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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-460

Filed 6 February 2024

Mecklenburg County, No. 11 CVS 18175

EDWARD G. CONNETTE, as guardian ad litem for AMAYA GULLATTE, a Minor, and ANDREA HOPPER, individually and as parent of AMAYA GULLATTE, a Minor, Plaintiffs,

v.

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY d/b/a CAROLINAS HEALTHCARE SYSTEM, and/or THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY d/b/a CAROLINAS MEDICAL CENTER, and/or THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY d/b/a LEVINE CHILDREN'S HOSPITAL, GUS C. VANSOESTBERGEN, CRNA, Defendants.

Appeal by defendants from order entered 9 March 2023 by Judge Robert C.

Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 November 2023.

*Edwards Kirby, LLP, by Mary Kathryn Kurth, John R. Edwards, and Michael E. Sindoni, for plaintiffs-appellees.*

*Robinson, Bradshaw & Hinson, P.A., by Matthew W. Sawchak, Jonathan C. Krisko, Erik R. Zimmerman, H. Hunter Bruton, and Travis S. Hinman, and Lincoln Derr PLLC, by Tricia M. Derr and Maria D. Ortiz, for defendants-appellants.*

ZACHARY, Judge.

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Defendants appeal from the trial court’s order denying their motion “to apply the law of the case on remand” from this Court following our Supreme Court’s opinion in *Connette v. Charlotte-Mecklenburg Hospital Authority* (“*Connette II*”), 382 N.C. 57, 876 S.E.2d 420 (2022). The full background of this case can be found in *Connette II*, as well as this Court’s opinion in *Connette v. Charlotte-Mecklenburg Hospital Authority* (“*Connette I*”), 272 N.C. App. 1, 845 S.E.2d 168 (2020), which our Supreme Court reversed in *Connette II*. We recite only those facts pertinent to the issues advanced in the appeal presently before us.

In *Connette II*, our Supreme Court allowed Plaintiffs’ petition for discretionary review of this Court’s determination in *Connette I*, which reviewed issues arising from the 2018 trial of this case. 382 N.C. at 61, 876 S.E.2d at 423–24. Two of the seven Justices of our Supreme Court recused themselves from the consideration of *Connette II*. *Id.* at 73, 876 S.E.2d at 431. By a three-to-two vote, our Supreme Court reversed this Court’s opinion in *Connette I* and “remanded to the Court of Appeals for further remand to the trial court for a new trial.” *Id.* On 1 December 2022, this Court entered its mandate reversing the certification of the opinion in *Connette I* and remanding to the trial court “for the trial court to conduct a new trial in this matter consistent with the opinion of the Supreme Court.”

Before the trial court on remand, on 22 December 2022, Defendants filed a motion requesting that the trial court apply the law of the case in either of two ways. First, Defendants cited *Fraday v. Groves Thread/General Accident Insurance Co.*, 312

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N.C. 316, 317–18, 321 S.E.2d 835, 836 (1984), for the proposition that our “Supreme Court may reverse the Court of Appeals *only* if at least four Justices vote to reverse.” Because the majority in *Connette II* comprised only three Justices, Defendants argued that *Connette I*—in which this Court “affirmed [the trial court]’s [2018] final judgment in Defendants’ favor”—remained undisturbed by *Connette II* and thus persisted “as the law of the case.”

Alternatively, Defendants asserted that Plaintiffs proceeded on two separate theories of negligence in the 2018 trial: “the negligent-plan theory” and “the negligent-administration theory.” Although the trial court’s exclusion of the expert witness testimony “barred Plaintiffs from pursuing the negligent-plan theory[,]” Defendants posited that the exclusion of that testimony did not impede Plaintiffs’ pursuit of the negligent-administration theory. In that the jury returned a verdict in Defendants’ favor, and Defendants claimed that “[n]either appellate court disturbed the 2018 defense verdict on negligent administration,” Defendants asserted that the 2018 jury verdict “stands as the law of the case” despite our Supreme Court’s reversal and remand in *Connette II*.

On 22 February 2023, Defendants’ motion came on for hearing in Mecklenburg County Superior Court. On 9 March 2023, the trial court entered an order denying Defendants’ motion and rejecting both arguments raised therein. First, the trial court denied with prejudice that part of Defendants’ motion that “asks the [trial c]ourt to forgo further proceedings in this matter on the basis that only three Justices of the

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North Carolina Supreme Court voted to reverse the decision of the North Carolina Court of Appeals and to remand the case for a new trial[.]” And second, the trial court denied—“without prejudice to Defendants’ ability to submit later motions in limine”—that part of Defendants’ motion that “asks the Court to limit the new trial in this matter to Plaintiffs’ contention of negligence about the anesthesia plan[.]” Defendants timely filed notice of appeal.

Notwithstanding Defendants’ arguments on appeal concerning our Supreme Court’s authority in *Connette II* to either reverse its own precedent or to reverse this Court’s opinion in *Connette I*, it is beyond dispute that this Court is bound by its own prior orders. See *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). On remand from our Supreme Court in *Connette II*, this Court entered its mandate in the form of a certification of judgment on 1 December 2022. See N.C.R. App. P. 32(a) (“Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs.”).

The certification of judgment included the following relevant paragraph:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the certification of the opinion of this Court heretofore made to the trial tribunal be, and it is hereby, Reversed and the matter is Remanded to the trial tribunal (Superior Court, Mecklenburg County) for the trial court to conduct a new trial in this matter consistent with the opinion of the Supreme Court.

Despite Defendants’ various arguments in favor of recognizing this Court’s

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opinion in *Connette I* as the “law of the case” on remand from *Connette II*, this certification of judgment clearly states that this Court has reversed the certification of judgment of *Connette I*. We are thus bound by our mandate of 1 December 2022 to reject Defendants’ arguments and affirm the trial court’s order.

Moreover, our mandate also directs “the trial court to conduct a new trial in this matter consistent with the opinion of the Supreme Court.” The mandates of our appellate courts are “binding upon [the trial courts] and must be strictly followed without variation or departure. . . . Otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of authority over inferior tribunals.” *D & W, Inc. v. City of Charlotte*, 268 N.C. 720, 722–23, 152 S.E.2d 199, 202 (1966) (cleaned up). In that Defendants’ motion represented an indirect challenge to the opinion of our Supreme Court in *Connette II*, and our mandate directed “the trial court to conduct a new trial in this matter consistent with the opinion of the Supreme Court[,]” the trial court did not err in complying with our mandate and denying Defendants’ motion.

For the foregoing reasons, the trial court’s order is affirmed. Defendants’ arguments are preserved, should they seek further review.

AFFIRMED.

Judges TYSON and FLOOD concur.

Report per Rule 30(e).