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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-271

Filed 5 November 2024

Wake County, No. 21 CVS 003912

ESTATE OF TIMOTHY LEROY BUNCE and HEIDI BUNCE, Individually,
Plaintiffs,

v.

REX HEALTHCARE, INC.; BRUCE USHER, JR., M.D.; and NORTH CAROLINA
HEART AND VASCULAR, Defendants.

Appeal by plaintiffs from order entered 1 December 2023 by Judge William R.
Pittman in Wake County Superior Court. Heard in the Court of Appeals 8 October
2024.

*Law Office of Hayes Hofler, PA, by R. Hayes Hofler, III, for plaintiffs-
appellants.*

*Huff Powell & Bailey PLLC, by Katherine Hilkey-Boyatt, Pankaj K. Shere, and
Beth S. Reeves, Pro Hac Vice, for defendant-appellee Rex Healthcare, Inc.*

*Gordon Rees Scully Mansukhani, LLP, by Mindi L. Schulze, Kelly A. Brewer,
for defendant-appellee Bruce Usher, Jr., M.D.*

*Ellis & Winters LLP, by Alex J. Hagan, for non-party University of North
Carolina Health Care System.*

PER CURIAM.

This appeal arises from a medical negligence and wrongful death action.

I. Background

In March 2021, the Estate of Timothy Leroy Bunce and Mr. Bunce's surviving spouse Heidi Bunce ("Plaintiffs") sued Rex Healthcare, Inc. ("Rex"), Dr. Bruce Usher, and North Carolina Heart and Vascular, alleging they caused Mr. Bunce's death.

Plaintiffs' complaint alleged the following: In 2008, Mr. Bunce was diagnosed with chronic systolic heart failure. Ten years later, in November 2018, Dr. Usher implanted Mr. Bunce's new cardiac defibrillator. In the months following the implantation, Mr. Bunce experienced issues with the new device.

On or about 11 April 2019, Mr. Bunce went into cardiogenic shock. He was admitted to UNC Rex Hospital in Raleigh and then moved to UNC Hospital Cardiac Intensive Care Unit in Chapel Hill. The medical team escalated his treatment to ECMO and emergently intubated him on 15 April 2019. Mr. Bunce was removed from life support and died on 24 April 2019.

The parties have filed many motions since Plaintiffs filed the initial complaint in 2021. Notably, there have been complications with scheduling depositions (and cancelling them last minute), particularly the deposition of Plaintiffs' expert witness, and persistent allegations of missing medical records by Plaintiffs.

In December 2023, after a hearing on multiple motions, the trial court entered an order dismissing the action with prejudice and ordering Plaintiffs to pay all costs,

including attorney fees. Plaintiffs appeal.¹

II. Analysis

Plaintiffs raise multiple issues on appeal. However, Plaintiffs consistently provide only short rule statements and fail to support their arguments with explanations of *why* their cited rules apply to this case. Thus, many of their arguments on appeal could be deemed waived. *See* N.C. R. App. P. 28(b)(6) (2023) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”). *See also Viar v. North Carolina Dep’t of Transp.*, 359 N.C. 400, 402 (2005) (“It is not the role of the appellate courts, however, to create an appeal for an appellant.”). Nonetheless, in our discretion, we address the issues below in the interest of being thorough.

A. Plaintiffs’ Motion to Add a Claim of Fraudulent Concealment

First, Plaintiffs contend the trial court erred in denying their motion to add a claim of fraudulent concealment. Plaintiffs filed their motion as a Rule 15(d) motion *to supplement* the original complaint. However, Defendants contended at the hearing that Plaintiffs’ motion was truly a Rule 15(a) motion *to amend* the complaint. In either case, we conclude the trial court did not abuse its discretion in denying Plaintiffs’ motion.

Rule 15(a) instructs that “[a] party may amend his pleading once as a matter

¹ In April 2024, Defendants filed a joint motion to dismiss the appeal. In August 2024, Plaintiffs filed a motion to add exhibits on appeal. In our discretion, we deny both motions.

of course at any time before a responsive pleading is served . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” N.C.G.S. § 1A-1, Rule 15(a). “Reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments.” *Martin v. Hare*, 78 N.C. App. 358, 361 (1985). “In deciding if there was undue delay, the trial court may consider the relative timing of the proposed amendment in relation to the progress of the lawsuit.” *Draughon v. Harnett Cnty. Bd. Of Educ.*, 166 N.C. App. 464, 467 (2004).

Rule 15(d) states that “[u]pon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is definitive in its statement of a claim for relief or defense.” N.C.G.S. § 1A-1, Rule 15(d).

The denial of both Rule 15(a) and Rule 15(d) motions is reviewed for abuse of discretion. *Henry v. Deen*, 310 N.C. 75, 822 (1984) (standard of review for Rule 15(a) motion); *Brackett v. SGL Carbon Corp.*, 158 N.C. App. 252, 258 (2003) (standard of review for Rule 15(d) motion).

Here, Plaintiffs moved to add this claim more than two years after they filed their complaint. Allowing the motion would further delay a case which had already

been substantially delayed by Plaintiffs. Further, Plaintiffs failed to support their allegation of fraudulent concealment. The trial court also determined that the allegedly “concealed” records were previously provided to Plaintiffs multiple times—twice before Plaintiffs even commenced this action in March 2021. We note the affidavit before the trial court in which UNC Rex Hospital’s Director of Health Information Management attested that Mr. Bunce’s medical records were provided to Plaintiffs’ counsel on July 20, 2019, and again on January 20, 2020. In denying Plaintiffs’ request to add the fraudulent concealment claim, the trial court stated that it could not “find any reason why something that’s been produced three times, how it can then be concealed, fraudulently or otherwise.”

Based on our review of the record, we conclude that the trial court did not abuse its discretion in denying Plaintiffs’ motion to add a fraudulent concealment claim.

B. Plaintiffs’ Motion to Join UNC HCS as a Necessary Party

Second, Plaintiffs argue the trial court erred by denying their motion to join the University of North Carolina Healthcare System (“UNC HCS”) as a necessary party.

Plaintiffs had named UNC HCS as a defendant in its complaint. However, UNC HCS is a state agency and cannot be sued in state court for torts claims. *See Kawai Am. Corp. v. Univ. of North Carolina at Chapel Hill*, 152 N.C. App. 163, 165 (2002). Accordingly, Plaintiffs voluntarily dismissed UNC HCS from this civil action and commenced an action against UNC HCS in the Industrial Commission pursuant

to the State Torts Claim Act, N.C.G.S. § 143-291, *et seq* (2023). *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 329 (1982). The Industrial Commission later granted summary judgment for UNC HCS and dismissed Plaintiffs' claim with prejudice.²

In April 2023, Plaintiffs attempted to join UNC HCS back to this civil action, alleging that UNC HCS was as a necessary party to their fraudulent concealment claim. In their motion, Plaintiffs allege that UNC HCS colluded with Rex to fraudulently conceal Mr. Bunce's medical records.

"Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in." *Gaither Corp. v. Skinner*, 238 N.C. 254, 256 (1953).

As discussed above, Plaintiffs' motion to add a fraudulent concealment claim was appropriately denied. Accordingly, Plaintiffs' motion to add UNC HCS as a necessary party is moot.

Regardless, even if the motion to join UNC HCS was not moot, Plaintiffs' motion would still fail because UNC HCS's sovereign immunity as a state agency protects it from intentional torts claims, such as a claim for fraudulent concealment. *See Wojsko v. State*, 47 N.C. App. 605, 610 (1980) ("Suits against the State, its agencies and its officers for alleged tortious acts can be maintained only to the extent

² Plaintiffs appealed the Industrial Commission's decision to our Court. We dismissed the appeal on 16 May 2023.

authorized by the Tort Claims Act . . . [which] authorizes recovery only for negligent torts. Intentional torts committed by agents of the State are not compensable under the Tort Claims Act.”).

C. Attorneys’ Fees

Next, Plaintiffs argue the trial court erred in ordering Plaintiffs to pay Defendants’ attorneys’ fees. “The [trial] court has inherent authority to sanction attorneys for misconduct, which sanctions may include the imposition of attorney’s fees[.]” *Couch v. Priv. Diagnostic Clinic*, 146 N.C. App. 658, 665 (2001). On appeal, we review the trial court’s exercise of its inherent authority for an abuse of discretion. *Id.* at 663.

Upon a thorough review of the record, we conclude that competent evidence supports the trial court’s findings, and its findings support its conclusions of law. In particular, we note the following conclusions by the trial court:

1. Plaintiffs’ counsel has deliberately and continually violated the Local Rules of Wake County Superior Court.
2. Plaintiffs’ counsel has deliberately and continually violated the North Carolina Rules of Civil Procedure.
3. Plaintiffs’ counsel has deliberately and continually violated orders of the Court.
4. Plaintiffs’ counsel has continually violated the Rules of Practice of the Superior and District Courts.
5. Plaintiffs’ counsel’s violations have been willful, deliberate, incompetent, and unprofessional at best, contemptuous at worst.

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6. Plaintiffs' counsel's violations, delay and obfuscation have significantly prejudiced Defendants in their personal and professional lives and reputations, have increased Defendants' costs, and essentially have prevented Defendants from preparing an adequate defense.
7. Plaintiffs have intentionally and unreasonably delayed this matter.
8. Plaintiffs have failed to prosecute this matter.
9. Plaintiffs' counsel's actions are contrary to the interests of justice.
10. Plaintiffs' acts and omissions require sanctions by the Court.

Based on these conclusions, we hold that the trial court did not abuse its discretion in requiring Plaintiffs to pay Defendants' attorneys' fees.

III. Conclusion

For the reasons stated above, we affirm the trial court's order.

AFFIRMED.

Panel consisting of Chief Judge DILLON and Judges MURPHY and THOMPSON.

Report per Rule 30(e).