UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 9 | Number 1 Article 24

12-1-1930

Judgments -- Setting Aside Judgment for Neglect of Attorney Not Residing in County of Trial

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case felt bound by an earlier decision[11] which denied the right through fear of disturbing the harmony of the home and due to a strict construction of the statute, since it was in derogation of the common law. That decision left the wife with a remedy in the divorce court and in the criminal court, but such a right is not here presented, as this is a negligent injury and not a willful one.

North Carolina and Wisconsin have adopted the liberal construction of their married women acts and permit tort actions by the wife, whether the injury is willful[12] or negligent.[13] New York, on the other hand, under a similar statute has refused the tort action.[14]

It is submitted that the right of action should not be denied the wife because of vague public policy based on *a priori* reasoning which experience in other states has demonstrated to be unfounded. The married women statutes are remedial in character and should be liberally construed.[15] There should be no procedural limitations on married women, as such. Instead, the right of a married woman to recover against her husband should be governed by reasonable limitations of substantive law, consistent with the relation of the parties.[16]

HUGH BROWN CAMPBELL.

Judgments—Setting Aside Judgment for Neglect of Attorney Not Residing in County of Trial

In a recent North Carolina case plaintiff instituted suit in Ashe County against defendant who lived in Gaston County. Defendant filed a verified answer but neither he nor his attorney appeared for trial. Judgment was rendered against defendant. Under §600 of

[11] Thompson v. Thompson, 218 U. S. 611, 31 Sup. Ct. 111, 54 L. ed. 1180, 30 L. R. A. (N. S.) 1153, 21 ANN. CAS. 921 (1910); Note (1913) 22 YALE L. J. 250; 9 MICH. L. REV. 440 (It is to be noted that the remarks concerning property actions are against the great weight of authority).

[12] Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206 (1920), 181 N. C. 66, 106 S. E. 149 (1921); Note (1921) 19 MICH. L. REV. 659, 7 VA. L. REV. 476.

[13] Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9, 29 A. L. R. 1479 (1923); Note (1923) 33 YALE L. J. 315, 2 N. C. LAW REV. 113, 10 VA. L. REV. 161; Waite v. Pierce, *supra* note 8; Earle v. Earle, 198 N. C. 411, 151 S. E. 884 (1930).

[14] Newton v. Weber, *supra* note 10. It is to be noted that the N. C. statute does not expressly permit the wife to sue her husband in tort but such a result is derived by construction only. N. C. ANN. CODE (Michie, 1927) §§454, 2506, 2513.

[15] BLACK, INTERPRETATION OF LAWS (2d ed. 1911) 375-378.

[16] See Mathewson v. Mathewson, 79 Conn. 23, 37, 63 Atl. 285, 287, 5 L. R. A. (N. S.) 611 (1906); Brown v. Brown, *supra* note 7. For excellent treatment of the subject see McCurdy, *Torts Between Persons in Domestic Relation* (1930) 43 HARV. L. REV. 1030.

the Code defendant moved to set the judgment aside for excusable neglect. The judge denied the motion upon the following finding of facts only: that defendant employed counsel in Gaston County who did not regularly attend the courts of Ashe County. *Held,* Judgment set aside. The negligence of the attorney is not imputed to the defendant who was not negligent in employing Gaston County counsel. The filing of a verified answer alleging facts which, if true, would constitute a meritorious defense makes such a finding unnecessary.[1]

The great majority of jurisdictions hold the neglect of an attorney in permitting a judgment to be entered against his client to be the neglect of the client and no ground for relief unless excusable.[2] North Carolina holds the neglect of counsel in the performance of profession duties[3] not attributable to the party[4] if he himself is not negligent.[5]

Should a party employing counsel not regularly practicing in the county of trial be himself held negligent and no relief granted him if his attorney negligently permits judgment to be entered against him?

The clerk has no legal obligation to notify either the party or his attorney that a case is set for trial.[6] Because of this, the former difficulty of transportation and communication caused North Carolina to hold a party negligent for employing counsel outside the county of trial and to refuse to set aside a judgment secured through counsel's

[1] Sutherland v. McLean and Faysoux, 199 N. C. 345, 154 S. E. 662 (1930).

[2] Note (1910) 27 L. R. A. (n. s.) 858; 1 FREEMAN, JUDGMENTS (1925) §248; Delewski v. Delewski, 76 Ind. App. 37, 131 N. E. 228 (1921); Nitsche v. City of Chicago, 280 Ill. 132, 117 N. E. 500 (1917); Guardia v. Guardia, 48 Nev. 230, 229 Pac. 386 (1924); Patterson v. Uncle Sam Oil Co., 101 Kan. 40, 165 Pac. 661 (1917); Carlson v. Bankers' Discount Co., 107 Ore. 686, 215 Pac. 986 (1923); Munroe v. Dougherty, 196 Mo. App. 124, 190 S. W. 1022 (1917). Where defendant is his own attorney his negligence will not excuse, Pac. Acceptance Co. v. McCue *et al,* 71 Mont. 99, 228 Pac. 761 (1924).

[3] See Seawell v. Parsons Lumber Co., 172 N. C. 320, 90 S. E. 241 (1916) (if attorney acting as a mere agent to employ another attorney—an act which the client could perform—his neglect is that of the client).

[4] Grandy v. Products Co., 175 N. C. 511, 95 S. E. 914 (1918); Helderman v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627 (1926); Gaylord v. Berry, 169 N. C. 733, 86 S. E. 623 (1915); Grill v. Vernon, 65 N. C. 76 (1871) (defendant is not required to examine the records to see if his attorney has filed answer).

[5] A party must always give to his litigation the attention which a man of ordinary prudence would give to his important business. Osborn v. Leach, 133 N. C. 428, 45 S. E. 783 (1903); Kercher v. Baker, 82 N. C. 169 (1880).

[6] Cahoon v. Brinkley, 176 N. C. 5, 96 S. E. 650 (1918); McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4 (1913); Pulaski Oil Co. v. Conner, 62 Okla. 211, 162 Pac. 464 (1927); Baker v. Hunt & Co., 66 Okla. 42, 166 Pac. 891 (1917); McCord v. Harrison, 207 Ala. 480, 93 So. 428 (1922); Dallister v. Pilkington, 185 Iowa 815, 171 N. W. 127 (1919).

neglect.[7] At other times she has not so held.[8] The instant case marshalls the former decisions and expressly abrogates the rule that due care requires a party to employ local counsel. In view of the present transportation and communication facilities the reason for the former holdings fails and, under the rule that the negligence of an attorney is not imputed to the client, it is submitted that this is a logical and correct result. It is also submitted that the majority holding that the negligence of the attorney is excusable only when that of the party would be[9] is much the better rule and would save the court much future embarrassment.

Plaintiff in the instant case did all that the law has heretofore required of him and the dissenting judge asks what more he must do to secure a valid judgment.[10] Is the answer, let him notify both the non-resident defendant and his attorney that the case is set for trial? This suggestion is placing an unusual burden upon plaintiff and is not a necessary result of the case as the point the court intended to decide was that defendant was not negligent in employing non-resident counsel, and it did not squarely meet the issue raised by defendant's failure to attend court himself.

The case further holds that the filing of a verified answer removes the necessity of a specific finding of a meritorious defense. If no answer has been filed, defendant's contentions are not before the court and such a finding is indispensable[11] for unless defendant has a valid defense it would be a vain thing to disturb the judgment already entered.[12] By the weight of authority a verified answer suffices for an affidavit of merits[13] and the affidavit need show only a

[7] Allen v. McPherson, 168 N. C. 435, 84 S. E. 766 (1915); Hardware Co. v. Buhmann, 159 N. C. 511, 75 S. E. 731 (1912); Ham v. Finch, 173 N. C. 72, 91 S. E. 605; McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4 (1913); Hyde County Board & Lumber Co. v. Thomasville Chair Co., 190 N. C. 437, 130 S. E. 12 (1925).

[8] Seawell v. Parsons Lumber Co., *supra* note 2; Helderman v. Hartsell Mills Co., *supra* note 3; Osborn v. Leach, *supra* note 4; Sutherland v. McLean, 199 N. C. 345, 351, ("To follow the decisions now existing, it would be necessary to possess the double head of Janus, and such trancsendent qualification ought not to be required of trial judges.")

[9] See note 1. In McCord v. Harrison and Stringer, 207 Ala. 480, 93 So. 428 (1922) the court reaches an opposite conclusion from the instant case on similar facts.

[10] Sutherland v. McLean, *supra* note 7, at 353.

[11] Bowie v. Tucker, 197 N. C. 671, 150 S. E. 200 (1929); School v. Peirce, 163 N. C. 424, 79 S. E. 687 (1913).

[12] 34 C. J. Judgments, §550.

[13] Maden v. Dunbar *et al*, 52 N. D. 74, 201 N. W. 991 (1924); Huebner v. Farmers Ins. Co., 71 Iowa 30, 32 N. W. 13 (1887); State v. District Court of Second Judicial District, 38 Mont. 415, 100 Pac. 207 (1909); Eherhart v.

prima facie meritorious defense, which cannot be controverted by counter-affidavits.[14] It might be argued that the judge having found no meritorious defense is presumed to have had before him facts sufficient to negative it.[15] The answer, however, speaks for itself as a part of the record of which the court will take judicial notice[16] and from which the court will review the conclusions of the judge.[17]

The cases cited in the dissent on this point are all cases in which no answer had been filed or no facts at all were found relative to the negligence.[18] While good practice may require the judge to set out findings relative to a meritorious defense, any other holding, it is submitted, would have been over technical and not in harmony with the highly remedial purpose of §600.[19]

SUSIE SHARP.

Libel—Negotiable Instruments—Injury to Business Reputation by Altering Check

Plaintiff, a corporation operating a general merchandise store, gave defendant, a wholesale meat packing corporation, a post-dated check for $54.99 to settle an account, as agreed. Defendant sent the check in for collection with the date altered, making it payable at once. The check was returned by the bank due to insufficient funds. The plaintiff, having deposited enough to pay the check, sued the defendant for damage to its credit and business reputation caused by defendant's negligent, wanton, and willful premature presentation of the check causing the bank to give false information that the plaintiff had drawn a check without funds. A jury verdict of $2,000 was affirmed, the plaintiff being entitled to such substantial damages as would compensate for the injury as well as such punitive damages as were proper punishment for such willful wrong.[1]

This case is without precedent or direct authority and was decided by analogy to suits against banks for the wrongful dishonor of customers' checks. The situations, while generally similar, are different

Salogar *et al*, 71 Cal. App. 290, 235 Pac. 86 (1925). 1 FREEMAN, JUDGMENTS (1925) §286.

[14] 1 FREEMAN, JUDGMENTS, §289; 34 C. J. Judgements, §571 (3).

[15] Holcomb v. Holcomb, 192 N. C. 505, 135 S. E. 332 (1926).

[16] 23 C. J., Evidence, §1918; N. C. ANN. CODE (Michie, 1927) §1412; Wilson v. Beaufort County Lumber Co., 131 N. C. 164, 42 S. E. 565 (1902).

[17] Norton v. McLaurin, 125 N. C. 185, 34 S. E. 269 (1898).

[18] Sutherland v. McLean, *supra* note 7, at page 352.

[19] (1927) 5 N. C. L. REV. 269.

[1] St. Charles Mercantile Co. v. Armour & Co., 153 S. E. 473 (S. C. 1930).