

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-1395
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

DEBORAH B. HARMON,
Plaintiff,

v.

Wake County
No. 09 CV 25433

DONALD G. HUNT, JR., JAMIE L.
VAVONESE, JASON M. FEARON, KRISTEN
G. ATKINS a/k/a KRISTEN G. ATKINS-
MOMOT & AKINS LAW FIRM, P.C. f/k/a
THE LAW OFFICES OF AKINS, HUNT &
FEARON, PLLC,
Defendants.

Appeal by Plaintiff from order entered 24 May 2011 by Judge
Donald W. Stephens in Wake County Superior Court. Heard in the
Court of Appeals 9 May 2012.

*Bryant Duke Paris, III Professional Limited Liability
Company, by Bryant Duke Paris, III, for Plaintiff-
Appellant.*

*Yates, McLamb & Weyher, L.L.P., by Barbara B. Weyher and
Samuel G. Thompson, Jr., for Defendant-Appellee.*

BEASLEY, Judge.

Deborah B. Harmon (Plaintiff) appeals the trial court's
dismissal of her legal negligence action. For the following
reasons, we affirm.

On 23 December 2009, Plaintiff filed a complaint alleging legal negligence against Donald G. Hunt, Jr., Jamie L. Vavonese, Jason M. Fearon, Kristen G. Atkins a/k/a Kristen G. Atkins-Momot, Akins Law Firm, P.C. f/k/a the Law Offices of Akins, Hunt & Fearon, PLLC (Defendants) stemming from Defendants' previous representation of Plaintiff in an action for breach of fiduciary duty against Daniel L. Frangis (Frangis) and Right Track Enterprises of Cary, Inc. (Right Track). In Defendants' answer, they denied negligence and raised, *inter alia*, the defense of collateral estoppel and law of the case. Defendants also moved for judgment on the pleadings. On 24 May 2011, the trial court granted Defendants' motion on the pleadings. Plaintiff gave timely notice of appeal.

Plaintiff asserts that the trial court erred by granting Defendant's motion for judgment on the pleadings where Plaintiff's allegations were sufficient to allow her to proceed on her claims for legal negligence and respondeat superior. We disagree.

"Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (internal quotations and citations omitted). "This Court reviews *de novo* a trial court's ruling on

motions for judgment on the pleadings. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Builders Mut. Ins. Co. v. Glascarr Properties, Inc.*, 202 N.C. App. 323, 325, 688 S.E.2d 508, 510 (2010).

Defendants contend that the principles of collateral estoppel and law of the case prevent Plaintiff from relitigating issues that were resolved in our unpublished opinion in *Harmon v. Frangis*, 197 N.C. App. 231, 676 S.E.2d 670 (2009) (unpublished opinion). We agree.

"Collateral estoppel precludes relitigation of an issue decided previously in judicial or administrative proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in an earlier proceeding." *Lancaster v. N.C. Dep't of Env't & Natural Res.*, 187 N.C. App. 105, 111, 652 S.E.2d 359, 363 (2007) (citations omitted). "The elements of collateral estoppel . . . are as follows: (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *McDonald v. Skeen*, 152 N.C. App. 228, 230, 567 S.E.2d 209, 211 (2002).

In *Harmon*, Plaintiff challenged the trial court's enforcement of a settlement agreement. Plaintiff was

represented by Defendants in an action for breach of fiduciary duty and fraud against Frangis and Right Track stemming from the operation of a general partnership. Plaintiff's then attorneys, Defendants, filed a motion to withdraw from representing her. Before the trial court ruled on the motion, Plaintiff retained the counsel of David Duke. Before the trial court's ruling on the motion to withdraw, Defendants entered into a settlement agreement on Plaintiff's behalf. At the hearing on the motion to withdraw, the trial court granted Defendants' motion to withdraw. The trial court also granted the adverse party's motion to enforce the settlement. Plaintiff appealed the enforcement of the settlement arguing that the settlement was not valid because she did not consent to settlement and her attorneys acted without authority. In *Harmon*, our Court affirmed the trial court's decision to enforce the settlement agreement finding that

[P]laintiff's new attorney, David Duke, admitted himself that plaintiff did not sign the agreement because she had simply changed her mind. Plaintiff does not explain why changing her mind after an agreement had been entered into is a legally sufficient reason for the agreement to be invalidated, and this Court declines to create one on her behalf.

In this case, Plaintiff alleges that Defendants negligently represented her in reaching the settlement. Moreover, Plaintiff asserts that her allegations in the legal negligence case were

sufficient to state a claim for professional malpractice and our decision in *Harmon* does not bar Plaintiff's legal negligence claim. Plaintiff relies on our Supreme Court's decision in *Beckwith v. Llewellyn*, 326 N.C. 569, 391 S.E.2d 189 (1990).

In *Beckwith*, the plaintiff instituted a malpractice action against the attorneys that previously represented her in a wrongful death action. The plaintiff in *Beckwith* alleged that her former attorneys failed to fully advise her about the calculation of attorney fees. The Court in *Beckwith* held that collateral estoppel was not a bar to the plaintiff's malpractice claim where the issues to be resolved were not identical. "The focus in the prior case was not whether the attorneys had taken advantage of their client but whether the settlement reached with the opposing party was fair. . . . In the prior case, plaintiff and her attorneys were on the same side; in the present case they are adversaries." *Id.* at 574, 391 S.E.2d at 192.

Plaintiff in the case *sub judice* asserts that the same principles apply in this case. Although Plaintiff highlights that the *Beckwith* Court considered the relationship between the parties and nature of the claims, a further reading of *Beckwith* reveals a critical distinguishing factor between *Beckwith* and the present case. The plaintiff in *Beckwith*

[did] not seek to set aside the agreement

with the original defendants settling the lawsuit; nor [did] she seek to set aside the court's approval of the settlement. . . . This is not a proceeding to set aside or reopen the order approving the settlement but instead to recover damages based upon a breach of fiduciary duties on the part of her attorneys in obtaining it. Thus, the issues to be concluded . . . are not the same as those involved in the prior action and the issues in question are not identical to the issues . . . actually litigated . . . in the prior action.

Id. at 575, 391 S.E.2d at 192. (citations and internal quotations omitted).

Unlike *Beckwith*, Plaintiff in this case is seeking to relitigate issues addressed in *Harmon*. In this case, Plaintiff commenced a civil action for negligence against Defendants alleging that Defendants breached their duty to Plaintiff

- a. by failing to possess the degree of professional learning, skill and ability that other attorneys similarly situated ordinarily possess;
- b. by failing to use their best judgment in providing Plaintiff with legal services;
- c. by failing to exercise reasonable care and diligence in the application of their knowledge and skill for the benefit of Plaintiff;
- d. by failing to investigate, prepare and prosecute properly the civil action in advance of trial;
- e. on information and belief, by failing to interview or depose persons who could have testified to relevant events;
- f. by withdrawing from their representation of Plaintiff at a critical time in the civil action's proceedings such that Plaintiff's standing in the case was

prejudiced;
g. by entering into a settlement of Plaintiff's civil action against Frangis and Right Track without Plaintiff's authority and in doing so, prejudicing Plaintiff's valuable legal and equitable rights under North Carolina law; (emphasis added).

Plaintiff's complaint further alleged that Defendants' negligence proximately caused damage to Plaintiff by causing her previous civil action against Frangis and Right Track to be settled *without her authority* and "if Plaintiff's valid civil action against Frangis and Right Track had not been negligently handled . . . then Plaintiff's position would have prevailed and she would have had and recovered judgment from Frangis and Right Track."

In *Harmon*, our Court affirmed the validity of the settlement and concluded that Defendants acted within Plaintiff's authority when they negotiated the settlement. In this case, a reading of Plaintiff's duty and proximate cause allegations seek to relitigate the issue of whether Defendants acted without her authority in reaching the settlement. It is well-settled that "once a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case." *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631 (1983). Because we concluded in *Harmon* that Defendants acted within Plaintiff's authority to

enter the settlement, and Plaintiff's legal malpractice complaint seeks to relitigate the issue of Defendant's authority to enter into the settlement underlying *Harmon*, we hold that *Harmon* is the law of the case as to Defendants' authority in reaching a settlement with Frangis and Right Track. Even omitting such *allegations* from the complaint does not cure this defect where Plaintiff's proximate cause allegations are based on the settlement being entered without her authority. Because an indispensable issue of Plaintiff's legal negligence complaint was raised and resolved in our decision *Harmon*, we affirm the trial court's dismissal of this action.

Affirmed.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).