IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-46

No. COA21-360

Filed 18 January 2022

Buncombe County, No. 20 CVD 3449

THERESA LYNN REVIS, Plaintiff,

v.

KRISTI J. SCHLEDER, M.D. and HOT SPRINGS HEALTH PROGRAM, Defendants.

Appeal by Defendants from order entered 11 January 2021 by Judge Marvin P. Pope, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 14 December 2021.

No brief filed on behalf of Plaintiff-Appellee.

Hall Booth Smith, P.C., by Adam Peoples and Kaitlyn Myers, for Defendant-Appellant Kristi J. Schleder, M.D.

Michael Best & Friedrich, L.L.P., by Carrie E. Meigs, Justin G. May, and Mason E. Maney, for Defendant-Appellate Hot Springs Health Program

WOOD, Judge.

¶ 1 Defendants Kristi J. Schleder, M.D. ("Schleder") and Hot Springs Health Program ("Hot Springs") (collectively, "Defendants") appeal an order denying their motion to dismiss Plaintiff Theresa Lynn Revis's ("Plaintiff") complaint. On appeal, Defendants contend the trial court erred in denying their motion to dismiss because

Plaintiff failed to plead a cognizable claim of *res ipsa loquitur* and failed to comply with the special pleading requirements of N.C. R. Civ. P. 9(j). After careful review of the record and applicable law, we dismiss Defendants' appeal as interlocutory.

I. Factual and Procedural Background

¶ 2 On May 2, 2018, Plaintiff went to Hot Springs to be treated for an upper respiratory infection. Plaintiff filled out "a patient information form, which included documenting her allergies to certain medications, specifically including Penicillin." Plaintiff saw Schleder, who reviewed Plaintiff's medical history before prescribing Amoxicillin/Clavulanate 875/125 mg (Augmentin).[1]

¶ 3 That same day, Plaintiff filled the Augmentin prescription and took one dose of the medication. "Shortly thereafter, . . . Plaintiff began to experience extreme respiratory distress, hives, and incontinence." Plaintiff was transported to a local hospital in Asheville, North Carolina, where she received treatment for a serious allergic reaction that resulted in a myocardial infarction.[2]

¶ 4 On October 2, 2020, Plaintiff filed a civil action, alleging Defendants were

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[1] Augmentin is an oral antibiotic "derived from the basic penicillin nucleus." U.S. National Library of Medicine, *Augmentin- amoxicillin and clavulanate potassium tablet, film coated*, Daily Med. https://dailymed.nlm.nih.gov/dailymed/drugInfo.cfm?setid=174cc098-fe49-4f1a-87e2-601c7573f0db.

[2] A myocardial infarction is otherwise known as a heart attack. Mayo Clinic, *Heart Attack*, https://www.mayoclinic.org/diseases-conditions/heart-attack/symptoms-causes/syc-20373106.

negligent in prescribing Augmentin when Plaintiff had a penicillin allergy. In lieu of filing an answer, Defendants moved to dismiss Plaintiff's complaint for failure to state a claim upon which relief could be granted and failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. After hearing arguments from counsel, the trial court entered its order denying Defendants' motion to dismiss on January 11, 2021. Schleder timely filed her written notice of appeal on February 5, 2021. Hot Springs timely filed its written notice of appeal on February 9, 2021.

II. Discussion

¶ 5 As a preliminary matter, we note that Defendants' appeal is interlocutory. "A judgment is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Feltman v. City of Wilson*, 238 N.C. App. 246, 249, 767 S.E.2d 615, 618 (2014) (quoting *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (207) (citation omitted)). An order is an interlocutory order if it does not settle all issues in the case but rather "directs some further proceeding preliminary to the final decree." *Id.* (quoting *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. rev. denied*, 313 N.C. 601, 330 S.E.2d 610 (1985)). "[W]hether an appeal is interlocutory presents a jurisdictional issue." *Akers v. City of Mt. Airy*, 175 N.C. App. 777, 778, 625 S.E.2d 145, 146 (2006) (citation omitted); *see*

also Feltman, 238 N.C. App. at 249, 767 S.E.2d at 618 (citation omitted).

¶ 6 "As a matter of course, our Court does not review interlocutory orders." *R.C. Koonts & Sons, Inc. v. First Nat'l Bank*, 266 N.C. App. 76, 79-80, 830 S.E.2d 690, 693 (2019) (citing *Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 589, 599 S.E.2d 422, 426 (2004)). "If, however, the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review, we may review the appeal under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1)." *Id.* at 80, 830 S.E.2d at 693 (citation omitted).

> In order to determine whether a particular interlocutory order is appealable pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1), we utilize a two-part test, with the first inquiry being whether a substantial right is affected by the challenged order and the second being whether this substantial right might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal.

¶ 7 *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 78, 711 S.E.2d 185, 189 (2011) (citations omitted).

¶ 8 A "substantial right" is a "legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [party] is entitled to have preserved and protected by law: a material right." *Meyers v. Mutton*, 155 N.C. App. 213, 216, 574 S.E.2d 73, 76 (2002). "The extent to which an interlocutory order affects a substantial right must be determined on a case-by-case basis." *Hamilton*, 212 N.C. at 78, 711 S.E.2d at 189

(citations omitted). The appealing party has the burden to demonstrate the appropriate grounds for this Court's acceptance of an interlocutory appeal. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994)). "It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order." *Id.* at 380, 444 S.E.2d at 354. "As a result, if the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of appellate jurisdiction." *Denney v. Wardson Construction Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019) (citing *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 96 (2015)).

¶ 9 Here, Defendants seek our review of the denial of their motion to dismiss on the merits, arguing that they would lose the right to be immune from suit under N.C. R. Civ. P. 9(j). Under our Rules of Civil Procedure, medical malpractice actions are subject to heightened pleading requirements. N.C. Gen. Stat. § 1A-1, Rule 9(j). Rule 9(j) provides that, to avoid dismissal, a complaint alleging medical malpractice shall "specifically assert that the medical care and all medical records pertaining to the alleged negligence that are available to the" complaining party "have been reviewed by a person who is reasonably expected to qualify as an expert . . . and who is willing to testify" as such; or all such medical care and records have been reviewed by a person the complaining party will seek to have qualified as an expert; or the

complaint "alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1)-(3).

¶ 10 While there is no dispute that Plaintiff's complaint did not contain a Rule 9(j) certificate that the medical records and care have been reviewed, Plaintiff's complaint alleged medical negligence on the basis of *res ipsa loquitur*. Accordingly, we are not persuaded by Defendants' contention that "immediate appellate review is particularly appropriate given the facts of this case as it is the only procedural mechanism that can protect Defendants' substantial right to be free from actions that do not comply with Rule 9(j)."

¶ 11 Defendants further contend immediate review is appropriate because "[t]he trial court's order affects Defendants' substantial right to be free from inconsistent verdicts." Defendants specifically argue that absent immediate appellate review, the case would erroneously proceed to trial. Thereafter, "[i]f Plaintiff were to be successful at trial, it is reasonably possible that only one defendant would appeal," allowing the case to be retried as to that defendant.

¶ 12 In *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982), our Supreme Court held that "the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." 305 N.C. at 608, 290 S.E.2d at 596. In *Liggett*

Group v. Sunas, 113 N.C. App. 19, 437 S.E.2d 674 (1993), this Court held that

> [a] substantial right . . . is considered affected "if there are overlapping factual issues between the claim determined and any claims which have not yet been determined" because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues.

113 N.C. App. at 24, 437 S.E.2d at 677 (citation omitted). Accordingly, there is a two-part test which must be met: (1) the same factual issues are present in both trials and (2) the possibility of inconsistent verdicts on those issues exists. *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 426, 444 S.E.2d 694, 697 (1994); *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995) (citation omitted).

¶ 13 "Issues are the 'same' if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Hamilton*, 212 N.C. App. at 79, 711 S.E.2d at 190 (quoting *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491, *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 772 (1989)). In *Davidson*, this Court clarified what it means when "issues are the same":

> when common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn "create[es] the possibility that a party will be prejudiced by

> different juries in separate trials rendering inconsistent verdicts on the same factual issue.

Davidson, 93 N.C. App. at 25, 376 S.E.2d at 491 (alteration in original) (quoting *Green*, 305 N.C. at 608, 290 S.E.2d at 596).

¶ 14 In *Estate of Reddings v. Welborn*, 170 N.C. App. 325, 612 S.E.2d 664 (2005), this Court reached the merits of an appeal because there was a risk of inconsistent verdicts. There, the plaintiff brought a civil suit against three defendants. 170 N.C. App. at 328, 612 S.E.2d at 667. The trial court granted summary judgment in favor of one defendant, and the plaintiff appealed. *Id.* Although the plaintiff's appeal was interlocutory, this Court reached the merits because the plaintiff asserted claims under a theory of vicarious liability and only one defendant was present before this Court. *Id.* at 329, 612 S.E.2d at 668 ("However, claims still existed against the remaining defendants, including Welborn and Russell. Since plaintiffs' theory of LifeUSA's liability is that LifeUSA is vicariously liable for Welborn[] and Russell's actions, many of the same factual issues would apply to the claims against defendants and inconsistent verdicts could result from separate trials.").

¶ 15 The present case, however, is distinguishable from *Reddings*. Here, both Defendants are present before this Court, asserting the same argument regarding Plaintiff's claims. Defendants' contention that a risk of inconsistent verdicts exists is speculative because it is dependent on Plaintiff's success at trial and only one

Defendant returning to this Court. As we have previously held that a risk of inconsistent verdicts appears where there are overlapping factual issues between the claims appealed and any *remaining* claims, and all claims have been appealed here, we hold that Defendants failed to meet their burden in justifying our acceptance of this interlocutory appeal. *See Davidson*, 93 N.C. App. at 25, 376 S.E.2d at 491 (citations omitted).

III. Conclusion

¶ 16 After careful review of the record and applicable law, we dismiss Defendants' appeal as interlocutory.

DISMISSED.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).