No. 474PA05-2 EIGHTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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BETTY L. GRANT, Executrix of the Estate of Tommy J. Grant	)	
v	)	From Guilford
HIGH POINT REGIONAL HEALTH SYSTEM	)	

****

PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(Filed 9 July 2007)
(Allowed 6 March 2008)

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure and Section 7A-31(c) of the North Carolina General Statutes, High Point Regional Health System ("Hospital") respectfully petitions the Supreme Court of North Carolina that the Court certify for discretionary review the decision of the North Carolina Court of Appeals rendered in Grant v. High Point Regional Health System, No. COA06-1079, slip op. (June 19, 2007), insofar as the decision reverses the order of the trial

court dismissing plaintiff's claim for common law obstruction of justice, on the basis that (1) the subject matter on appeal has significant public interest; and (2) the cause involves legal principles of major significance to the jurisprudence of the State. In support of this petition, Hospital shows the following:

STATEMENT OF THE FACTS

On September 12, 2000, Mr. Tommy Grant had x-rays taken of his knee at Hospital. (R. p. 26; Amended Complaint, ¶IV). Sometime thereafter, Mr. Grant was diagnosed with cancer in his knee. (Id., ¶V). Tommy Grant died on February 13, 2003, apparently as a result of complications with his cancer. (Id., ¶III).

Ms. Patti Holt sent a letter dated August 31, 2003 to Hospital. (R. p. 26; Amended Complaint, ¶VI). In her letter, Ms. Holt identified herself as attorney for the estate of Tommy Grant. (Id.). Ms. Holt requested copies of records, including radiology films from June 1, 2000 through December 31, 2000. (Id.). Ms. Holt's letter did not indicate that Mr. Grant's estate was considering legal action involving Hospital. (See R. pp. 26-27, ¶VI and Exhibit A referenced therein).

On September 15, 2003, Ms. Holt telephoned an alleged Hospital employee named "Rose" to inquire as to the status of the previous records request submitted by Ms. Holt. (R. p. 27; Amended Complaint, ¶VIII). Plaintiff alleges that "Rose" told Ms. Holt that Mr. Grant's x-ray films from September 13, 2000 were present in the hospital and requested that Ms. Holt send another release for the records because the release Ms. Holt supposedly sent in August had not been received. (See id.).

Ms. Holt contacted "Rose" again on September 23, 2003. (R. p. 27; Amended Complaint, ¶IX). At that time, "Rose" allegedly told Ms. Holt that she could not locate Mr. Grant's September 13, 2000 x-rays. (See id.).

On January 14, 2004 plaintiff's attorneys sent Hospital a subpoena in the matter of Grant v. Ward, 02 CVS 11441 (Guilford County. (R. p. 28; Amended Complaint, ¶XI and Exhibit D therein (R. p. 36)). Notably, the subpoena did not name Hospital as a party to the pending litigation involving plaintiff and Robert J. Ward, MD and Bethany Medical Center, PA. (See id.) Plaintiff alleges that Hospital responded to the subpoena on January 20, 2004 stating that "the knee films taken on 9-13-00 are not in the patient's folder" and that Hospital records indicated that the films had not been checked out. (Id., ¶XIII).

Plaintiff commenced the present action on February 6, 2004. The complaint alleged a claim for "spoliation" of records. (See R. pp. 8-9; Complaint, ¶¶XIV - XVIII).

Plaintiff filed an amended complaint on June 4, 2004. The amended complaint pled the same claim of "spoliation" and added additional claims for "common law obstruction of justice" (R. p. 30; Amended Complaint, ¶¶XXII - XXIV) and punitive damages (R. p. 31; Amended Complaint, ¶XXVI).

Plaintiff contends that the failure of the Hospital to produce Mr. Grant's September 13, 2000 x-ray "has effectively precluded the Plaintiff from being able to successfully prosecute a medical malpractice action against the Defendant hospital and others." (R. p. 28; Amended Complaint, ¶XIV). It is on these alleged facts that plaintiff purports to state claims for "spoliation," "common law obstruction of justice" and punitive damages.

REASONS WHY CERTIFICATION SHOULD ISSUE

In the three weeks since it was released, the decision below has already garnered significant public interest both in North Carolina,[1] as well as other jurisdictions.[2] As noted by

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[1] See, e.g., "Obstruction Recognized as Common Law Claim," North Carolina Lawyers Weekly, at pp. 1, 5, Vol. 20, No. 14 (June 25, 2007); Adams, Brent, "Suit Allowed for Withholding X-rays," Injuryboard.com (June 27, 2007) (http://fayetteville.injuryboard.com/suit-allowed-for-withholding-xrays.php) ("In a landmark decision, the North Carolina Court of Appeals has ruled that a hospital may be sued for obstruction of justice if it fails to produce x-rays requested by the patient."); Womble Carlyle Sandridge & Rice, PLLC, North Carolina Appellate Blog, "COA Recognizes "Obstruction of Justice" Tort, Even When Alleged Obstruction Doesn't Occur in Pending Case," (June 19, 2007) (http://womblencappellate.blogspot.com/2007/06/coa-recognizes-obstruction-of-justice.html#links) ("Today the Court of Appeals (COA) recognized the existence of a civil cause of action for "obstruction of justice," but rejected a cause of action for spoliation.... The Fourth Circuit has held, as a matter of federal law, that spoliation is not a substantive claim or defense but instead is a rule of evidence administered at the discretion of the trial court. Today's holding (that spoliation isn't a substantive claim) may not be such a big deal, given the COA's recognition of a tort for "obstruction of justice." Indeed, in rejecting a spoliation cause of action, the COA held that "it is clear that any wrong alleged by Plaintiff in the present case is not without a remedy because we have already held that Plaintiff stated a cause of action for common law obstruction of justice.").

[2] Joseph, Gregory P., CLE Seminar, National Foundation for Judicial Excellence, "Spoliation: Truth or Consequences," (June 30, 2007) (http://www.josephnyc.com/downloand.php?73) and "Obstruction as Cause of Action for Spoliation," (http://www.josephnyc.com/blog) ("Grant highlights that, even in jurisdictions that have not recognized an independent tort

several commentators, although couched as a claim for "common law obstruction of justice," the decision below is tantamount to recognizing a new cause of action for spoliation of evidence because the decision greatly expands North Carolina tort law.

"At common law, [obstruction of justice] is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice." In re Kivett, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983). Prior to the Court of Appeals' decision below, North Carolina had limited the tort of common law obstruction of justice to claims generally grounded upon the same offenses as codified in Article 30, Chapter 14 (the statutory criminal offense of obstructing justice).[3] In contrast, however, cases alleging obstruction of justice grounded upon facts that do not directly impact or otherwise involve the judicial system were held not to fall within the common law offense of obstruction of justice. See, e.g., Broughton v. McClatchy Newspapers, Inc., 161 N.C.App. 20, 588 S.E.2d 20 (2003) (affirming summary judgment against obstruction of justice claim grounded upon allegation that defendant published defamatory newspaper article about

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claim for spoliation, a claim may exist under other legal precepts such as obstruction and/or civil conspiracy.").

[3] See, e.g., Kivett, supra, (attempt by superior court judge to solicit another resident superior court judge to issue a restraining order preventing convening of grand jury during which soliciting judge believed he would be indicted constituted obstruction of justice; see N.C. Gen. Stat. § 14-226 (2005)); Burgess v. Busby, 142 N.C.App. 393, 408, 544 S.E.2d 4, 12 (2001)(harassment of former jurors by former defendant; see N.C. Gen. Stat. § 14-225.2 (2005)); Jackson v. Blue Dolphin Communications, 226 F.Supp.2d 785 (2002)(attempt by defendants to force plaintiff to sign a false affidavit to be used by defendants in a court proceeding, followed by defendants' termination of plaintiff's employment upon her refusal; see N.C. Gen. Stat. § 14-226 (2005)).

plaintiff's pending litigation in another matter involving her estranged husband).

In re Kivett, supra, is the landmark North Carolina decision addressing the common law obstruction of justice claim that plaintiff attempts to bring in the present case. Unlike the present case, Kivett involved facts that clearly implicated the judicial system: an attempt by a Superior Court judge to enjoin a grand jury from convening because the judge believed a bill of indictment was going to be issued against him. See Kivett, 309 N.C. at 662-63, 309 S.E.2d at 458. On those facts, this Court held that "[Judge Kivett's] conduct with respect to the attempt to prevent the convening of the grand jury would support a charge of common law obstruction of justice." Id. at 670, 309 S.E.2d at 462. Since Kivett was decided, the reported cases upholding a claim for obstruction of justice all involve facts demonstrating a clear attempt by a party to obstruct or impede a legal proceeding involving that party. (See supra, n. 3).

The Court of Appeals' decision expands the narrow obstruction of justice tort previously recognized by this Court in Kivett by applying the tort to facts that do not remotely involve an active, or even threatened, legal proceeding against the defendant. Indeed, the sole reference in the record to any legal proceeding -- a subpoena issued by plaintiff for the

records at issue[4] -- reflects that the request for records made by plaintiff to Hospital was in the context of legal action initiated against third-parties, not Hospital. (See R. p. 36).

To support its decision, the Court of Appeals relies heavily upon this Court's decision in Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984). Both the facts and the issue before the Court in Henry are inapposite to the present case and therefore the Court of Appeals' reliance upon the decision is misplaced.

This Court's decision in Henry v. Deen, supra, does not address the tort of obstruction of justice, but rather common law civil conspiracy. See id. at 77, 310 S.E.2d at 328. Even so, the Court of Appeals' decision below relies upon the following statement in Henry for the proposition that plaintiff in the present case pled facts stating a claim for obstruction of justice: "Such acts by defendants, if found to have occurred, would be acts which obstruct, impede or hinder public or legal justice and would amount to the common law offense of obstruction of justice." See Grant, slip op. at 7-9 (citing Henry, 310 N.C. at 87, 310 S.E.2d at 334). However, the "acts" at issue in Henry were far removed from the present case and involved allegations that defendants conspired to create and did create misleading and false medical records, obliterated other

[4] The subpoena served by plaintiff was attached to both her original and amended complaints as an exhibit. (See R. p. 36).

records, conspired to destroy other records, and agreed to produce false documents to anyone requesting plaintiff's medical chart. See Henry, 310 N.C. at 87, 310 S.E.2d at 334. Thus, to the extent the Court of Appeals decision rests upon a factual similarity between Henry and the present case, there is none.

Because the question before the Court was whether plaintiff stated a claim for civil conspiracy, it is clear from this Court's decision in Henry that any observations made by the Court about the tort of obstruction of justice were not necessary to the decision and were therefore obiter dictum. See, e.g., Trustees of Rowan Tech. College v. Hammond Assocs., 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985)("Language in an opinion not necessary to the decision is obiter dictum and later decisions are not bound thereby"); see also Brisson v. Santoriello, 351 N.C. 589, 596, 528 S.E.2d 568, 572 (2000). Indeed, as this court has pointed out,

> "it is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision."

State v. Jackson, 353 N.C. 495, 500, 546 S.E.2d 570, 573 (2001)(quoting Moose v. Board of Comm'rs of Alexander County, 172 N.C. 419, 433, 90 S.E. 441, 448-49 (1916))(emphasis added). Accordingly, this Court is not bound by the mere dicta in Henry

relied upon by the Court of Appeals to support the decision below.

If left to stand without any further clarification by this Court, the decision below will have a significant, long lasting impact on the citizens and legal system in North Carolina. Any party, regardless of whether adverse, irrespective of whether litigation is pending or even threatened, will be subject to a claim for "obstruction of justice" if they do not comply with a request for documents, data or other information to the satisfaction of the individual making the request. The result will be to greatly expand the universe of potential defendants to include not merely the parties to a dispute, but conceivably their doctors, accountants, employers, and anyone else maintaining information thought relevant to the dispute. The result will also invite speculation among juries who are asked not to decide cases, but to speculate about what effect untimely or unavailable evidence may have had on another case, or conceivably a case that never existed.[5] Quite simply, the

[5] While the Court of Appeals affirmed the trial court's dismissal of plaintiff's "spoliation" tort claim, by allowing the case to go forward as one for "obstruction of justice" under the current facts, the Court of Appeals effectively adopted the spoliation tort in North Carolina, albeit under the name "obstruction of justice." Although not a part of Hospital's petition to this Court, it is notable that the first state generally recognized as adopting a tort for spoliation of evidence, California, has reversed itself and concluded that the proof and damages are too speculative in nature for a spoliation tort to exist. See Cedars-Sinai Medical Center v. Superior Court, 954 P.2d 511 (Cal. 1999)(refusing to recognize spoliation tort against party to litigation); see also Temple Comm. Hosp. v. Superior Court, 976 P.2d 223 (Cal. 1999)(refusing to recognize spoliation tort against

present case provides this Court with the singular opportunity to stem the tide before the judicial system is inundated with endless litigation over disputes that involve nothing more than whether documents, data or other information were produced to a party making such request.

ISSUES TO BE BRIEFED

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issues in its brief for review:

1. Whether the Court of Appeals erroneously concluded that plaintiff's complaint stated a claim for common law obstruction of justice under the facts as pled?

2. Whether a party states a claim for common law claim obstruction of justice where the well pleaded facts fail to show that the defendant was involved with any pending or threatened litigation or other proceeding with plaintiff at the time the obstruction of justice allegedly occurred?

3. Whether a party states a claim for common law obstruction of justice where proximate cause is speculative in nature and not subject to any reasonable or rationale proof beyond speculation and conjecture?

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non-party); see also Trevino v. Ortega, 969 S.W.2d 950, 952 n. 3 (Tex. 1998)(refusing to adopt spoliation tort while observing that "[c]ourts in more than twenty states have considered the issue, but the courts of only six states have recognized a cause of action for negligent or intentional spoliation").

Respectfully submitted, this the 6th day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **DEFENDANT HIGH POINT REGIONAL HEALTH SYSTEM'S PETITION FOR DISCRETIONARY REVIEW (N.C. R. App. P. 15; N.C.G.S. § 7A-31)** was served upon the parties to this action by mailing a copy thereof by first-class, postage pre-paid mail to the following counsel of record:

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This the 6th day of July, 2007.

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