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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-238

Filed: 7 January 2020

Mecklenburg County, No. 18 CVS 7024

JAMES DAVID SIKES AND MACKENZIE RAE SIKES, Plaintiffs,

v.

DR. BART C. FARRELL, DDS, MD, CAROLINAS CENTER FOR ORAL & FACIAL SURGERY, JOEL J. NAPENAS, DDS, CAROLINAS CENTER FOR ORAL HEALTH, STEPHEN B. TATTER, MD, Ph.D. and WAKE FOREST BAPTIST HEALTH, Defendants.

Appeal by Plaintiffs from order entered 15 October 2018 by Judge Lisa Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 October 2019.

Combs Law, PLLC, by Todd J. Combs, for Plaintiffs.

Lewis Brisbois Bisgaard & Smith LLP, by Carrie E. Meigs and Justin G. May, for Defendants.

DILLON, Judge.

Plaintiffs appeal from the order dismissing the complaint with prejudice per Rule 12(b)(6) and Rule 9(j) of the North Carolina Rules of Civil Procedure. For the reasons stated below, we affirm.

I. Background

SIKES V. FARRELL

Opinion of the Court

Plaintiff James Sikes received oral surgery performed by Defendant Bart C. Farrell, which allegedly resulted in a misplaced screw in Mr. Sikes' jaw. Mr. Sikes went to numerous other doctors to receive advice and treatment, but nothing helped his painful situation. He then brought this medical malpractice action. The relevant facts with their corresponding dates are as follows:

On 28 October 2013, Defendant performed the oral surgery on Mr. Sikes where the injury occurred.

On 26 October 2016, Plaintiffs filed their first complaint, just within the three-year statute of limitations.

On 7 April 2017, Plaintiffs voluntarily dismissed their complaint without prejudice per Rule 41.

On 5 April 2018, Plaintiffs filed a second complaint ("Complaint"), within a year of taking the Rule 41 dismissal.

On 17 May 2018, Defendant responded with a Motion to Dismiss per Rule 12(b)(6) and an Answer to the Complaint.

On 15 October 2018, the trial court granted Defendant's Motion to Dismiss.

Defendants Farrell and Carolinas Center for Oral & Facial Surgery ("Defendants") moved to dismiss, claiming that Plaintiffs did not properly comply with Rule 9(j) and thus, failed to state a claim per Rule 12(b)(6). The trial court granted Defendants' motion. Plaintiffs timely appealed the matter to this court.

II. Appellate Jurisdiction

Plaintiffs state in their brief that the trial court's dismissal order was a final judgment as to all claims and, therefore, our Court has appellate jurisdiction. Our dissenting colleague contends that Plaintiffs have failed to include enough in the record to demonstrate that this appeal is not interlocutory in nature.

It is true that Plaintiffs' Complaint asserted claims against *six* defendants. But the motion to dismiss, which is the subject of this appeal, was only brought by two of the Defendants. The Plaintiffs' brief does allude to the fact that certain claims were dismissed in the summer of 2018.

It is true that the record itself does not contain anything showing that Plaintiff's claims against the other four defendants were dismissed or otherwise resolved. And it would have been the *better practice* for Plaintiffs to include such documentation. However, we conclude that the information that is contained in the record on appeal before us *is* sufficient to demonstrate that the trial court's order was final as to all pending claims in this case and that, therefore, we have appellate jurisdiction.

For instance, the dismissal order being appealed states that the entire matter was being dismissed. Specifically, it states that "Plaintiffs' complaint should be dismissed" and that, accordingly, "IT IS ORDERED, ADJUDGED AND DECREED that this matter be and hereby is dismissed with prejudice."

Further, the record contains a number of other documents which suggests that the claims against the other four defendants had been resolved sometime during the summer of 2018, as suggested in Plaintiffs' brief. Specifically, the record contains certificates of service attached to papers filed prior to the summer of 2018 which show that the other four defendants were served. But the certificates of service attached to papers filed from August 2018 going forward only show Plaintiffs and Defendants as being served. These papers include the dismissal order being appealed, the notice of appeal, and all papers filed with this Court during this appeal.

Accordingly, the order on its face purports to be a final order as to all pending claims *and* the certificates of service contained in the record on appeal otherwise suggest that the other four defendants were no longer part of this matter as of sometime prior to the entry of the dismissal order. We conclude that the record is sufficient to demonstrate that we have jurisdiction to hear this appeal.

III. Analysis

The issue presented here has been addressed various times by our Supreme Court, and thus we follow its precedent.

Here, the amended complaint, which was filed *after* the running of the statute of limitations contains a Rule 9(j) certification that an expert has reviewed the medical records *but* does not contain a statement that the expert reviewed the records prior to the running of the statute of limitations:

82. Without waiving these objections and specifically relying upon the same, the medical care and all medical records pertaining to the alleged negligence, that are available to the Plaintiff, after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness pursuant to Rule 702 of the North Carolina Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care.

Our Supreme Court has held that where a complaint is refiled within one year of a Rule 41 dismissal but otherwise after the running of the original statute of limitations, the complaint may be timely filed; but the Rule 9(j) certification *must* assert that the review by the expert occurred prior to the running of the statute of limitations. *Vaughan v. Mashburn*, 371 N.C. 428, 438-39, 817 S.E.2d 370, 377-78 (2018).

Plaintiffs make a number of arguments in their brief concerning motions and matters not contained in the record. For instance, Plaintiffs state that they moved the trial court to allow them to amend their amended complaint to correct their Rule 9(j) certification. They state that they emailed the trial court with a request to amend prior to the trial court's entry of the dismissal order that is before us. Plaintiffs concede that they did not file a formal motion to amend until after the entry of the dismissal order. In either case, neither the email nor the formal motion are in the record on appeal. Also, Plaintiffs state that they have moved the trial court for relief from the dismissal order pursuant to Rule 60(b). But, again, there is nothing in the

record on appeal concerning that motion.

IV. Conclusion

Based on the record before us, we conclude that the trial court did not err in dismissing Plaintiffs' Complaint with prejudice pursuant to the North Carolina Rules of Civil Procedure 12(b)(6) and 9(j).

AFFIRMED.

Judge BERGER concurs.

Judge STROUD dissents by separate opinion.

Report per Rule 30(e).

STROUD, Judge, dissenting.

I dissent because I believe this Court does not have jurisdiction to consider Plaintiffs’ interlocutory appeal. If this Court had jurisdiction to address the merits, I agree Plaintiffs’ Rule 9(j) certification in their complaint was deficient, and I would concur in the result reached by the majority opinion.

The order on appeal dismisses Plaintiffs’ medical malpractice claim against two of the six named defendants. Based upon the record before this Court, this is an interlocutory appeal, and this Court does not have jurisdiction to consider it unless the Plaintiffs have carried their burden of demonstrating why an interlocutory appeal should be allowed.

Since the question whether an appeal is interlocutory presents a jurisdictional issue, this Court has an obligation to address the issue *sua sponte* regardless whether it is raised by the parties. Generally, an order “made during the pendency of an action, which does not dispose of the case, but leaves it for further action,” is interlocutory and not immediately appealable.

Akers v. City of Mount Airy, 175 N.C. App. 777, 778-79, 625 S.E.2d 145, 146 (2006) (citations omitted).

While an interlocutory appeal may be allowed in “exceptional cases,” this Court must dismiss an interlocutory appeal for lack of subject-matter jurisdiction, unless the appellant is able to carry its “burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature.”

There are two instances in which an interlocutory appeal may be allowed:

First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

C. Terry Hunt Indus., Inc. v. Klausner Lumber Two, LLC, __ N.C. App. __, __, 803 S.E.2d 679, 682 (2017) (citations omitted).

The trial court did not certify “there is no just reason to delay the appeal” of the order dismissing claims against two of the six defendants, and Plaintiffs have not even argued they have a substantial right which would be jeopardized without an immediate appeal.

The majority opinion recognizes that the record on appeal does not show whether the claims against the other four defendants are still pending. I also note that our record does not include a transcript of the hearing; if we had a transcript, it would probably reveal the status of those claims. But the burden of demonstrating this Court’s jurisdiction and of including everything necessary for this Court’s review in the record on appeal is on the Plaintiffs, and they have clearly failed to meet that burden.

North Carolina Rule of Appellate Procedure 9(a) states appellate “review is solely upon the record on appeal.” In compiling the record, the parties must provide so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating the portions of the transcript to be so filed.

The burden is on the appellant to “commence settlement of the record on appeal, including providing a verbatim transcript if available.”

The North Carolina Rules of Appellate Procedure are “mandatory and not directory.”

Sen Li v. Zhou, ___ N.C. App. ___, ___, 797 S.E.2d 520, 524 (2017) (citations and brackets omitted).

The record on appeal shows Plaintiffs filed their complaint for medical malpractice against six defendants. Plaintiffs alleged Defendant Dr. Bart Farrell is an oral surgeon and Defendant Carolinas Center is his employer. On 28 October 2013, Dr. Farrell performed the initial “surgery on Plaintiff Mr. Sike’s maxilla for correction of oral maxillary facial deformity with a LeForte ostrotomy [sic] type 1.” Plaintiffs alleged Mr. Sikes had “extreme pain” and other serious complications immediately following the surgery. Plaintiffs allege Dr. Farrell performed another procedure to correct the problem, and Carolinas Center paid for him “to have a root canal and crown.” Mr. Sikes continued to experience serious pain. He was then referred to Defendant Dr. Joel Napenas.

Plaintiff alleged Dr. Napenas is a specialist in “oral medicine dentistry” and a “pain management physician” employed by Defendant Carolina Oral Health. Plaintiffs allege Dr. Napenas misdiagnosed Mr. Sikes’s condition as trigeminal neuralgia, prescribed various medications for his pain, and performed local injections of anesthesia. Mr. Sikes was then referred to Defendant Dr. Stephen Tatter.

Plaintiffs allege Dr. Tatter is a medical doctor with a “primary practice specialty in neurosurgery” “who performs . . . microvascular nerve decompression on the brainstem.” Dr. Tatter was employed by Defendant Wake Forest Baptist Health. Plaintiff alleged Dr. Tatter performed “unnecessary surgery for an incorrect diagnosis” on 24 October 2014.

On 17 May 2018, Defendants Farrell and Carolinas Center filed their Answer and Motions to Dismiss. The motion to dismiss was based in part upon Rule 9(j) of the North Carolina Rules of Civil Procedure and upon the applicable statutes of limitations. The Certificate of Service for the Answer shows it was served upon counsel for Plaintiffs, counsel for Dr. Tatter and Wake Forest Baptist Health, and counsel for Dr. Napenas and Carolinas Center.

On 29 August 2018, counsel for Dr. Farrell and Carolinas Center filed a notice of hearing on their motion to dismiss on 2 October 2018. The Certificate of Service for the notice of hearing shows the notice was served only on counsel for Plaintiffs. The motion to dismiss was heard on 2 October 2018 and the trial court filed its order,

entitled “Order Allowing Defendants’ Motion to Dismiss” on or about 15 October 2018. The Order is very brief, but it states that the matter came on for hearing “for consideration of Defendants’ Dr. Bart C. Farrell, DDS, MD and Carolinas Center for Oral & Facial Surgery’s Motion to Dismiss” and based upon the pleadings and arguments of counsel, the trial court decreed that “this matter be and hereby is dismissed with prejudice.”

The record before this Court does not include answers or motions to dismiss filed by any defendants other than Dr. Farrell and Carolinas Center. In fact, the only mention of the other defendants’ counsel is in the certificate of service of Dr. Farrell’s and Carolinas Center’s answer and motion to dismiss. I recognize that it is possible that the trial court had already dismissed Plaintiffs’ claims against the other defendants or those claims were settled, but the record before this Court is entirely silent on the matter. All we know for certain is that six defendants were sued, and the trial court granted the motion to dismiss filed by only two of those defendants in the order on appeal.

The majority opinion reads the trial court’s order as dismissing the entire case as to all six defendants. This reading ignores the language of the order, which states specifically the trial court was hearing only the motion to dismiss filed by Dr. Farrell and Carolinas Center. There is no reason to believe the trial court *sua sponte* dismissed claims against four other defendants who had not noticed hearing on their

own motions to dismiss, if such motions were filed. In addition, the legal basis of the motion to dismiss filed by Dr. Farrell and Carolinas Center would be relevant to this analysis, because the merits of motions to dismiss by the other defendants would not necessarily be the same. Since Dr. Farrell's and Carolinas Center's motion was based on the failure of the Rule 9(j) certification and the statute of limitations, the merits of the motion was dependent upon certification by a qualifying expert as to the particular specialty for which malpractice was alleged and the nature of each of the three medical malpractice claims alleged in Plaintiffs' complaint. The motion to dismiss was also based upon the applicable statute of limitation, and the statute of limitation is an affirmative defense which must be specifically pled by the defendant seeking to invoke it. *See Unifund CCR, LLC v. Francois*, __ N.C. App. __, __, 817 S.E.2d 915, 917 (2018) ("Rule 8 of the Rules of Civil Procedure requires that a defendant set forth affirmatively a statute of limitations defense in a responsive pleading. Our appellate courts repeatedly have emphasized that the statute of limitations is a technical defense, and must be timely pleaded or it is deemed waived. Thus, trial courts have no authority to raise the statute of limitations defense on their own initiative; the defendant must assert this affirmative defense or it is waived." (citations and quotation marks omitted)).

Plaintiffs asserted three separate medical malpractice claims, arising at different times, against three physicians with different areas of practice who

performed different treatments and procedures. The first claim, against Dr. Farrell and Carolinas Center, arose in 2013 and is based upon negligence in performing the initial dental surgery. The second is a claim for misdiagnosis of the cause of Mr. Sikes' pain and is against Dr. Napenas and Carolina Oral Health. The third claim is for misdiagnosis and performing unnecessary surgery based upon that misdiagnosis and is against a neurosurgeon, Dr. Tatter, and Wake Baptist. Based upon the allegations of the complaint, it is unlikely that one expert would be qualified to testify under Rule 9(j) as to each of these three claims against physicians with different specialties of practice and based upon different medical procedures. *See* N.C. Gen. Stat. § 8C-1, Rule 702(b); N.C. Gen. Stat. § 90-21.12 (2017).

Overall, the minimal record on appeal leaves much room for us to speculate about various reasons this Court may have jurisdiction to consider this appeal. But this Court should not engage in speculation. The Plaintiffs had the burden of including sufficient information in the record on appeal to demonstrate that the order on appeal is a final order, if it did actually dispose of the entire claim as to all parties. Otherwise, the Plaintiffs have the burden of demonstrating a substantial right which would allow an immediate appeal if the order is not final. The Plaintiffs failed to meet either burden. "A jurisdictional default, therefore, precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. v. White Oak Transp.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008).

SIKES V. FARRELL

STROUD, J., dissent

I therefore dissent and would dismiss Plaintiffs' appeal.