition that the presence or absence of malpractice insurance by a party to a case constitutes a substantial right for the purpose of justifying an immediate appeal.

Because plaintiffs have failed to carry the burden of showing this Court that their appeal is properly before us, we dismiss it as interlocutory.

Dismissed.

Judges HUNTER, JR., Robert N. and BEASLEY concur.

Report per Rule 30(e).