

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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 Appellate Procedure.

NO. COA11-948
NO. COA11-1024

NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

THE ESTATE OF AKEL DAVIS, by
WILLIAM MILLS, ADMINISTRATOR;
and SHAMEKIA DAVIS,
Individually,
Plaintiffs,

v.

Durham County
No. 10 CVS 3420

AMY O. GROFF, M.D. and
MID-CAROLINA OBSTETRICS &
GYNECOLOGY, P.C.,
Defendants.

Appeal by Defendants from order entered 17 February 2011 by Judge Paul C. Ridgeway and appeal by Plaintiffs from order entered 18 April 2011 by Judge Michael R. Morgan, in Superior Court, Durham County. Heard in the Court of Appeals 13 December 2011. As the issues presented by both Plaintiffs' and Defendants' appeals to this Court arise out of the same action and involve common questions of law, we have consolidated the appeals for hearing pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure.

Grant Richman, PLLC, by Robert M. Grant, Jr. and Howard S. Richman; and Kuniholm Law Group, by Elizabeth F. Kuniholm, for Plaintiffs.

Yates, McLamb & Weyher, L.L.P., by John W. Minier and Kathrine E. Fisher, for Defendants.

McGEE, Judge.

This action involves wrongful death and medical malpractice claims brought on behalf of Akel Davis, who died in Wake County on 27 July 2005, one day after his delivery by Defendant Amy O. Groff, M.D. Durham County is the resident county of Plaintiff William Mills, Administrator of the Estate of Akel Davis, and Plaintiffs filed this action on 7 May 2010 in Durham County. None of the remaining individual parties were residents of Durham County at the time of Akel Davis's delivery and death. Defendant Mid-Carolina Obstetrics & Gynecology, P.C. is a North Carolina professional corporation with its principal place of business in Wake County.

Defendants filed a motion to change venue on 8 November 2010. In their motion, Defendants argued that the only connection to Durham County was that Plaintiff William Mills resided in Durham County and therefore Durham County was an improper venue for the action. Judge Michael R. Morgan denied Defendants' motion to change venue by order entered 8 December 2010. Defendants filed a second motion to change venue on 24

January 2011, arguing that an opinion of this Court filed on 21 December 2010, *Roberts v. Adventure Holdings, LLC*, __ N.C. App. __, 703 S.E.2d 784 (2010), *disc. review denied*, 365 N.C. 187, 707 S.E.2d 241 (2011), established that William Mills's residency in Durham County was insufficient to make venue in Durham County proper. Judge Paul C. Ridgeway denied Defendants' 24 January 2011 motion to change venue by order entered 17 February 2011. Defendants appeal.

Defendants' Appeal

Defendants argue that the trial court erred in denying their motion for a change of venue. We disagree.

First, we note that the trial court's 17 February 2011 order denying Defendants' motion for a change of venue is interlocutory. However, "because [D]efendants have alleged that the county indicated in the complaint is improper, we address the merits of [D]efendants' appeal." *Roberts*, __ N.C. App. at __, 703 S.E.2d at 786.

Defendants argue that this Court's opinion in *Roberts* constituted a change in the law, rendering Durham County an improper venue for the present case. The trial court stated in its 17 February 2011 order that, because a different judge had already denied Defendants' earlier motion seeking a change of venue, the trial court was without authority to grant

Defendants' latest motion for a change of venue. The trial court further stated that "even if [*Roberts*] constitute[d] a 'changed circumstance' justifying reconsideration of this matter . . . the relief sought by . . . Defendants must nonetheless be denied." Defendants' reliance on *Roberts* is misplaced.

This Court held in *Roberts* that Durham County, the resident county of the plaintiff's guardian *ad litem* (GAL), was not a proper county for venue absent any other connection between the parties or the subject matter and Durham County. *Roberts*, __ N.C. App. at __, 703 S.E.2d at 787-88. The *Roberts* Court clearly stated: "North Carolina courts have not addressed the specific issue of whether or not the residence of a GAL is sufficient to confer venue." *Id.* at __, 703 S.E.2d at 786. However, North Carolina courts have addressed the issue of whether the residence of an administrator of an estate is sufficient to confer venue. Our Supreme Court has held: "While an executor or administrator must be sued in his official capacity in the county where he qualified . . . he may bring an action in the county where he resides[.]" *Trust Co. v. Finch*, 232 N.C. 485, 486, 61 S.E.2d 377, 378 (1950) (citations omitted). Defendants acknowledge this holding in *Finch*, but argue that "*Roberts* changed the law." This Court is without

authority to change law established by our Supreme Court or, for that matter, prior decisions of this Court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). The *Roberts* Court cited *Blackwell v. Vance Trucking Co.*, 139 F. Supp. 103 (E.D.S.C. 1956) to explain why the law regarding administrators and other fiduciaries did not apply to GALs. The *Blackwell* Court stated:

[E]xecutors, administrators and these other named representatives are the real parties in interest. Executors and administrators are invested with the power and duty to take into custody the assets of the estate and to manage and preserve such assets; to institute and defend suits in behalf of the estate and generally to control and handle the property of the estate. Also it is generally true that executors and administrators alone can bring actions for the benefit of the estate.

. . . .

But a guardian ad litem is something quite different. He is appointed for the mere temporary duty of protecting the legal rights of an infant in a particular suit and his duties and his office end with that suit. He is not a party in interest in the suit, no property comes into his hands, and he has no powers nor duties either prior to the institution of the suit or after its termination.

Id. at 106-07 (citation omitted).

Roberts has no application in the matter before us. The law, as stated by our Supreme Court in *Finch*, stands. Durham

County, the resident county of the Administrator of the Estate of Akel Davis, was a proper venue in which to initiate this action. The trial court did not err in denying Defendants' motion for a change of venue.

Plaintiffs' Appeal

Plaintiffs argue that the trial court erred in granting Defendants' motion to stay all proceedings pending resolution of Defendants' appeal. We disagree.

Plaintiffs' appeal is also interlocutory. "In the absence of any final judgment, we may hear an interlocutory appeal if the order affects a substantial right. However, 'the party seeking review of the interlocutory order still must show that it affects a substantial right[.]'" *Griessel v. Temas Eye Ctr., P.C.*, 199 N.C. App. 314, 316, 681 S.E.2d 446, 447 (2009) (citations omitted).

[T]he appellant must include in its statement of grounds for appellate review "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right."

[The appellant has] the burden of showing why the appeal affects a substantial right. "It is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]" Where the appellant fails to carry the burden of

making such a showing to the court, the appeal will be dismissed.

Johnson v. Lucas, 168 N.C. App. 515, 518-19, 608 S.E.2d 336, 338 (2005) (citations omitted). Plaintiffs state the following in their brief:

Plaintiffs claim that the orderly and timely progress of pre-trial discovery of expert witnesses to be completed in accordance with a Discovery Scheduling Order entered in this medical malpractice action, which discovery will necessarily need to be completed regardless of the ultimate decision about venue, is a substantial right that will be adversely affected or lost if this appeal is not heard.

Plaintiffs cite to no authority in support of this "claim." Plaintiffs make no argument, beyond that quoted above, that the trial court's 18 April 2011 order allowing Defendants' motion to stay affects a substantial right of Plaintiffs. Plaintiffs fail to carry their burden of showing that the grant of Defendants' motion to stay affected any substantial right of Plaintiffs' permitting appellate review of the 18 April 2011 interlocutory order. We therefore dismiss Plaintiffs' appeal.

COA11-948 is affirmed; COA11-1024 is dismissed.

Judges STEELMAN and McCULLOUGH concur.

Report per Rule 30(e).