

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-586
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

CHRISTY X. DANIUS and LEEMA
PILLAI,
Plaintiffs,

v.

Mecklenburg County
No. 09 CVS 29776

J. NEAL RODGERS and THE LAW
OFFICES OF J. NEAL RODGERS, PLLC,
Defendants.

Appeal by Plaintiffs from judgment entered 21 January 2011
by Judge Nathaniel Poovey in Mecklenburg County Superior Court.
Heard in the Court of Appeals 26 October 2011.

*Harrington Law, P.C., by James M. Harrington, for
Plaintiffs-Appellants.*

*Dean & Gibson, PLLC, by Angela W. McIlveen, for Defendants-
Appellees.*

BEASLEY, Judge.

Siblings Christy X. Danius and Leema Pillai (Plaintiffs)
appeal from a 21 January 2011 order granting summary judgment in
favor of J. Neal Rodgers and the Law Offices of J. Neal Rodgers,
PLLC (Defendants). For the reasons stated below, we affirm.

On 14 December 2009, Plaintiffs filed a complaint alleging, *inter alia*, that Defendants committed legal malpractice by negligently mishandling litigation between (1) Plaintiffs and Wake Forest University Baptist Medical Center (the hospital), and (2) Plaintiff Pillai and her former employer Real Vision Solutions, LLC (Real Vision). On 9 September 2010, Defendants filed a motion for summary judgment, pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. By order dated 21 January 2011, the Honorable Nathaniel Poovey granted Defendants' motion. On 11 February 2011, Plaintiffs filed a timely notice of appeal.

A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "When ruling on a motion for summary judgment, the court must look at the record in the light most favorable to the party opposing the motion." *W. S. Clark & Sons, Inc. v. Union National Bank*, 84 N.C. App. 686, 688, 353 S.E.2d 439, 440 (1987) (internal quotation marks and citations omitted). A defendant can meet his burden and show that summary judgment is proper by "showing that the plaintiff

cannot surmount an affirmative defense which would bar the claim." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828 (1995) (citation omitted).

The doctrine of election of remedies is an affirmative defense "invoked to estop the plaintiff from suing a second defendant only if [plaintiff] has sought and obtained final judgment against a first defendant and the remedy granted in the first judgment is repugnant or inconsistent with the remedy sought in the second action." *Swain v. Leahy*, 111 N.C. App 884, 886, 433 S.E.2d 460, 461 (1993) (citation omitted). The remedy granted in the first action "is inconsistent with suit in the second action when the relief demanded in the second action is a continuation of relief sought in the first action, or if relief sought in the first action can redress the damage claimed in the second action." *McCabe v. Dawkins*, 97 N.C. App. 447, 448, 388 S.E.2d 571, 572 (1990) (internal citations omitted). A second action can be considered a continuation of the first action

when plaintiff seeks to recover some alleged deficiency in the settlement or judgment of the first action. If plaintiff accepts settlement, or judgment is rendered on his demand in the first action, such acceptance or judgment is a final redress of that action, regardless of whether the amount of relief is what plaintiff requested.

Id. at 449, 388 S.E.2d at 572 (citations omitted).

Plaintiffs allege that Defendants committed professional malpractice in negligently handling both their claim against the hospital and Plaintiff Pillai's claim against Real Vision. Plaintiff Pillai contends that Defendants' negligence in handling her case against Real Vision led her to suffer the loss of her H1-B visa. Plaintiffs also assert that Defendants caused them to lose the opportunity to pursue their claims against the hospital for the alleged wrongful disclosure of confidential medical information. Plaintiffs argue that because Defendants failed to conduct adequate discovery, when the hospital counterclaimed for the bills owed on Plaintiff Danius' wife's medical care, they were left without a defense, and financially unable to fight the counterclaim.¹

It is uncontroverted that Plaintiffs entered into settlements for both of the aforementioned claims. In essence, Plaintiffs now argue that Defendants' negligence caused the settlements reached in those cases to be less favorable than

¹ Plaintiffs also allege that they were prejudiced in their claim against Sardar Inamullah, former employee of the hospital. Plaintiffs assert this as a separate claim, but the settlement agreement with the hospital specifically releases the hospital and all present or former employees from all causes of action arising out of the alleged wrongful release of medical information. As such, this settlement agreement also covers the claim against Mr. Inamullah related to this same alleged disclosure.

they could have been. This argument is without merit. As our Court held in *Stewart v. Herring*,

if a party contends that he or she was deprived of a legal claim because of the action of another and he pursues the claim against the original defendant he cannot then make a claim against the party he says caused him to lose all or part of the original claim. This is so even if the settlement the plaintiff is able to make on the original claim is not as good as it would have been if there had been no wrongful action by the third party.

80 N.C. App. 529, 531, 342 S.E.2d 566, 567 (1986). Plaintiffs are barred from suing Defendants for professional negligence by the doctrine of election of remedies. Accordingly, the trial court's grant of summary judgment is upheld. Because we affirm summary judgment on these grounds, we decline to address Plaintiffs' alternative arguments.

Affirmed.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).