

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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 A p p e l l a t e P r o c e d u r e .

NO. COA10-1118
NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2011

MARY L. STEPP,
Plaintiff,

v.

Henderson County
No. 08 CVS 2135

AWAKENING HEART, P.A., NANCY L.
TARLOW, ISLE OF SKY CHIROPRACTIC,
PLLC and JENNIFER J. HARRIS,
Defendants.

Appeal by plaintiff Mary Linda Stepp from judgment entered 16 April 2010 by Judge Dennis J. Winner in Henderson County Superior Court. Heard in the Court of Appeals 23 February 2011.

Karolyi-Reynolds, PLLC, by James O. Reynolds, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Dale A. Curriden, for defendant-appellee.

STEELMAN, Judge.

Where the trial court did not certify the trial court's order for summary judgment as to defendants Nancy Tarlow and Awakening Heart for immediate appeal pursuant to Rule of Civil Procedure 54(b) and plaintiff failed to show she would be

deprived of a substantial right absent immediate review pursuant to N.C. Gen. Stat. § 1-277 (a) and N.C. Gen Stat. § 7A-27 (d) (1), plaintiff's appeal is dismissed as interlocutory.

I. Factual and Procedural Background

On 5 May 2004, Mary Linda Stepp ("plaintiff") began treatment with defendant Nancy Tarlow, D.C. ("Tarlow") at defendant Awakening Heart, P.A. ("Awakening Heart") after sustaining injuries to her wrists from a motor vehicle accident on 1 May 2004. Plaintiff complained of pain, including tingling, soreness and numbness in her wrists. Treatment continued until 1 November 2004. On 14 March 2005, plaintiff was examined for insurance settlement purposes.

Thereafter, plaintiff sought treatment from defendant Jennifer J. Harris, D.C. ("Harris") of defendant Isle of Sky Chiropractic, PLLC ("Isle of Sky"). Plaintiff remained under Harris and Isle of Sky's care from 12 August 2005 until 30 December 2005. Harris diagnosed plaintiff with carpal tunnel syndrome.

On 1 May 2007, plaintiff executed a release settling all claims arising from the 1 May 2004 accident. On 13 November 2008, plaintiff was diagnosed with permanent post-traumatic degenerative arthrosis of both wrists.

On 14 August 2008, plaintiff obtained an Order Extending Statute of Limitations in a Medical Malpractice Action.

Plaintiff then filed a complaint against defendants on 9 December 2008, alleging negligent chiropractic treatment by defendants resulting in permanent injury to her wrists.

On 11 May 2009, plaintiff filed an amended complaint, pursuant to a consent order. Tarlow, Awakening Heart, Harris and Isle of Sky filed motions for summary judgment. The trial court granted the motion with respect to Tarlow and Awakening Heart, dismissing plaintiff's complaint with prejudice. The summary judgment motion was denied as to Harris and Isle of Sky. The trial court did not certify that the order was immediately appealable pursuant to Rule 54(b) of the Rules of Civil Procedure.

Plaintiff appeals.

II. Interlocutory Nature of Appeal

We first address whether plaintiff's appeal is properly before this Court. An appeal is interlocutory if "it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *Howerton v. Grace Hosp., Inc.*, 124 N.C. App. 199, 201, 476 S.E.2d 440, 442 (1996).

A party may only appeal an interlocutory order if

- (1) the order is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to Rule 54(b) of the Rules of Civil Procedure, or
- (2) the trial court's decision

deprives the appellant of a substantial right that will be lost absent immediate review.

Gregory v. Penland, 179 N.C. App. 505, 509, 634 S.E.2d 625, 628 (2006); see also N.C. Gen. Stat. § 1-277(a) (2009); N.C. Gen. Stat. § 7A-27(d)(1) (2009).

Since the trial court did not certify the order in the instant case for immediate appeal pursuant to Rule 54(b), we must determine if a substantial right will be affected absent immediate review. See, e.g., *In re Estate of Redding v. Welborn*, 170 N.C. App. 324, 328, 612 S.E.2d 664, 668 (2005).

A substantial right is "one which will clearly be lost or irretrievably adversely affected if the order is not reviewable before final judgment." *Blackwelder v. State Dep't. of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983). The burden of demonstrating that a substantial right will be affected is upon the appealing party. See *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). While avoidance of two trials on the same issues and the possibility of inconsistent verdicts may affect a substantial right, generally, avoidance of a trial on different issues does not. *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982).

Plaintiff contends that such a right is implicated because her claims rest upon the same factual issues, allowing for the

possibility of inconsistent verdicts. We disagree. Although plaintiff's claims concern the breach of standard of care by defendants, distinct factual bases exist for those claims.

Plaintiff alleges Tarlow and Awakening Heart were negligent in failing to examine or failing to document an examination of plaintiff's hands or wrists or diagnose or treat her condition, in failing to maintain plaintiff's intake forms, health and complaint reports, and by conducting fraudulent record keeping.

Plaintiff alleges Harris and Isle of Sky negligently diagnosed plaintiff's condition without consulting radiographs or performing a wrist examination, and were negligent in failing to maintain examinable records of treatment.

Plaintiff's claims concern each defendant's separate actions and the extent to which each defendant deviated from the applicable standard of chiropractic care. Further, plaintiff's claims concern treatment during two distinct periods of time; plaintiff's treatment under Tarlow and Awakening Heart spanned from 5 May 2004 to 1 November 2004, while Harris and Isle of Sky saw plaintiff from 12 August 2005 to 30 December 2005. Since plaintiff's claims are not predicated upon the same factual issues, there is no risk that plaintiff will be prejudiced by inconsistent verdicts. *See Green*, 305 N.C. at 608, 290 S.E.2d at 595-596 ("the issue in the principal case is whether Duke independently violated a separate and unrelated duty of care to

plaintiff . . . [t]he resolution of these ultimate issues does not depend upon similar factual issues or similar proof." (citation omitted).

Plaintiff has failed to show that she would be deprived of a substantial right absent immediate review of the trial court's order. This appeal must be dismissed.

DISMISSED.

Judges CALABRIA and BEASLEY concur.

Report per Rule 30(e).