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DeAnna Coleman

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NOTES/CLE MATERIALS

A NEW ROUTE TO MEDICAL MALPRACTICE IN NORTH CAROLINA?

DEANNA COLEMAN*

INTRODUCTION

In North Carolina, a plaintiff filing a medical malpractice claim must meet the certification requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure.¹ Potential plaintiffs who cannot meet North Carolina's certification requirements to bring a medical malpractice action may soon have a new avenue of relief. On March 6, 2008, the Supreme Court of North Carolina (the Court) granted discretionary review of the North Carolina Court of Appeals decision in *Grant v. High Point Regional Health System*.² On October 10, 2008, the Court issued another decision ruling that discretionary review of the case was improvidently granted.³ By following the North Carolina Court of Appeals' decision in *Grant*, injured claimants who, by no fault of their own, cannot secure certification for a malpractice action may be able to receive compensation by way of a tort claim for common law obstruction of justice.⁴

In *Grant*, the North Carolina Court of Appeals held that the plaintiff successfully stated a claim for common law obstruction of justice.⁵ Quoting the Supreme Court of North Carolina, the Court of Appeals stated, "[a]t common law, it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice."⁶ Plaintiff pur-

* B.A., University of North Carolina at Chapel-Hill, The School of Journalism and Mass Communication, 2006; J.D. (cand.) North Carolina Central University School of Law, 2010. I would like to thank Josh Starin for his comments and guidance for this casenote. I dedicate this casenote to my parents, Cindy and Willie Coleman, for their love and support, now and always.

1. N.C. GEN. STAT. § 1A-1, Rule 9(j) (2008).

2. *Grant v. High Point Reg'l Health Sys.*, 362 N.C. 234, 234, 659 S.E.2d 441, 441 (2008).

3. *Grant v. High Point Reg'l Health Sys.*, 362 N.C. 502, 502, 666 S.E.2d 757, 757 (2008) (per curiam).

4. *Grant v. High Point Reg'l Health Sys.*, 184 N.C. App. 250, 255-56, 645 S.E.2d 851, 855 (2007), *disc. rev. granted*, 362 N.C. 234, 234, 659 S.E.2d 441, 441 (2008), *disc. rev. improvidently granted per curiam*, 362 N.C. 502, 666 S.E.2d 757.

5. *Grant*, 184 N.C. App. at 255-56, 645 S.E.2d at 855.

6. *Id.* at 253, 645 S.E.2d at 853 (quoting *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983)).

sued the obstruction action after the Hospital allegedly prevented her from receiving the Rule 9(j)⁷ certification required to bring a claim for medical malpractice.⁸ Grant's claim for damages included all those damages which could be demanded in an action for medical malpractice.⁹

This note first focuses on the *Grant* case and the relatively limited history of civil claims of common law obstruction of justice in North Carolina. The facts and holdings of the cases are explained in detail in order to demonstrate the circumstances under which the North Carolina appellate courts have previously recognized a civil claim for common law obstruction of justice. The note then discusses the feasibility of a tort action for common law obstruction in cases similar to *Grant*. Finally, the note considers possible judicial standards that the Court could set forth if the Court chooses to recognize this new tort claim.

THE CASE

Betty L. Grant, executrix of the estate of Tommy J. Grant (decedent), brought claims against High Point Regional Health System (Hospital) for common law obstruction of justice and common law spoliation of evidence.¹⁰ Grant alleged that decedent visited the Hospital's emergency room on or around September 13, 2000 while experiencing excruciating knee pain.¹¹ Decedent was later diagnosed with cancer.¹² At the time of the diagnosis, the cancer had advanced to a terminal stage.¹³ Decedent died on February 17, 2003.¹⁴

An attorney for Grant sent the hospital a letter on August 31, 2003.¹⁵ The letter notified the hospital of a potential medical negligence claim.¹⁶ Additionally, the letter requested production of medical records, including x-rays, from June 1 through December 31,

7. N.C. GEN. STAT. §1A-1, Rule 9(j) (2008) (Under this rule, a claim for medical malpractice will be dismissed unless, "(1) the pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, (2) the pleading specifically asserts that the medical care has been reviewed by a person that the complainant will see to have qualified as an expert W by motion under Rule 702(e) of the Rules of Evidence and is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or (3) the pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*".)

8. *Grant*, 184 N.C. App. at 251-52, 645 S.E.2d at 853.

9. *Id.* at 252, 645 S.E.2d at 853.

10. *Id.*

11. *Id.* at 251, 645 S.E.2d at 852.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

2000.¹⁷ The Hospital did not respond to the request for records.¹⁸ On September 15, 2003, Grant's attorney had a telephone conversation with a hospital employee named "Rose" regarding the request for records.¹⁹ Rose told the attorney that the original request had not been received, and that the records were available in decedent's file.²⁰ Rose additionally suggested that the attorney send a new medical release form to place in decedent's file.²¹ On September 23, 2003, after sending a new release form and failing to hear from Rose or any other hospital employee, Grant's attorney called Rose a second time.²² Rose informed Grant's attorney that she was unable to locate the medical records.²³

After attempting unsuccessfully to obtain decedent's medical records for several months following the telephone conversation, Grant's attorney sent the Hospital a subpoena to produce the records.²⁴ On January 20, 2004, the Hospital informed Grant that the records were not in decedent's file and had not been checked out.²⁵

Grant further alleged that, after being put on notice of a potential medical negligence claim, the Hospital intentionally destroyed decedent's records.²⁶ Grant claimed that the actions taken by the Hospital rendered her unable to bring a successful suit for medical malpractice against the Hospital and others involved in decedent's care.²⁷ Grant also alleged that the missing x-rays prevented Grant from receiving Rule 9(j) certification as required to pursue a medical malpractice action.²⁸

As a result of the Hospital's alleged behavior, Grant claimed as damages:

actual damages, including but not limited to all damages she could have recovered for wrongful death and medical negligence- i.e. medical expenses, funeral expenses, pain and suffering, loss of services, protection, care and assistance, society, companionship, conform and guidance, kindly offices and advice.²⁹

Grant also sought punitive and compensatory damages.³⁰

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 251, 645 S.E.2d at 853.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 252, 645 S.E.2d at 853.

27. *Id.* at 251, 645 S.E.2d at 853.

28. *Id.* at 251-52, 645 S.E.2d at 853.

29. *Id.* at 252, 645 S.E.2d at 853.

30. *Id.*

The trial court granted the Hospital's motion to dismiss the claims of common law spoliation of evidence and common law obstruction of justice on February 10, 2006.³¹ On review, the North Carolina Court of Appeals reversed in part.³² The court held that Grant had sufficiently stated a claim for common law obstruction of justice, but that the Hospital's alleged conduct did not constitute common law spoliation of evidence.³³

BACKGROUND

The North Carolina Court of Appeals recognized the common law offense of obstruction of justice as a cognizable civil claim in the 2001 case of *Burgess v. Busby*.³⁴ Prior to *Burgess*, a claim of obstruction of justice was discussed twice in civil matters heard by the Supreme Court of North Carolina.³⁵

The earlier of the cases, *In re Kivett*, concerned a superior court judge who was under investigation and recommended for removal.³⁶ Common law obstruction of justice was among the many claims that served as a basis for removal.³⁷ The facts of *Kivett* indicated that the judge in question attempted to prevent the convening of a grand jury against his interests.³⁸ The judge called a fellow superior court judge and asked that he issue a restraining order to stop the grand jury from meeting as scheduled.³⁹ The Supreme Court found that these actions formed a sufficient basis for a claim of obstruction of justice.⁴⁰

In defining obstruction of justice, the Supreme Court explained, "at common law it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice."⁴¹ Article 30 of Chapter 14 of the North Carolina General Statutes lists specific activities which constitute obstruction of justice.⁴² The court in *Kivett* opined that common law offenses, which are neither contradicted nor abrogated by statute remain cognizable in North Carolina.⁴³ In reaching this conclusion, the Court relied on N.C. Gen. Stat. § 4-1, which allows:

31. *Id.*

32. *Id.* at 258, 645 S.E.2d at 857.

33. *Id.*

34. *Burgess v. Busby*, 142 N.C. App. 393, 544 S.E.2d 4 (2001).

35. See *In re Kivett*, 309 N.C. 635, 309 S.E.2d 442 (1983); *Henry v. Deen*, 310 N.C. 75, 310 S.E.2d 326 (1984).

36. *Kivett*, 309 N.C. at 637, 309 S.E.2d at 443.

37. *Id.* at 670, 309 S.E.2d at 462.

38. *Id.* at 642, 309 S.E.2d at 446.

39. *Id.*

40. *Id.* at 670, 309 S.E.2d at 462.

41. *Id.*

42. See N.C. GEN. STAT. §§ 14-221 to -227 (2008).

43. *Kivett*, 309 N.C. at 670, 309 S.E.2d at 462.

such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.⁴⁴

The court noted that “the common law offense of obstruction of justice may take a variety of forms,”⁴⁵ and concluded that the actions of the judge under investigation were included in those various forms.⁴⁶

The second North Carolina Supreme Court case addressing common law obstruction of justice in a civil action was *Henry v. Deen*.⁴⁷ In *Deen*, the administrator of Archie Lee Henry’s (decedent) estate brought an action for medical malpractice and civil conspiracy against two physicians and a physician’s assistant (defendants) as a result of decedent’s allegedly wrongful death.⁴⁸

Decedent visited the emergency room at Anson County Hospital after experiencing pain, discomfort, nausea and trouble breathing.⁴⁹ The attending physician in the emergency room diagnosed decedent with pneumonia and advised that decedent follow-up with defendant Deen if his discomfort persisted.⁵⁰ The emergency room staff reviewed x-rays of the decedent’s chest after his visit and noted potential deterioration in his heart.⁵¹ The physician contacted decedent and advised that he should see Deen for a complete medical evaluation.⁵² After his symptoms persisted, decedent visited Deen’s office, where defendants Deen and Hall gave decedent a mere “cursory examination” and advised decedent to continue taking pneumonia medication.⁵³ The decedent died on July 8, 1979 of massive myocardial infarction as a result of heart disease.⁵⁴

In support of the claim of civil conspiracy, the administrator of decedent’s estate alleged that, after decedent’s death, defendants Deen, Hall and Niazi initiated a conspiracy.⁵⁵ The complaint further con-

44. N.C. GEN. STAT. § 4-1 (2008).

45. *Kivett*, 309 N.C. at 670, 309 S.E.2d at 462 (quoting 67 C.J.S. *Obstruction of Justice* §§ 1, 2 (1978)).

46. *Kivett*, 309 N.C. at 670, 309 S.E.2d at 462.

47. *Deen*, 310 N.C. 75, 310 S.E.2d 326.

48. *Id.* at 77, 310 S.E.2d at 328.

49. *Id.* at 77, 310 S.E.2d at 329.

50. *Id.*

51. *Id.* at 78, 310 S.E.2d at 329.

52. *Id.*

53. *Id.*

54. *Id.* at 79, 310 S.E.2d at 329. The term “myocardial infarction” is also commonly known as a “heart attack.” See THE MERCK MANUAL OF MEDICAL INFORMATION 210 (Mark H. Beers et al. eds., Merck Research Laboratories 2d home ed. 2003) (1997).

55. *Deen*, 310 N.C. at 79, 310 S.E.2d at 329.

tended that the defendants agreed to alter decedent's medical records to prevent the administrator from discovering the negligent acts of Deen and Hall.⁵⁶ The trial court granted a motion to dismiss the claim of civil conspiracy and the Court of Appeals affirmed.⁵⁷

The Supreme Court of North Carolina held that the dismissal was in error.⁵⁸ Noting that the "gravamen of the action is the resultant injury, and not the conspiracy itself," the court opined that the alleged acts, if found to have occurred, would support a claim of common law obstruction of justice.⁵⁹

Prior to *Grant*, the most recent North Carolina case discussing a civil claim for common law obstruction of justice was *Burgess v. Busby*.⁶⁰ In *Burgess*, former jurors in a medical malpractice case brought suit against a physician who was a defendant in the case.⁶¹ The jurors alleged that the physician, after being found guilty of medical malpractice, sent a letter to the sole hospital in Rowan County.⁶² In the letter, the physician identified the jurors by name and address, and labeled them as individuals who had found a doctor guilty.⁶³ The jurors alleged that the physician's actions constituted, among other offenses, common law obstruction of justice.⁶⁴ The North Carolina Court of Appeals opined that the allegations of the complaint sufficiently stated a claim for common law obstruction of justice.⁶⁵

Of important note in *Kivett* and *Deen* is the fact that the allegations of common law obstruction of justice arose from conduct of the defendants that took place while they were on notice of potential lawsuits.⁶⁶ *Kivett* and *Deen* are the only two such cases that have been reviewed by the Supreme Court prior to *Grant*. *Burgess*, as a Court of Appeals case, is persuasive but not binding precedent for the Supreme Court. Therefore, prior to *Grant*, the Supreme Court has found a potential tort claim for common law obstruction of justice only where the defendant's actions hindered a *pending* suit.⁶⁷ After *Grant*, it is up to the Supreme Court to decide whether a tort claim for common law

56. *Id.* at 79, 310 S.E.2d at 329-30.

57. *Id.* at 80, 310 S.E.2d at 330.

58. *Id.* at 90, 310 S.E.2d at 336.

59. *Id.* at 87, 310 S.E.2d at 334.

60. *Burgess v. Busby*, 142 N.C. App. 393, 544 S.E.2d 4 (2001).

61. *Id.* at 396, 544 S.E.2d at 6.

62. *Id.* at 397, 544 S.E.2d at 6.

63. *Id.* at 398, 544 S.E.2d at 6.

64. *Id.* at 407, 544 S.E.2d at 12.

65. *Id.* at 409, 544 S.E.2d at 13.

66. See *Deen*, 310 N.C. at 86-88, 310 S.E.2d at 334-35; *Kivett*, 309 N.C. at 663-65, 309 S.E.2d at 458-59.

67. See *Deen*, 310 N.C. 75, 310 S.E.2d 326; *Kivett*, 309 N.C. 635, 309 S.E.2d 442; *Grant*, 184 N.C. App. 250, 645 S.E.2d 851.

obstruction of justice exists in North Carolina, and if so, under what circumstances.

ANALYSIS

In the future, if the Supreme Court follows the decision of the Court of Appeals, it will broaden the scope of tort liability in North Carolina. The Court of Appeals' decision would allow a civil claim for common law obstruction of justice to survive where a person does "any act which prevents, obstructs, impedes or hinders public or legal justice," regardless of whether suit is pending.⁶⁸ The actions of the Hospital in *Grant*, if proven true, should be followed by legal consequences. Hospitals and other organizations that have a duty to keep records should not be able to evade legal action by destroying evidence of their wrongful acts prior to suit being filed. However, in the interests of fairness and administrative ease, there should be judicially-created standards for bringing a tort claim for common law obstruction of justice.

A civil claim for common law obstruction of justice grounded on sufficient facts should survive a motion to dismiss.⁶⁹ As the Supreme Court noted in *Deen*, "this State has a policy against parties deliberately frustrating and causing undue expense to adverse parties gathering information about their claims."⁷⁰ If the Supreme Court allows the decision in *Grant* to stand, it will promote the policy that individuals who have been legally wronged should have recourse through the judicial system. Additionally, a tort claim of obstruction would provide a substitute avenue of relief where a party, by no fault of their own, cannot meet the statutory requirements to bring a medical malpractice action.⁷¹

What is lacking in the Court of Appeals' decision in *Grant* is some form of criteria for determining culpability when a tort action for common law obstruction is litigated. If a claim of obstruction of justice survives a motion to dismiss, it should be decided using underlying standards of proof. A sample judicial test may include as elements: 1) that the defendant knew a proceeding was pending or likely to be instituted against him; 2) that the defendant, with the knowledge of the pending suit, altered, concealed or destroyed evidence and; 3) that the

68. *Grant*, 184 N.C. App. at 253, 645 S.E.2d at 853 (emphasis added).

69. *See id.* at 257, 645 S.E.2d at 856.

70. *Deen*, 310 N.C. at 87, 310 S.E.2d at 334.

71. *See* N.C. GEN. STAT § 1A-1, Rule 9(j) (2008).

defendant acted with the intention to impair the value or availability of the evidence in a suit against him.⁷²

Applying this proposed test to the facts of *Grant*, the Court of Appeals correctly held that Grant's claim for common law obstruction of justice was sufficient to survive a motion to dismiss. First, the Hospital was on notice of a potential medical negligence claim.⁷³ When Grant's attorney initially contacted the Hospital, she specifically stated that she represented the decedent's estate with respect to a *potential medical negligence claim*.⁷⁴ Grant alleged that the Hospital "intentionally and/or recklessly destroyed" decedent's records after being placed on notice of a potential malpractice action.⁷⁵ Based on these facts, Grant's complaint was sufficient to state a claim upon which relief could be granted under the theory of common law obstruction of justice.⁷⁶

As previously stated, a tort action for obstruction would, in effect, create an alternate avenue to bring a medical malpractice action. A question arises, then, with regard to the availability of damages in such a suit. While a discussion of the full scope of damages is too broad for this note, a few considerations are worthy of mention. The damages sought in *Grant* included all of the actual damages that could have been awarded in a successful suit for wrongful death and medical malpractice.⁷⁷ It would logically follow that, in order to receive such damages in a tort action for obstruction, the plaintiff would have to prove that they would have prevailed in medical malpractice and wrongful death actions. This would ultimately lead to a "case within a case," and could potentially result in claims being decided based upon speculation about the results of a (nonexistent) prior suit. It appears as though a civil trial for common law obstruction of justice would closely resemble a trial for attorney malpractice.⁷⁸ The extent of available damages should be left to the sound discretion of the Supreme Court, or, in the alternative, the legislature.

72. 67 C.J.S. *Obstructing Justice* § 31 (2008) (explaining that the sample test could be applied in cases regarding suppression of evidence and modified for other categories of proceedings not codified in the North Carolina General Statutes).

73. *Grant*, 184 N.C.App. at 251, 645 S.E.2d at 852.

74. *Id.* (hospital arguing in its petition for discretionary review that the notice solely pertained to potential claims against third parties).

75. *Id.* at 252, 645 S.E.2d at 853.

76. See N.C. GEN. STAT. § 1A-1, Rule 12(b)(6) (2008).

77. *Grant*, 184 N.C. App. at 252, 645 S.E.2d at 853 (involving petitioner seeking compensatory and punitive damages).

78. See generally *Rorrer v. Cooke*, 313 N.C. 338, 361, 329 S.E.2d 355, 369 (1985) (describing the elements of a successful attorney malpractice claim, including a showing that the original claim would have resulted in a judgment in the plaintiff's favor).

CONCLUSION

The emerging jurisprudence in North Carolina on the propriety of a tort action for common law obstruction of justice in this area rests with the decision by the North Carolina Court of Appeals in *Grant v. High Point Reg'l Health Sys.*⁷⁹ Following the decision in *Grant*, hospitals and other professional organizations will be held to an even higher level of accountability than they are currently subject to. This accountability is warranted, however, by the fact that a tort claim for common law obstruction would survive only where it could be proven that the defendant intentionally acted to thwart the administration of public justice.

A tort action for common law obstruction of justice would be consistent with prior decisions of the North Carolina Court of Appeals as well as the Supreme Court of North Carolina.⁸⁰ The availability of this action would discourage individuals who may otherwise attempt to avoid a malpractice suit by concealing or destroying any evidence of their own fault.

When the Supreme Court or the Court of Appeals renders decisions on this issue in the future, they should not come without instruction. The courts should acknowledge the tort action, adding judicial direction to ensure that the claim can be fairly litigated based upon coherent requirements.

79. See *Grant*, 184 N.C. App. 250, 645 S.E.2d 851. After the decision by the Supreme Court of North Carolina holding that discretionary of the decision in *Grant* was improvidently granted, the appellant in the case moved for a voluntary dismissal on remand, which was granted. Notice of Voluntary Dismissal at 1, *Grant v. High Point Reg'l Health Sys.*, No. 04 CVS 3885 (Jan. 9, 2009).

80. See *Busby*, 142 N.C. App. 393, 544 S.E.2d 4; see also *Kivett*, 309 N.C. 635, 309 S.E.2d 442.