NO. COA10-108

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

JOHN KEELY HOWARD and wife,
CYNTHIA HICKLIN HAMMOND,
Plaintiffs,

v. Mecklenburg County
08 CVS 13045

ORTHOCAROLINA, P.A.; PRESBYTERIAN ORTHOPAEDIC HOSPITAL; THE PRESBYTERIAN HOSPITAL; PRESBYTERIAN ANESTHESIA ASSOCIATES, P.A.; PRESBYTERIAN HEALTHCARE SYSTEM; ALFRED L. RHYNE, III, M.D.; FAISAL A. SIDDIQUI, M.D.; THEODORE A. BELANGER, M.D.; FRANCIS J. STRANICK, M.D.; MATTHEW J. MINNICK, CRNA; KELLY HARLESS, RN; AUBREY T. WRIGHT, M.D.; KEVIN T. RUNEY; SOUTH CAROLINA SURGICAL MONITORING SERVICES, LLC; NORTH CAROLINA SURGICAL MONITORING SERVICES, LLC; SENTIENT MEDICAL SYSTEMS; SURGICAL MONITORING SERVICES, INC. AND JEFFREY H. OWEN,
Defendants.

Appeal by Defendants from Order entered 15 October 2009 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 September 2010.

Carruthers & Roth, P.A., by Norman F. Klick, Jr. and Kevin A. Rust for Defendant-Appellants Alfred L. Rhyne, III, M.D.,

Faisal A. Sidiqui M.D., Theodore A. Belanger, M.D., Orthocarolina, P.A.

Coffey Bomar LLP, by Tamura D. Coffey and Amanda B. Palmieri, for Defendant-Appellants Presbyterian Orthopaedic Hospital, L.L.C., The Presbyterian Hospital, Presbyterian Healthcare System, Matthew J. Minnick, C.R.N.A, and Kelly Harless, R.N.

McKaig & McKaig, P.A., by A. Stuart McKaig, III, and Heather H. McKaig and Messa & Associates P.C., by Joseph L. Messa, Jr. and Thomas N. Sweeney, for Plaintiff-Appellees.

BEASLEY, Judge.

Defendants appeal from an order denying their motions to dismiss Plaintiffs' complaint. We dismiss Defendants' appeal as interlocutory.

This action arose from a surgical procedure performed at Presbyterian Orthopedic Hospital on 14 June 2005. On 21 May 2008, Plaintiffs filed a motion seeking an extension of the statute of limitations to "investigate the merits of filing a medical malpractice action" against Defendants. Specifically, Plaintiffs sought "additional time to have the relevant medical records reviewed by a physician in order to comply with N.C.R.C.P. 9(J)." Without the extension, Plaintiffs' medical malpractice claim would have expired on 13 June 2008.

On 22 May 2008, the trial court granted Plaintiffs' motion and extended the statute of limitations until 9 October 2008. Both the Plaintiffs' motion and the trial court's order were filed under

docket number "08-CVS-13045." Though Plaintiffs' motion was granted in May, Plaintiffs failed to file the trial court's order until 12 June 2008. Additionally, on 12 June 2008, Plaintiffs filed an application seeking additional time to file a complaint "as provided in Rule 3 of the Rules of Civil Procedure." By attached exhibit, Plaintiffs alleged numerous common law causes of action, omitting any medical malpractice claims. The trial court granted Plaintiffs' motion on 12 June 2008. The motion, and the subsequent order granting the motion, were filed under a docket number "08-CVS-13044."

On 2 July 2008, Plaintiffs filed a complaint against Defendants under docket number "08-CVS-13044." In the complaint Plaintiffs again raised numerous common law causes of action, omitting any claims for medical malpractice. Plaintiffs asserted that "[a] Rule 9(j) certification is not required for the filing of this Complaint." On 21 August 2008, Plaintiffs voluntarily dismissed their complaint alleging common law causes of action against Defendants. Plaintiffs' notice of voluntary dismissal was once again filed under docket number "08-CVS-13044."

On 9 October 2008, Plaintiffs filed a second complaint against Defendants this time under docket number "08-CVS-13045." In this complaint Plaintiff raised many of the earlier dismissed common law causes of action and included the previously omitted medical

malpractice claims.

Generally raising the same arguments, counsel for both the hospital Defendants and physician Defendants moved to dismiss Plaintiffs' cause of action arguing that Plaintiffs' complaint should be dismissed as barred by the statute of limitations. On 15 October 2009, the trial court issued an order denying Defendants' motion to dismiss. In its order the trial court determined that Plaintiffs' action alleging "non-malpractice" claims did not void the 9(j) extension granted on 21 May 2008 and Plaintiffs' complaint could not be dismissed for failure to include a physician certification. Additionally, the trial court found that because the Plaintiffs' Rule 9(j) expert did not engage in the same specialties as Defendants, Dr. Francis J. Stranick, M.D., and Dr. Aubrey T. Wright, M.D., the malpractice causes of action were dismissed as to those Defendants. Thereafter, the trial court determined that there was no just cause for delay for appellate review of this decision pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Defendants filed notice of appeal from the trial court's order.

Defendants' numerous assignments of error and arguments on appeal can be summarized in two arguments: I) the trial court erroneously failed to determine that Plaintiffs' October 2008 complaint was filed outside the applicable statute of limitations;

and II) the trial court erroneously failed to determine that Plaintiffs' 9(j) extension was void.

Because Defendants appeal from an order denying their motions to dismiss, we must first address the interlocutory nature of this appeal.

"'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.'" *Curl v. American Multimedia, Inc.*, 187 N.C. App. 649, 652, 654 S.E.2d 76, 79 (2007) (quoting *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). "Typically, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007). However, interlocutory orders are reviewable:

> (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

Turner v. Norfolk Southern Corp., 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (internal citations quotations omitted).

Our Court has held that "when an appeal is from an order which

is final as to one party, but not all, and where the trial court has certified the matter under Rule 54(b), [our Court] must review the issue." *James River Equipment, Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 340, 634 S.E.2d 548, 552 (2006). "Rule 54(b) certification by the trial court is reviewable by this Court on appeal in the first instance because the trial court's denomination of its decree as 'a final . . . judgment does not make it so." *First Atl. Mgmt. Corp. v. Dunlea Realty* Co., 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (quoting *Tridyn Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979)). While afforded great deference on appeal, certification by a trial court that "there is no just reason for delay" is not binding upon this Court. *See DKH Corp. v. Rankin-Patterson Oil Co., Inc.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998). Settling the interlocutory nature of an appeal is a matter properly reserved for appellate courts. *First Atl. Mgmt.*, 131 N.C. App. at 247, 507 S.E.2d at 60.

Here, while the trial court's order is final as to Defendants Dr. Francis J. Stranick, M.D. and Dr. Aubrey T. Wright, M.D. we disagree with the trial court's determination that there is no just reason for delay. "While perhaps not the sole consideration, . . . application of the substantial right analysis [is] [a] prerequisite to the court's decision regarding Rule 54(b)

certification that there existed 'no just reason to delay the appeal.'" *Id.* at 249, 507 S.E.2d at 61-62. A substantial right is one that "will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment. [T]he right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed." *Blackwelder v. State Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780-81 (1983). "Whether a substantial right is affected is determined on a case-by-case basis and should be strictly construed." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002).

In this case, the trial court's order does not affect a substantial right belonging to Defendants. "It is well established that if a complaint is filed without a Rule 9(j) certification, Rule 9(j) mandates that the trial court grant a defendant's motion to dismiss." *Ford v. McCain*, 192 N.C. App. 667, 671, 666 S.E.2d 153, 156 (2008). Defendants generally argue that a substantial right is lost because they will lose their opportunity to dismiss Plaintiffs' action for failure to obtain expert certification. We disagree. Our Supreme Court has explained that the avoidance of a full trial on the merits is not a "substantial right," warranting immediate appellate review. *See Bailey v. Gooding*, 301 N.C. 205,

210, 270 S.E.2d 431, 434 (1980). In *Estate of Spell v. Ghanem*, our Court applied this reasoning to a medical malpractice action. 175 N.C. App. 191, 622 S.E.2d 725 (2005). There, the defendants asserted that, absent immediate appellate review, they would lose the right to have the plaintiffs' malpractice dismissed for failure to obtain Rule 9(j) certification. *Id.* at 194, 622 S.E.2d at 727. Addressing this argument, our Court held that "avoidance of a trial is not a substantial right that would make . . . an interlocutory order appealable." *Id.* at 195, 622 S.E.2d at 729 (internal quotation marks omitted). Accordingly, Defendants' argument that they will lose a substantial right absent immediate appellate review, is without merit.

Additionally, Defendants, by motion, petition this Court for a writ of certorari pursuant to Rules 2 and 21 of the North Carolina Rules of Appellate Procedure. "While it is true that this Court has authority to issue a writ of certiorari to review a trial court order 'when no right of appeal from an interlocutory order exists,'" *Stone v. Martin*, 69 N.C. App. 650, 652, 318 S.E.2d 108, 110 (1984) (internal quotations omitted), Defendants in the present action have failed to present a compelling issue warranting immediate appellate review. We therefore decline to exercise our discretion and deny Defendants' petition for a writ of certiorari.

Dismissed.

Judges MCGEE and BRYANT concur.

Report per Rule 30(e).