NO. COA09-890

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

MARY LOUISE DIGGS,
Plaintiff,

v. Forsyth County
No. 02 CVS 7066

FORSYTH MEMORIAL HOSPITAL, INC.,
Defendant.

Appeal by Plaintiff from order entered 27 March 2009 by Judge Richard L. Doughton in Superior Court, Forsyth County. Heard in the Court of Appeals 11 February 2010.

Kennedy, Kennedy, Kennedy & Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, for Plaintiff.

Bennett & Guthrie, P.L.L.C., by Richard V. Bennett and Joshua H. Bennett, for Defendant.

North Carolina Association of Defense Attorneys, by Phillip T. Jackson, amicus curiae.

STEPHENS, Judge.

I. Procedural History

This appeal results from a medical malpractice action arising out of gall bladder surgery performed on Plaintiff at the Forsyth Medical Center. The matter was before this Court on Plaintiff's prior appeal from the trial court's order granting summary judgment in favor of Forsyth Memorial Hospital, Inc. ("FMH" or "Defendant"), Novant Health, Inc. ("NHI"), and Novant Health Triad Region, L.L.C.

("NHTR") (collectively the "hospital Defendants"). *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 628 S.E.2d 851 (2006) ("*Diggs I*"). The pertinent factual background of this matter up to the time of that appeal is set out in our opinion in *Diggs I*.

Plaintiff's original complaint, filed 11 October 2002, also named Sheila Crumb, Joseph McConville, M.D., and Piedmont Anesthesia & Pain Consultants, P.A. (collectively the "anesthesiology Defendants") as Defendants. Plaintiff voluntarily dismissed her claims against the anesthesiology Defendants on 16 April 2004 in order to immediately appeal from the trial court's order of summary judgment in favor of the hospital Defendants.[1] *Id.* at 294, 628 S.E.2d at 854. Thus, the anesthesiology Defendants were not parties to the appeal in *Diggs I*. On 11 April 2005, Plaintiff filed a second complaint against the anesthesiology Defendants, raising the same claims as alleged in the initial complaint which was voluntarily dismissed.

On 2 May 2006, in *Diggs I*, this Court affirmed the trial court's entry of summary judgment in favor of NHI and NHTR but reversed and remanded the entry of summary judgment with respect to FMH. Plaintiff and the anesthesiology Defendants subsequently entered into a settlement agreement (the "Settlement Agreement"),

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[1] *See Goodman v. Holmes & McLaurin Attorneys at Law*, 192 N.C. App. 467, 471-72, 665 S.E.2d 526, 530 (2008) (Although interlocutory orders are not immediately appealable, the plaintiff's voluntary dismissal of all claims that remained after the trial court entered partial summary judgment on the original claims had the effect of making the partial summary judgment a final order, rather than an interlocutory order, and thus appealable.).

and the trial court entered an order of dismissal with prejudice on 29 August 2006 (the "Order"), dismissing Plaintiff's claims against the anesthesiology Defendants.

On remand from our decision in *Diggs I* and upon learning of the dismissal of Plaintiff's claims against the anesthesiology Defendants, FMH filed a motion for partial summary judgment on 4 October 2007,[2] arguing that Defendant was entitled to partial summary judgment because all of Plaintiff's claims against Defendant's alleged apparent agents, the anesthesiology Defendants, had been dismissed with prejudice. In an order entered 19 October 2007 by Judge Richard L. Doughton, the trial court denied Defendant's motion.

Thereafter, the case was tried by a jury before Judge Ronald Spivey at the 19 November 2007 civil session of Forsyth County Superior Court. This trial resulted in a hung jury and a mistrial was declared on 17 December 2007. On 18 August 2008, the case was again tried by a jury before Judge Charles C. Lamm, Jr., which again resulted in a hung jury and the declaration of a mistrial. A third trial was scheduled for the week of 4 May 2009.

On 17 November 2008, Defendant filed a motion for reconsideration of Judge Doughton's denial of Defendant's motion for summary judgment. On 27 March 2009, Judge Doughton entered an order granting Defendant's motion and entering summary judgment in favor of Defendant. Plaintiff appeals from the trial court's order

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[2]This document is not file stamped but is dated 4 October 2007.

allowing Defendant's motion for reconsideration of Defendant's motion for summary judgment and granting summary judgment in Defendant's favor. We affirm.

II. Standard of Review

This Court reviews a trial court's grant of summary judgment *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). The burden is on the movant to establish that there are no triable issues of fact. *Fairview Developers, Inc. v. Miller*, 187 N.C. App. 168, 170, 652 S.E.2d 365, 367 (2007), *disc. review denied*, 362 N.C. 176, 658 S.E.2d 484 (2008). On appeal, this Court views the record in the light most favorable to the non-moving party, drawing all reasonable inferences in the nonmovant's favor. *Gaskill v. Jennette Enters., Inc.*, 147 N.C. App. 138, 140, 554 S.E.2d 10, 12 (2001), *disc. review denied*, 355 N.C. 211, 559 S.E.2d 801 (2002).

III. Discussion

A. Trial Court's Authority to Reconsider Order Denying Motion for Summary Judgment

Plaintiff argues that the trial court lacked the authority to reconsider its earlier denial of Defendant's motion for summary judgment. Plaintiff also contends that because Defendant's motion for reconsideration of summary judgment was not based on a specific Rule of Civil Procedure, Defendant's motion should have been denied. We disagree.

Plaintiff supports her argument in part with the following footnote from Judge Campbell's dissent in *Crawford v. Commercial*

Union Midwest Ins. Co., 147 N.C. App. 455, 556 S.E.2d 30 (2001), *cert. denied*, 356 N.C. 160, 568 S.E.2d 190 and *aff'd per curiam*, 356 N.C. 609, 572 S.E.2d 781 (2002):

> [A]lthough Plaintiffs have timely appealed from the denial of their "Motion to Reconsider Summary Judgment," having determined that it does not qualify as a Rule 59(e) motion, and because there are no other provisions for motions for reconsideration in our Rules of Civil Procedure, the motion to reconsider was properly denied.

Id. at 462, n.8, 556 S.E.2d at 35, n.8 (Campbell, J., dissenting). A footnote from a dissent does not constitute controlling legal authority. Furthermore, Judge Campbell's dissenting opinion was rejected by our Supreme Court in its *per curiam* decision affirming the majority's opinion. *Crawford*, 356 N.C. 609, 572 S.E.2d 781. Thus, Judge Campbell's dissent provides no support for Plaintiff's contention.

Plaintiff also contends that our decision in *Hastings for Pratt v. Seegars Fence Co.*, 128 N.C. App. 166, 493 S.E.2d 782 (1997), supports her argument. *Hastings* involved an action for negligence and infliction of emotional distress after a minor child was injured while playing on a gate constructed by defendant Seegars. *Id.* at 167, 493 S.E.2d at 783. Seegars moved for summary judgment, and this motion was granted by the Honorable James E. Ragan, III, with respect to the claims for infliction of emotional distress but denied as to the claims for damages for personal injuries. *Id.* at 168, 493 S.E.2d at 783. After additional discovery, Seegars made a second motion for summary judgment on the claims for damages for personal injuries pursuant to Rule 56 of the

North Carolina Rules of Civil Procedure. *Id.*; *see* N.C. Gen. Stat. § 1A-1, Rule 56 (setting forth the procedure for obtaining summary judgment and when summary judgment is available). Seegars' motion was heard before the Honorable W. Russell Duke, Jr., and Judge Duke granted Seegars' motion. *Id.*

On appeal, this Court reversed Judge Duke's order holding that Judge Ragan's order denying Seegars' motion for summary judgment precluded Judge Duke from granting Seegars' subsequent motion. *Id.* at 168, 493 S.E.2d at 783-84.

> The general rule is well-established that one trial judge may not reconsider and grant a motion for summary judgment previously denied by another judge. A second motion for summary judgment may be considered by the trial court only when it presents legal issues different from those raised in the earlier motion.

Id. (internal citations and quotation marks omitted). Thus, we concluded that

> the issue of the manner in which the minor plaintiff used the fence and gate was before Judge Ragan at the hearing of defendant's first motion for summary judgment and his denial of summary judgment was conclusive upon the issue, precluding Judge Duke from thereafter granting summary judgment on that same issue.

Id. at 169, 493 S.E.2d at 784.

Defendant contends that *Hastings* is distinguishable from the instant case, and we agree. In *Hastings*, after the defendant's motion for summary judgment was denied by one Superior Court judge, the defendant filed a second motion for summary judgment which was granted by a different Superior Court judge. *Id.* at 167-68, 493 S.E.2d at 783; *See Transcon. Gas Pipe Line Corp. v. Calco Enters*,

132 N.C. App. 237, 241, 511 S.E.2d 671, 674-75 (1999) (reconsideration of a motion for summary judgment by a second judge is precluded by rule that no appeal lies from one superior court judge to another; one superior court judge may not correct another's errors of law; and ordinarily one judge may not modify, overrule, or change the judgment of another superior court judge previously made in the same action). Defendant's motion in the case *sub judice*, however, was not a second motion for summary judgment. Rather, Defendant filed a motion for the same judge who ruled on the earlier motion to reconsider his original ruling.

Our analysis in the present case is instead informed by this Court's decision in *Miller v. Miller*, 34 N.C. App. 209, 237 S.E.2d 552 (1977). In *Miller*, the respondent made a motion for summary judgment where the petitioner sought a partition order for two tracts of land allegedly owned by the parties as tenants by the entirety. *Id.* at 209-10, 237 S.E.2d at 553. The Davie County Superior Court, the Honorable William T. Graham presiding, initially denied the motion, but subsequently struck the original order and granted respondent's motion for summary judgment. *Id.* On appeal, petitioner argued that the trial court erred in reversing its previous order denying respondent's motion for summary judgment. *Id.* at 212, 237 S.E.2d at 555. Our Court affirmed the trial court's order holding that "[a]n order denying summary judgment is not *res judicata* and a judge is clearly within his rights in vacating such denial." *Id.* "*Miller* presented the question whether a judge who rules on a motion for summary judgment

may thereafter strike the order, rehear the motion for summary judgment, and allow the motion. Such procedure does not involve one judge overruling another, and is proper under Rule 60." *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 635, 272 S.E.2d 374, 377 (1980). Accordingly, we hold that Judge Doughton did not err in granting Defendant's motion for reconsideration of the denial of Defendant's earlier motion for summary judgment.

Additionally, we are not persuaded by Plaintiff's argument that the trial court's order should be reversed for failure to cite the Rule of Civil Procedure under which it was acting. Rule 60 of the North Carolina Rules of Civil Procedure provides that for any reason justifying relief from the operation of judgment, a court may relieve a party from a final judgment or order. N.C. Gen. Stat. § 1A-1, Rule 60 (2009). Although Rule 60 does not apply to interlocutory orders, our case law clearly establishes that a trial court is free to set aside its own earlier judgment and may even do so on its own initiative. *See Barnes v. Taylor*, 148 N.C. App. 397, 400, 559 S.E.2d 246, 248 (2002) ("[T]he trial court had authority to set aside its earlier judgment on its own initiative."). Moreover, we note that earlier in this matter, Plaintiff sought reconsideration of an interlocutory order entered by the Honorable Edwin G. Wilson, Jr. In a letter dated 1 April 2004, Plaintiff asked Judge Wilson to reconsider his "ruling on the discoverability of the Risk Management documents and incident reports" "in the interest of justice[.]" Accordingly, Plaintiff's argument is overruled.

B. Dismissal with Prejudice of Plaintiff's Claims Against the Anesthesiology Defendants

Plaintiff also argues that should we determine that the trial court could reconsider Defendant's motion for summary judgment, summary judgment was nevertheless improper in this instance. Specifically, Plaintiff contends that the Order of dismissal with prejudice against the anesthesiology Defendants did not constitute an adjudication on the merits. We disagree.

It is undisputed that Defendant's liability is derivative from the liability of its agents, the anesthesiology Defendants, under the doctrine of *respondeat superior*. *Phillips v. Rest. Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 216, 552 S.E.2d 686, 695 (2001) ("Under the doctrine of *respondeat superior*, a principal is liable for the torts of its agent which are committed within the scope of the agent's authority, when the principal retains the right to control and direct the manner in which the agent works."), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 132 (2002). Thus, a judgment on the merits in favor of the anesthesiology Defendants would preclude an action against their principal, Defendant. *See Draughon v. Harnett Cty. Bd. of Educ.*, 166 N.C. App. 464, 469-70, 602 S.E.2d 721, 726 (2004) ("The general rule in North Carolina is that judgment on the merits in favor of the agent precludes any action against the principal where, as here, the principal's liability is purely derivative."); *Pinnix v. Griffin*, 221 N.C. 348, 350, 20 S.E.2d 366, 369 (1942) ("[T]he verdict and judgment against the plaintiff on the issue of negligence in an action against the

servant is conclusive and bars a later action by the same plaintiff against the principal.").

Plaintiff contends that this case is governed by N.C. Gen. Stat. § 1B-4 which provides that

> [w]hen a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
>
> (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

N.C. Gen. Stat. § 1B-4 (2009).

In *Yates v. New South Pizza, Ltd.*, 330 N.C. 790, 412 S.E.2d 666 (1992), our Supreme Court considered "whether an injured plaintiff [was] entitled to proceed against an employer on the theory of respondeat superior after having executed, for valuable consideration, a covenant not to sue the negligent employee or his insurer." *Id.* at 791, 412 S.E.2d at 667-68. The Court held that such a plaintiff could proceed, stating that the "[p]laintiff, in good faith, executed a covenant not to sue the employee or the employee's insurer, expressly reserving the right to sue defendant. Therefore, pursuant to N.C.G.S. § 1B-4(1), defendant was not discharged from liability." *Id.* at 796, 412 S.E.2d at 670.

Plaintiff contends that the present case is like *Yates*, and that the litigation was terminated by a release and covenant not to sue. Plaintiff asserts that

> [t]he Settlement Agreement, Release and Covenant not to Sue was signed on August 1, 2006, ending the action against the Anesthesia Defendants. Judge Helms' Order was signed by him on August 22, 2006, twenty-one (21) days later. That Order was entered solely to close the Court file. That Order was entered by the Court on its own motion. There was no voluntary dismissal of the case by the Plaintiff's attorneys[.]

Contrary to Plaintiff's contention, however, the signing of the Settlement Agreement did not end the action against the anesthesiology Defendants. The Settlement Agreement expressly stated that "an additional part of the consideration for this Agreement is that [Plaintiff] shall file a Notice of Dismissal of [this] Action with prejudice as to [the anesthesiology] Defendants[.]" Thus, the Settlement Agreement itself established that this matter was not terminated until Plaintiff filed a notice of dismissal with prejudice, and this dismissal was entered by the trial court.

Plaintiff also asserts that the trial court's Order was "a ministerial act" entered "to close the Court file." Plaintiff's interpretation is contrary to the plain language of the Order. In *Barnes v. McGee*, 21 N.C. App. 287, 204 S.E.2d 203 (1974), this Court reasoned that

> [w]e think the words "with prejudice" are plain and should be given their plain meaning. If this practice is followed in the interpretation of all of our new Rules of Civil Procedure, much litigation can be

> avoided. It should not be necessary for the court in this and other cases to look behind the words "with prejudice" to determine the meaning of the court in its judgment of dismissal. The judge, in his discretion, could have dismissed the action on such other terms as he, in his discretion, determined that justice required.

Id. at 290, 204 S.E.2d at 205-06; *see Riviere v. Riviere*, 134 N.C. App. 302, 306, 517 S.E.2d 673, 676 (1999) ("[I]t is well settled in this state that a voluntary dismissal with prejudice is a final judgment on the merits."); *Graham v. Hardee's Food Sys., Inc.*, 121 N.C. App. 382, 384, 465 S.E.2d 558, 559-60 (1996) (A notice of dismissal by a plaintiff who has once dismissed in any court of this or any other state or of the United States "is with prejudice, and it operates as a disposition on the merits and precludes subsequent litigation in the same manner as if the action had been prosecuted to a full adjudication against the plaintiff.").

In *Wrenn v. Maria Parham Hosp., Inc.*, 135 N.C. App. 672, 522 S.E.2d 789 (1999), *disc. rev. denied, cert. denied*, 351 N.C. 372, 543 S.E.2d 149 (2000), this Court held that a plaintiff's negligence claim against an alleged employer on the theory of *respondeat superior* was barred where the plaintiff dismissed with prejudice his claim against the alleged employee. *Id.* at 679, 522 S.E.2d at 793. Our Court noted that even if the voluntary dismissal had not recited that it was "with prejudice," because it was the second dismissal of the plaintiff's claims against the employee, it would have operated as an adjudication on the merits. *Id.* at 680, 522 S.E.2d at 793-94. "[D]ismissal with prejudice, unless the court has made some other provision, is subject to the

usual rules of res judicata and is effective *not only on the immediate parties but also on their privies*." *Id.* at 681, 522 S.E.2d at 794 (quoting *Barnes*, 21 N.C. App. at 289, 204 S.E.2d at 205 (internal citation and quotation marks omitted)). "Thus, [a] judgment on the merits in favor of the employee precludes any action against the employer where, as here, the employer's liability is purely derivative." *Id.*

Here, as in *Wrenn*, the trial court entered an Order of voluntary dismissal with prejudice of Plaintiff's claims against Defendant's agents. Furthermore, this was Plaintiff's second dismissal of her claims against these Defendants. Thus, even if the Order had not stated that it was "with prejudice," the Order would have operated as an adjudication on the merits. *See id.* at 680, 522 S.E.2d at 793-94. For the foregoing reasons, we conclude that the trial court's Order of dismissal with prejudice constituted a final adjudication on the merits, thus precluding Plaintiff's action against Defendant.

Accordingly, the trial court's Order is

AFFIRMED.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).