IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-940

No. COA22-320

Filed 29 December 2022

Alamance County, No. 20 CVS 2215

ESTATE OF HENRY WYER, by and through the Administrators of the Estate, BENITA WYER and LAMONT WYER, Plaintiffs,

v.

ALAMANCE REGIONAL MEDICAL CENTER, INC. d/b/a CONE HEALTH ALAMANCE REGIONAL MEDICAL CENTER, Defendants.

Appeal by Plaintiffs from order entered 2 September 2021 by Judge Kevin M. Bridges in Alamance County Superior Court. Heard in the Court of Appeals 6 September 2022.

Kenneth M. Johnson, Attorney, P.A., by Kya Johnson, for plaintiffs-appellants.

Waldrep Wall Babcock & Bailey PLLC, by J. Dennis Bailey, for defendant-appellee.

MURPHY, Judge.

¶ 1 A complaint that alleges a decedent previously executed a form requiring resuscitation efforts but died after the medical provider unilaterally entered and subsequently followed an unauthorized Do Not Resuscitate Order alleges facts establishing negligence under the common law doctrine of res ipsa loquitur. On these

alleged facts, a medical malpractice action was not subject to the heightened pleading requirement of expert certification under Rule 9(j) of the Rules of Civil Procedure, and the trial court improperly dismissed the action for failure to include that certification. However, the trial court did not err in dismissing a second claim for breach of contract based on the same facts where that claim was, in effect, a medical malpractice action.

BACKGROUND

¶ 2 The Record on Appeal in this case does not disclose much. What is alleged is that on 11 May 2018, Decedent Henry Wyer, along with his daughter and co-administrator of his estate, Plaintiff Benita Wyer,[1] met with Defendant Alamance Regional Medical Center, Inc. d/b/a Cone Health Alamance Regional Medical Center and signed a form titled *Medical Orders for Scope of Treatment* ("MOST form") prior to Decedent's scheduled surgery. Decedent and his daughter indicated on the MOST form Decedent's wishes for Defendant to attempt resuscitation and provide the "[f]ull [s]cope of [t]reatment," including transfer, in the event Decedent were to stop breathing or lose his pulse. Although it appears from the pleadings that Decedent underwent surgery at Defendant Hospital, the pleadings do not reveal the scope of the surgery, how it went, or Decedent's prognosis following the surgery.

[1] Also joined as a plaintiff is Decedent's son and co-administrator of his estate, Lamont Wyer.

¶ 3 Plaintiff's complaint alleges Decedent was readmitted to Defendant Hospital on 14 June 2018 and that no additional MOST form was signed at that time. It is unclear why Decedent was readmitted. Although another MOST form was not signed upon the June readmittance, the complaint alleged Plaintiff had "another discussion" with Defendant's staff upon the June readmittance regarding a Do Not Resuscitate order ("DNR"). Although a different MOST form was not signed after that discussion, Defendant's staff signed and entered a DNR in Decedent's medical record effective 14 June 2018. Plaintiff alleges the May MOST form requiring a full scope of treatment in the event of an emergency was still in effect at all times.

¶ 4 Four days after his readmission, on 18 June 2018, Decedent went into a cardiopulmonary episode while in Defendant's care and died that day when Defendant's staff abided by the terms of the 14 June DNR, not performing CPR or otherwise attempting to resuscitate Decedent.

¶ 5 On 17 December 2020, Decedent's Estate filed a complaint in Alamance County Superior Court asserting claims for (I) negligence in improperly entering and subsequently following the June DNR Order and (II) breach of contract in entering the DNR Order without Plaintiff's consent and in violation of the binding May MOST form.

¶ 6 On 4 March 2021, Defendant filed a *Motion to Dismiss and Answer* admitting its entry of the DNR Order, alleging it conformed with applicable standards of care

in entering the form, and additionally alleging that the DNR Order superseded the agreement the parties previously reached in the MOST form. Defendant answered further that Decedent's medical records "reflect that [Plaintif] agreed with the DNR Order entered on [14 June 2018], regarding the medical care or treatment to be provided to [Decedent] thereafter."

¶ 7 The trial court granted Defendant's Rule 12(b)(6) motion to dismiss and dismissed both counts of Plaintiff's complaint for failing to assert that an expert reviewed Decedent's medical care and was willing to assert it fell below the applicable standard of care in accordance with Rule 9(j) of the North Carolina Rules of Civil Procedure. The trial court noted in its order "that at the hearing [Plaintiff's] counsel tendered copies of certain exhibits . . . as referenced in the complaint for review by the Court, which exhibits were reviewed under the standard applicable to the motion to dismiss, without converting the motion to summary judgment under Rule 56." Plaintiff filed timely notice of appeal.

ANALYSIS

¶ 8 "On a motion to dismiss for failure to state a claim upon which relief can be granted, all allegations of fact are taken as true but conclusions of law are not." *Jackson v. Bumgardner*, 318 N.C. 172, 174-75 (1986) (citations omitted). A complaint is properly dismissed under Rule 12(b)(6)

> when one of the following three conditions is satisfied: (1)

> when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of facts sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim.

Id. at 175.

¶ 9 "On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Wheeless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 584, 589 (2014), *appeal dismissed, disc. rev. denied*, 368 N.C. 247 (2015). "In conducting our analysis, we also consider any exhibits attached to the complaint because a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." *Krawiec v. Manly*, 370 N.C. 602, 606 (2018).

¶ 10 A "plaintiff's compliance with [N.C.G.S.] § 1A-1, Rule 9(j) requirements" likewise "presents a question of law to be decided by a court, not a jury. A question of law is reviewable by this Court *de novo*." *Smith v. Axelbank*, 222 N.C. App. 555, 558 (2012).

A. Count I – Negligence

¶ 11 Plaintiff first contends the trial court erred in dismissing the negligence count of its complaint for failure to provide the expert certification required under Rule 9(j) of the North Carolina Rules of Civil Procedure. We agree and reverse the trial court's

Rule 12(b)(6) dismissal of Count I.

¶ 12 Claims involving medical negligence are governed by Chapter 90 of the North Carolina General Statutes. For any medical malpractice action, Article 1B outlines a statutory negligence framework particularly defined to the practice of medicine.

¶ 13 A negligence claim is a medical malpractice action subject to Article 1B if it asserts either of the following:

> a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.
>
> b. A civil action against a hospital . . . for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

N.C.G.S. § 90-21.11(2) (2021).

¶ 14 N.C.G.S. § 90-21.12 then defines actionable medical negligence as care that "was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances . . . ." N.C.G.S. § 90-21.12(a) (2021). This includes "action or inaction" by the healthcare provider that likewise "was not in accordance with the standards of practice among similar health

care providers situated in the same or similar communities under the same or similar circumstances . . . ." *Id.*

¶ 15 Since it will often be the case that expert testimony is needed to opine on the applicable medical standard of care in any given case, the North Carolina General Assembly began subjecting medical malpractice actions to heightened pleading requirements under Rule 9 of the North Carolina Rules of Civil Procedure beginning in 1995, generally requiring an allegation certifying an expert witness had reviewed the claim before filing to survive dismissal. *See* N.C.G.S. § 1A-1, Rule 9(j) (2021); *see also Thigpen v. Ngo*, 355 N.C. 198, 203 (2002) ("The General Assembly added subsection (j) of Rule 9 in 1995 pursuant to chapter 309 of House Bill 730, entitled, 'An Act to Prevent Frivolous Medical Malpractice Actions by Requiring that Expert Witnesses in Medical Malpractice Cases Have Appropriate Qualifications to Testify on the Standard of Care at Issue and to Require Expert Witness Review as a Condition of Filing a Medical Malpractice Action.'"); *see generally* N.C.G.S. § 90-21.12 (2021). Rule 9(j) provides that "a complaint alleging medical malpractice shall be dismissed unless a plaintiff asserts in her complaint that her medical care has been reviewed by a person who is willing to testify that the medical care did not comply with the applicable standard of care[.]" *Smith*, 222 N.C. App. at 558; *see* N.C.G.S. § 1A-1, Rule 9(j).

¶ 16 However, because there also are often cases where proof of negligence or

causation in a medical malpractice action is lacking, Rule 9(j) alternatively requires that "a plaintiff must allege facts establishing negligence under the doctrine of *res ipsa loquitur*." *Smith*, 222 N.C. App. at 558 (citing N.C.G.S. § 1A-1, Rule 9(j)(3)). The *res ipsa loquitur* doctrine

> permits negligence to be inferred from the physical cause of an accident, without the aid of circumstances pointing to the responsible human cause. Where this rule applies, evidence of the physical cause or causes of the accident is sufficient to carry the case to the jury on the bare question of negligence.

Diehl v. Koffer, 140 N.C. App. 375, 377 (2000) (quoting *Harris v. Mangum*, 183 N.C. 235, 237 (1922)). The doctrine is invoked where "no proof of the cause of an injury is available, the instrument involved in the injury is in the exclusive control of the defendant, and the injury is of a type that would not normally occur in the absence of negligence." *Smith*, 222 N.C. App. at 559 (marks omitted); *Robinson v. Duke Univ. Health Sys.*, 229 N.C. App. 215, 225 (2013), *disc. rev. denied*, 367 N.C. 328 (2014); *see also Alston v. Granville Health Sys.*, 221 N.C. App. 416, 419, *disc. rev. denied*, 366 N.C. 247 (2012). "[T]he plaintiff must, in part, allege facts from which a layperson could infer negligence by the defendant based on common knowledge and ordinary human experience." *Robinson v. Halifax Reg'l Med. Ctr.*, 271 N.C. App. 61, 70 (2020). Where "[t]he fact of the casualty and the attendant circumstances [] themselves furnish all the proof that the injured person is able to offer or that it is necessary to

offer[,]" *Mitchell v. Saunders*, 219 N.C. 178, 183 (1941) (citation omitted), "the facts or circumstances accompanying an injury by their very nature raise a presumption of negligence on the part of the defendant." *Smith*, 222 N.C. App. at 559 (marks omitted).

> The doctrine is grounded in the superior logic of ordinary human experience; and it permits a jury, on the basis of experience or common knowledge, to infer negligence from the mere occurrence of the accident itself. However, application of the doctrine based on common knowledge is allowed only when the occurrence clearly speaks for itself.

Diehl, 140 N.C. App. at 378 (marks and emphases omitted).

¶ 17 "If the facts of the case justify[] . . . application of the doctrine of res ipsa loquitur, the nature of the occurrence and the inference to be drawn supply the requisite degree of proof to carry the case to the jury without direct proof of negligence" and, thus, the need for expert review and certification. *Tice v. Hall*, 310 N.C. 589, 593 (1984). "Uniformly, in this and other courts, *res ipsa loquitur* has been applied to instances where foreign bodies, such as sponges, towels, needles, glass, etc., are introduced into the patient's body during surgical operations and left there." *Id*. at 592 (citation omitted). We have also applied the doctrine where there were "injuries to a part of the patient's anatomy outside of the surgical field." *Robinson*, 229 N.C. App. at 225. Nonetheless, our Courts have emphasized that "any limitation of the application of *res ipsa loquitur* to only these two types of medical malpractice

cases is not supported by the plain language of our case law." *Id.* at 227.

¶ 18 Plaintiff argues it was not required to specifically plead the Rule 9(j) expert certification here in that it alleged facts implicating the doctrine of *res ipsa loquitur* thereby allowing the negligence claim to be presented to a jury pursuant to Rule 9(j)(3). Specifically, Plaintiff contends that "[h]ow the MOST form was replaced by the DNR form is not directly clear." We agree the doctrine of *res ipsa loquitur* applies here as to how the DNR Order came to be created and placed in Decedent's file, thus negating the need for certification of expert review.

¶ 19 The relevant inquiry is how Decedent's status was changed to DNR on 14 June, contrary to the MOST form completed a month earlier. To support a claim for medical malpractice, Plaintiff must put forth evidence establishing Defendant breached the applicable medical standards of care in entering the subsequent unconsented DNR order into his file. *See*, *e.g.*, N.C.G.S. § 90-21.17 (2021); *see also Tice*, 310 N.C. at 594 ("Defendant's evidence that he complied with the statutory standard does not remove the case from the jury's determination."). According to the complaint, the origin of the DNR form is unknown to Plaintiff; thus *res ipsa loquitur* permits the inference of negligence. *See Alston*, 221 N.C. App. at 419 ("Our Court has held that the *res ipsa loquitur* doctrine is only applicable where there is no direct proof of the cause of the injury available to the plaintiff."). Defendant may raise defenses to rebut the allegation of negligence or application of the *res ipsa loquitur* doctrine beyond its Rule

12(b)(6) motion.

¶ 20 Plaintiff alleged facts which, taken as true, invoke the doctrine of *res ipsa loquitur* as to the cause of the unauthorized June DNR Order in Decedent's file, and thus Plaintiff was not required to include the expert certification required under Rule 9(j) in order to survive a Rule 12(b)(6) motion. We reverse the dismissal of Count I of Plaintiff's complaint for negligence.

B. Count II – Breach of Contract

¶ 21 Plaintiff also challenges the trial court's dismissal of Count II for breach of contract. This claim is based on the same facts supporting Plaintiff's negligence claim; namely, Defendant's non-performance under the 11 May 2018 MOST form and subsequent entry of the unauthorized June DNR Order. The trial court dismissed Plaintiff's breach of contract claim pursuant to Rule 12(b)(6) for failure to provide the certification required by Rule 9(j). We conclude the trial court did not err in dismissing Count II of the complaint.

¶ 22 "[I]n the context of a health care provider's unauthorized disclosure of a patient's confidences, claims of medical malpractice, invasion of privacy, breach of implied contract and breach of fiduciary duty/confidentiality should all be treated as claims for medical malpractice." *Jones v. Asheville Radiological Group*, 129 N.C. App. 449, 456 (1998), *remanded on other grounds*, 350 N.C. 654 (1999). "Moreover, . . . North Carolina does not recognize breach of contract as a legal theory under which

one can recover for negligent malpractice." *Lackey v. Bressler*, 86 N.C. App. 486, 491 (1987); *see also Wheeless*, 237 N.C. App. at 590 (noting "unfair and deceptive acts committed by medical professionals are not included within the prohibition of N.C.G.S. § 75-1.1(a)."); *but see Bennett v. Hospice & Palliative Care Ctr. of Alamance-Caswell*, 246 N.C. App. 191, 196 (2016) (holding the trial court erred in dismissing the plaintiff's breach of contract action where the claim, involving post-mortem handling of the decedent's body and services, did not "involve[] the provision of medical care under [N.C.G.S.] § 90-21.11" as to invoke the heightened pleading requirements of Rule 9(j)).

¶ 23 The above authorities dictate Plaintiff cannot recover under a breach of contract theory for what is, in reality, an action for medical malpractice. The trial court did not err in dismissing Count II of Plaintiff's complaint.

CONCLUSION

¶ 24 Count I of Plaintiff's Complaint for medical negligence alleges facts implicating the common law doctrine of *res ipsa loquitur*; thus, the malpractice claim did not require the heightened pleading requirement of expert certification and review pursuant to Rule 9(j). The trial court therefore erred in dismissing Count I of Plaintiff's complaint under Rule 12(b)(6), and we vacate its order granting Defendant's motion to dismiss with respect to that count and remand for further proceedings consistent with this opinion. Count II of Plaintiff's complaint, however,

was properly dismissed as it states a claim for medical malpractice, not breach of contract.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges DILLON and INMAN concur.

Report per Rule 30(e).