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NO. COA08-83

NORTH CAROLINA COURT OF APPEALS

Filed: 5 August 2008

CHAD TYLER EDMUNDSON by and through
his Guardians Ad Litem,
Darryl G. Smith and Bobby G.
Abrams;

Plaintiff,

v.

Wilson County
No. 02 CVS 2318

LEESA GREER LAWRENCE, M.D.
AND EASTERN CAROLINA
PEDIATRICS, P.A.,

Defendants.

Court of Appeals

Appeal by Plaintiff from judgment entered 31 August 2007 by
Judge Thomas D. Haigwood in Wilson County Superior Court. Heard in
the Court of Appeals 12 June 2008.

Slip Opinion

*Keel O'Malley Tunstall L.L.P., by Jimmie R. Keel, for
Plaintiff-Appellant.*

*Walker, Allen, Grice, Ammons & Foy, L.L.P., by Jerry A. Allen,
Jr., and O. Drew Grice, Jr., for Defendants-Appellees.*

STEPHENS, Judge.

This matter arises out of a medical malpractice action commenced on 12 December 2002 by Plaintiff Chad Tyler Edmundson for allegedly negligent medical care provided by Defendants Leesa Greer Lawrence, M.D., and Eastern Carolina Pediatrics, P.A. The case was tried during the 16 January 2007 Special Session of Wilson County Civil Superior Court, and the jury returned a verdict in favor of

Defendants. On 8 February 2007, the trial court entered judgment dismissing the action and reserving for further hearing all matters related to the taxing of costs. On 12 June 2007 Plaintiff filed notice of appeal from that judgment.¹

The trial court heard Defendants' motion to tax costs at the 25 June 2007 court session. On 31 August 2007, the trial court entered an order granting Defendants' motion and awarding Defendants \$18,268 at 8% per annum interest as reimbursement for costs incurred defending the case at trial. From this order and judgment awarding costs, Plaintiff appeals.

Discussion

As a preliminary matter, we must address whether the trial court had jurisdiction to hear Defendants' motion to tax costs and to enter an award for costs after Plaintiff had filed notice of appeal from the 7 February 2007 judgment.

"The issue of jurisdiction over the subject matter of an action may be raised at any time during the proceedings, including on appeal." *McClure v. Cty. of Jackson*, __ N.C. App. __, __, 648 S.E.2d 546, 550 (2007). "This Court is required to dismiss an appeal *ex mero motu* when it determines the lower court was without jurisdiction to decide the issues." *Id.*

Pursuant to N.C. Gen. Stat. § 1-294,

¹ Plaintiff's appeal was heard by this Court on 29 November 2007. This Court filed an opinion on 18 December 2007, affirming the trial court's judgment. Plaintiff subsequently filed an appeal and a petition for discretionary review with the North Carolina Supreme Court. As of the date of the filing of this opinion, Plaintiff's appeal and petition are pending in the Supreme Court.

[w]hen an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

N.C. Gen. Stat. § 1-294 (2007). Accordingly, as a general rule, "timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court." *Parrish v. Cole*, 38 N.C. App. 691, 693, 248 S.E.2d 878, 879 (1978). During the pendency of an appeal, the court below only retains jurisdiction to hear motions and enter orders not affected by the judgment appealed from. *Herring v. Pugh*, 126 N.C. 852, 36 S.E. 287 (1900).

N.C. Gen. Stat. § 6-1 states, "[t]o the party for whom judgment is given, costs shall be allowed as provided in Chapter[s] [6 and] 7A" of the General Statutes. N.C. Gen. Stat. § 6-1 (2007). Chapter 6 provides that "costs may be allowed in the discretion of the court[,]. . . subject to the limitations on assessable or recoverable costs set forth in [N.C. Gen. Stat. §] 7A-305(d)[.]" N.C. Gen. Stat. § 6-20 (2007). The expenses set forth in N.C. Gen. Stat. § 7A-305(d) "constitute a limit on the trial court's discretion to tax costs pursuant to [N.C. Gen. Stat. §] 6-20[.]" N.C. Gen. Stat. § 7A-305(d) (2007).

In *Brooks v. Giesey*, 106 N.C. App. 586, 418 S.E.2d 236 (1992), we concluded that the trial court had jurisdiction to order plaintiffs to pay attorney's fees under N.C. Gen. Stat. § 6-21.5²

² Defendants moved for fees pursuant to N.C. Gen. Stat. § 6-21.5 which states, "[i]n any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the

where the motion seeking such payment was filed more than a year after summary judgment was entered for defendants, and more than a month after the judgment was affirmed on appeal. This Court explained:

Under a statute such as section 6-21.5, which contains a "prevailing party" requirement, the parties should not be required to litigate fees when the appeal could moot the issue. Furthermore, upon filing of a notice of appeal, a trial court in North Carolina is divested of jurisdiction with regard to all matters embraced within or affected by the judgment which is the subject of the appeal. N.C. Gen. Stat. § 1-294 (1983).

Brooks, 106 N.C. App. at 590-91, 418 S.E.2d at 238.

In *Gibbons v. Cole*, 132 N.C. App. 777, 513 S.E.2d 834 (1999), this Court followed *Brooks* and concluded that the trial court lacked jurisdiction to proceed on defendants' motion for fees³

prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." N.C. Gen. Stat. § 6-21.5 (2007).

³ Defendant moved for fees pursuant to N.C. Gen. Stat. § 6-21 which states, "[c]osts in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

. . . .

(2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, that in any caveat proceeding under this subdivision, the court shall allow attorneys' fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit.

N.C. Gen. Stat. § 6-21 (2007).

during the pendency of plaintiffs' appeal from the trial court's dismissal of their complaint. In its order granting the defendants' motion for fees, the trial court stated,

[t]he action of the plaintiffs was without merit. . . . In this matter, costs, including the defendants' reasonable attorneys fees, should be taxed against the plaintiffs.

Id. at 782, 513 S.E.2d at 837. This Court determined that "the trial court's decision to award attorneys fees was clearly affected by the outcome of the judgment from which plaintiffs appealed" and, thus, "the appeal by plaintiffs from the judgment on the pleadings deprived the superior court of the authority to make further rulings in the case until it returns from this Court." *Id.*

Likewise, in *McClure* this Court concluded that the trial court lacked jurisdiction to hear and rule on plaintiff's motion for costs and attorney's fees during the pendency of defendant's appeal in the underlying case. __ N.C. App. __, 648 S.E.2d 546. In the underlying action, the court entered judgment in favor of plaintiff, and defendant filed timely notice of appeal. Plaintiff subsequently filed a motion for costs and attorney's fees pursuant to N.C. Gen. Stat. §§ 6-1, 6-19.1, 6-20, 7A-314, and 143-318.16B. The trial court heard and granted plaintiff's motion for costs and attorney's fees. On appeal, this Court concluded that the trial court lacked jurisdiction to hear the motion, explaining:

N.C. Gen. Stat. § 1-294 specifically divests the trial court of jurisdiction unless it is a matter "not affected by the judgment appealed from." When, as in the instant case, the award of attorney's fees was based upon the plaintiff being the "prevailing party" in the

proceedings, the exception set forth in N.C. Gen. Stat. § 1-294 is not applicable.

McClure, __ N.C. App. at __, 648 S.E.2d at 551.⁴

Here, as in *Gibbons* and *McClure*, Plaintiff's appeal of the underlying civil action was pending in this Court when the trial court heard and granted Defendants' motion to tax costs. Accordingly, N.C. Gen. Stat. § 1-294 specifically divested the trial court of jurisdiction unless the matter was not affected by the judgment appealed from. However, as in *McClure*, the award of costs under N.C. Gen. Stat. §§ 6-1, 6-20, and 7A-305 was based upon Defendants being "the part[ies] for whom judgment is given." N.C. Gen. Stat. § 6-1. Since the result of the appeal could moot the issue of costs, the motion for costs was clearly embraced within Plaintiff's appeal of the underlying action. Thus, the exception set forth in N.C. Gen. Stat. § 1-294 is not applicable, and the trial court lacked jurisdiction to hear and decide Defendants' motion for costs.

Furthermore, although in its order dismissing Plaintiff's medical malpractice action, the trial court purported to "reserve[] for further hearing" matters related to the taxing of costs, "it is

⁴ We also noted that

the better practice is for the trial court to defer entry of the written judgment until after a ruling is made on the issue of attorney's fees and incorporate all of its ruling into a single, written judgment. This will result in only one appeal, from one judgment, incorporating all issues in the case.

McClure, __ N.C. App. at __, 648 S.E.2d at 551-52.

fundamental that a court cannot create jurisdiction where none exists." *McClure*, __ N.C. App. at __, 648 S.E.2d at 551. "N.C. Gen. Stat. § 1-294 specifically divests the trial court of jurisdiction unless it is a matter 'not affected by the judgment appealed from.'" *Id.* (quoting N.C. Gen. Stat. § 1-294). When, as in this case, the award of costs was based upon Defendants being the "part[ies] for whom judgment is given" in the proceedings, the exception set forth in N.C. Gen. Stat. § 1-294 is not applicable.

For the above-stated reasons, we reverse the trial court's order awarding Defendants costs.

REVERSED.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).