No. COA24-983 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

TASHA L. JONES and THOMAS O. JONES, Plaintiffs-Appellants, v. MICHAEL R. MILL, M.D., in his individual capacity; PAMELA RO, M.D. in her individual capacity; and JOHN DOE 1-5, in his/her individual capacity, Defendants-Appellees.	)	From Orange County

****

NORTH CAROLINA ASSOCIATION OF DEFENSE ATTORNEYS' AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES

****

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

No. COA24-983 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

TASHA L. JONES and THOMAS O. JONES, Plaintiffs-Appellants, v. MICHAEL R. MILL, M.D., in his individual capacity; PAMELA RO, M.D. in her individual capacity; and JOHN DOE 1-5, in his/her individual capacity, Defendants-Appellees.	)	From Orange County

****

NORTH CAROLINA ASSOCIATION OF DEFENSE ATTORNEYS' AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES[1]

****

[1] No party to this case, and no one other than the amicus curiae, its members, or its counsel, directly or indirectly wrote this brief or contributed money for its preparation. See N.C. R. App. P. 28.1(b)(3)(c).

INTEREST OF THE AMICUS CURIAE

The NCADA is an association of over 800 attorneys and paralegals that is dedicated to the development of the law and practice of civil litigation in North Carolina. The NCADA's primary objectives are to bring civil trial attorneys together to advance the administration of justice; promote the free exchange of information, ideas, and litigation techniques; and further enhance the practice, improve the skills, and increase the knowledge of lawyers defending individuals and businesses in North Carolina.

NCADA's members devote a majority of their time to representing the interests of individuals and businesses in civil litigation. They practice in diverse areas of the law, including medical malpractice, commercial litigation, general liability, workers' compensation, product liability, labor and employment, construction, and local government law.

The NCADA and its members have an interest in ensuring that the law governing liability of medical and other professionals is fair and consistent with the policies enacted by the North Carolina legislature. They also have an interest in ensuring that medical and other professionals have fair notice of the duties they owe to patients and clients, including so that defense attorneys can effectively advise their clients on compliance with the law.

ISSUE ADDRESSED

Was the trial court correct to grant summary judgment for the defendants?

INTRODUCTION

The General Assembly has broadly defined medical malpractice as any "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." N.C. Gen. Stat. § 90-21.11(2)(a). This Court has affirmed that the definition of medical malpractice is broad. See Gause v. New Hanover Reg'l Med. Ctr., 251 N.C. App. 413, 418, 795 S.E.2d 411, 415 (2016).

If a child dies as a result of alleged medical malpractice, the child's estate may bring a medical malpractice claim. See Crocker v. Roethling, 363 N.C. 140, 141, 675 S.E.2d 625, 627-28 (2009). In addition, the representatives of the estate, often the parents, can pursue a wrongful death claim based on the alleged malpractice, including for damages to surviving family members. See id. at 141, 675 S.E.2d at 627-28; N.C. Gen. Stat. § 28A-18-2(b)(4)(c). Recoverable damages include emotional damages caused by the loss of the child. See N.C. Gen. Stat. § 28A-18-2(b)(4)(c).

Sections 1-15(c) and 1-52 set forth a three-year statute of limitations for medical malpractice actions. Vaughan v. Mashburn, 371 N.C. 428, 430 n.1,

817 S.E.2d 370, 372 n.1 (2018). There is a two-year statute of limitations on wrongful death claims, running from the date of death, and no action for the decedent's death can be brought if the "decedent would have been barred, had he lived, from bringing an action for bodily harm" because of the limitations in section 1-15(c). N.C. Gen. Stat. § 1-53(4).

The Joneses did not bring a claim related to alleged injuries associated with their daughter's death within the applicable statute of limitations. They thus pled only breach of fiduciary duty and constructive fraud claims and contend that the medical malpractice statutes do not apply to them. But North Carolina's General Assembly carefully crafted a framework for medical malpractice claims that balances the interests of plaintiffs, medical professionals, and the public, and has detailed statutes governing such claims. Allowing the Joneses' claims to proceed outside this framework would unnecessarily risk creating new and unpredictable liability for medical professionals outside the careful balancing done by our legislature.

The Joneses' theories also seek to relax certain requirements of breach of fiduciary duty and constructive fraud claims. These claims may be brought

against many kinds of professionals, not just doctors.[2] Recognizing the Joneses' unconventional theories would unnecessarily and unpredictably risk expanding liability for such professionals throughout North Carolina. The NCADA therefore requests that this Court, like the trial court, enforce the statutes enacted by our legislature and require plaintiffs like the Joneses to bring claims that fall within the statutory definition of medical malpractice within the medical malpractice framework.

ARGUMENT

I. The medical malpractice framework enacted by the General Assembly governs the Joneses' claims.

North Carolina has a detailed statutory framework that governs claims for alleged wrongs in the medical context. This framework balances the interests of providing remedies for actual medical malpractice, limiting frivolous suits, containing the costs of healthcare, and maximizing the time doctors can spend treating patients.

---

[2] See Fox v. Wilson, 85 N.C. App. 292, 299, 354 S.E.2d 737, 742 (1987) (discussing fiduciary duties of attorneys); Phillips v. State Farm, 129 N.C. App. 111, 113, 497 S.E.2d 325, 327 (1998) (insurance agents); Forbes v. Par Ten Group, 99 N.C. App. 587, 599, 394 S.E.2d 643, 650 (1990)) (real estate brokers); Marketplace Antique Mall v. Lewis, 163 N.C. App. 596, 600, 594 S.E.2d 121, 125 (2004) (business partners); Morehead v. Harris, 262 N.C. 330, 335, 137 S.E.2d 174, 180 (1964) (estate administrators).

North Carolina's medical malpractice framework was amended as part of tort and medical liability reform efforts dating back to the 1970s. See Black v. Littlejohn, 312 N.C. 626, 631-33, 325 S.E.2d 469, 473-75 (1985). The reforms, most recently in 2011, considered the "very important and sometimes complicated issue" of medical malpractice liability and healthcare costs. "House Documents," North Carolina General Assembly, 2011-2012 Session, Audio Archives, 04-20-11, at 0:38:23-0:38:56. "One of the primary reasons" the reform was needed was "to drive down the cost of our health care system," id. at 41:37-41:44, and to "let doctors focus on practicing safe medicine" without "feel[ing] like they are constantly looking over their shoulders with fear of lawsuits," id. at 0:42:00-0:42:28.

This Court should enforce the framework enacted by the General Assembly.

A. The medical malpractice statutes set forth a standard of care, expert requirements, and parameters for informed consent claims.

North Carolina's medical malpractice statutes ensure that doctors do not have to defend claims that are not informed by the standard of practice under which they operate. Relevant provisions are discussed below.

1. Standard of care.

The practice of medicine is specialized and complex. Much of what physicians—including cardiologists and heart surgeons—do on a daily basis,

and the medical literature they read, is beyond the comprehension of lay people, and so highly specialized that it exceeds the expertise of medical professionals who practice in other areas. The standard of care in section 90-21.12 takes these realities into account.

Section 90-21.12 prohibits recovery in a medical malpractice action unless the plaintiff shows that the defendant's conduct "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 at the time of the alleged act giving rise to the cause of action." N.C. Gen. Stat. § 90-21.12(a). "[B]y adopting the 'similar community' rule . . . it was the intent of the General Assembly to avoid the adoption of a national or regional standard of care for health providers." Estate of Dobson v. Sears, 908 S.E.2d 882, 888 (N.C. Ct. App. Nov. 19, 2024).

The Joneses seek to recover without showing that this standard of care was breached. See Opening Br. 33-34.

2. Civil Procedure Rule 9(j).

Rule 9(j) of the North Carolina Rules of Civil Procedure requires a medical malpractice plaintiff to obtain pre-suit review by an expert who is reasonably qualified to testify about the applicable standard of care. N.C. Gen. Stat. § 1A-1, R. 9(j). The plaintiff must certify in the complaint that such an

expert has reviewed the conduct at issue and determined that the standard of care was breached. Id.

As the North Carolina Supreme Court has explained, Rule 9(j) "averts frivolous actions by precluding [their] filing in the first place." Vaughan, 371 N.C. at 435, 817 S.E.2d at 375. Enforcing Rule 9(j) ensures that health care providers are not called away from practice to defend claims that lack merit. It also creates a mechanism for early dismissal to minimize litigation expenses that can accumulate quickly during discovery, particularly in cases requiring extensive expert analysis.

The Joneses' complaint did not comply with Rule 9(j). (See R pp 5-26)

3. Evidence Rule 702(b).

If a malpractice claim is properly brought, the plaintiff must prove that the defendant health care provider breached the standard of care through expert testimony that meets the requirements of Evidence Rule 702(b). N.C. Gen. Stat. § 8C-1, R. 702(b). A qualified expert must practice in "the particular field of practice of the defendant health care provider[.]" Smith v. Whitmer, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671-72 (2003).

Rule 702(b) requires an expert to specialize in the same specialty as the physician against whom his testimony is offered, or in a similar specialty that includes performance of the care at issue and experience treating similar patients. N.C. Gen. Stat. § 8C-1, R. 702(b); FormyDuval v. Bunn, 138 N.C.

App. 381, 387-89, 530 S.E.2d 96, 101 (2000). An expert also must have devoted a majority of his or her professional time during the year preceding the care at issue to the active clinical practice of that specialty. Moore v. Proper, 366 N.C. 25, 33, 726 S.E.2d 812, 818 (2012).

While the Joneses offered expert testimony related to some aspects of their case, they contend that they can recover without having experts testify that the standard of care was breached. See Opening Br. 33-34.

4. Informed consent statute.

The General Assembly also has enacted a statute on informed consent claims, which governs the information to be provided to medical patients related to procedures and treatments. See N.C. Gen. Stat. § 90-21.13. This statute, too, adopts a same or similar community standard. Id. § 90-21.13(a).

Section 90-21.13 shows the General Assembly's intent that claims based on alleged disclosure deficiencies by health care providers be subject to the medical malpractice statutes. Indeed, this Court has determined that informed consent claims fall within that framework. See Nelson v. Patrick, 58 N.C. App. 546, 548-50, 293 S.E.2d 829, 831-32 (1982) (concluding plaintiff's claim for failure to obtain informed consent was governed by three-year medical malpractice statute of limitation rather than one-year battery statute of limitation).

The Jones seek to recover without complying with section 90-21.13. See Opening Br. 31-32.

B. The medical malpractice statutes reflect the legislature's judgment that expert testimony is needed to determine materiality regarding the provision of medical care.

The Joneses contend that their claims can proceed outside the medical malpractice framework, which requires expert testimony, because they contend that the defendants had a duty to disclose material information. See Opening Br. 2-3, 11, 24, 30-31. The Joneses are incorrect. The law's treatment of materiality is context dependent. Rules 9(j) and 702(b) show the General Assembly's judgment that, in the context of providing medical care, expert testimony is necessary.

Across the law, where a fiduciary relationship exists, a duty to disclose material facts may arise. See, e.g., Seraph Garrison, LLC ex rel. Garrison Enterprises, Inc. v. Garrison, 247 N.C. App. 115, 128, 787 S.E.2d 398, 408 (2016) (involving duties owed within the corporate context). Materiality varies by circumstances, however. See In re Est. of Heiman, 235 N.C. App. 53, 56, 761 S.E.2d 191, 193 (2014) ("In deciding what information Ms. Layden was required to disclose, it is necessary to understand the context."). For example, a real estate broker has a duty to share material facts known to her that she knows or should know would reasonably affect the purchaser's judgment. Cummings v. Caroll, 379 N.C. 347, 364, 866 S.E.2d 675, 688 (2021). In selling

ownership interests in an LLC, a majority owner who exercises control over the LLC may owe a duty to disclose facts to other owners if there is a "substantial likelihood" that they "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Merrell v. Smith, 2023 NCBC 2, 2023 ¶ 69, WL 166878, at *11 (N.C. Bus. Ct. Jan. 11, 2023).

As discussed above, in the medical context, the standard of care, Rule 9(j) and Rule 702(b) show the legislature's intent that experts are needed to discern the scope of duties owed by doctors within their field of practice. This is true even where claims about "furnishing or failure to furnish professional services in the performance of medical . . . care," N.C. Gen. Stat. § 90-21.11(2)(a), involve "administrative or other nonclinical issues," N.C. Gen. Stat. § 8C-1, R. 702(h).

King v. Bryant, which the Joneses cite, is inapposite because the issue before the Court did not relate to furnishing or referring a patient for medical care, but instead to arbitration rights. 369 N.C. 451, 795 S.E.2d 340 (2017); Opening Br. 14-15, 22-23. In King, a doctor had a patient sign an arbitration agreement without explaining the legal ramifications of doing so. 369 N.C. at 466, 795 S.E.2d at 350. Arbitration rights are not a matter of medical care. In the Joneses' case, the issue is whether doctors breached their professional duties by not discussing certain clinical data and surgery outcomes with a

minor patient's parents. Rule 9(j), Rule 702(b), and section 90-21.13 were created for this type of medical issue.

C. The NCAJ's argument that the Joneses' labels determine whether a claim is subject to the medical malpractice statutes is inconsistent with this Court's precedent.

Amici the North Carolina Advocates for Justice ("NCAJ") argue that the Joneses are the masters of their complaint and their claims are thus necessarily governed by the "breach of fiduciary duty" and "constructive fraud" labels that they have placed on them. See NCAJ Br. 4. The NCAJ rely largely on federal and out of state cases for this concept. See id. at 7-13. This Court, however, has consistently looked to the substance of factual allegations rather than the labels applied to them—especially in the context of claims against medical professionals.[3]

In Bennett v. Hospice & Palliative Care Center of Alamance Caswell, this Court analyzed which of the plaintiff's eleven claims constituted medical malpractice claims. 246 N.C. App. 191, 783 S.E.2d 260 (2016). Analyzing the factual allegations, the trial court concluded that the claims arising from the defendants' acts occurring before the decedent's death sought damages due to

[3] See, e.g., Gause, 251 N.C. App. 413, 795 S.E.2d 411; Sturgill v. Ashe Mem'l Hosp, 186 N.C. App. 624, 652 S.E.2d 302 (2007); Lewis v. Setty, 130 N.C. App. 606, 503 S.E.2d 673 (1998); Norris v. Rowan Mem'l Hosp, 21 N.C. App 623, 205 S.E.2d 345 (1974).

the failure to provide professional services and, therefore, sounded in medical malpractice. Id. This Court affirmed the dismissal of those claims for failure to comply with Rule 9(j). Id. at 193-95, 783 S.E.2d at 262-63.

Similarly, in Goss v. Solstice E., LLC, the parents of an adolescent girl at a residential treatment facility alleged that the facility breached its fiduciary duties by overmedicating their daughter, failing to notify them of an overdose, and failing to inform them about the daughter's care and education. No. COA18-1158, 2019 WL 3936268, at *6 (N.C. Ct. App. Aug. 20, 2019) (unpublished). This Court deemed the claims medical malpractice claims and affirmed dismissal for failure to comply with Rule 9(j). Id. The Court explained:

> Though not the direct provision of medical or health care, such alleged mismanagement and miscommunication is a professional service arising out of a health care provider's treatment . . . because it "aris[es] out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, [where] the labor or skill involved is predominantly mental or intellectual, rather than physical or manual."

Id. (quoting Lewis v. Setty, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998)).

The NCAJ's "because I pled so" argument is inconsistent with this Court's case law.

* * *

The Joneses are seeking damages for conduct that arose out of the defendants' "furnishing or failure to furnish professional services in the

performance of medical . . . care." N.C. Gen. Stat. 90-21.11(2)(a); (R pp 12-16). Allowing their claims to proceed outside the medical malpractice framework would take away the protections provided by that framework in the Joneses' case. It also may encourage future plaintiffs to similarly seek to hold medical professionals liable outside the framework carefully balanced by the legislature. Because legal harms related to their daughter's surgery could have been redressed within the medical malpractice framework, there is no need to open the door to allowing the Joneses and others to subvert the medical malpractice statutes.

II. Allowing the Joneses' claims to proceed would unnecessarily risk creating new and unpredictable forms of liability for professionals outside the medical context.

In attempting to save their breach of fiduciary duty and constructive fraud claims, the Joneses seek to relax certain requirements of those claims. As noted above, professionals in many industries owe fiduciary duties and may be subject to constructive fraud claims. See supra pp 4-5. A loosening of current law would unnecessarily risk subjecting professionals across North Carolina, both medical professionals and others, to liability in ways that have not existed before.

A. The Joneses seek to recover for an unrecognized, amorphous, and unpredictable injury.

The Supreme Court and this Court have rejected a loss of chance theory of injury. See Parkes v. Hermann, 376 N.C. 320, 325-26, 852 S.E.2d 322, 325-26 (2020); Beck v. DePaolo, 294 N.C. App. 315, 901 S.E.2d 462 (2024) (unpublished). The Joneses' claimed injury sounds in loss of chance and should be rejected like previous attempts to recover under such a theory.

In their own words, the Joneses were "deprived . . . of their opportunity and agency to make a choice about Skylar's surgery." Opening Br. 17. They assert that "they would have had Skylar's surgery at another hospital" if they knew about clinical data and surgery outcomes regarding UNC's pediatric heart surgery program. Opening Br. 17. However, they do not argue that the outcome of Skylar's surgery would have been different had they made a different choice. See Opening Br. 9, 15, 17. This purported "injury" is an extension of the loss of chance doctrine because the Joneses seek to recover for a lost opportunity without having to show a different outcome.

Moreover, under traditional loss of chance theory, plaintiffs are required to show at least a fifty percent chance of a different outcome. See Parkes, 376 N.C. at 323, 852 S.E.2d at 324. The Joneses do not attempt to show any chance of a different outcome, claiming that they would have the same injury even if their daughter's surgery had been successful. (See R S p 1575). In that

the Joneses contend that the outcome is irrelevant to their injury theory, their theory appears to offer no limiting principle. (See R S pp 1568-71 (discussing the lack of a limiting principle)).

In North Carolina, as discussed above, the applicable standard of materiality determines what information must be disclosed by a fiduciary. See supra pp 10-11. In the medical context, that standard requires expert testimony. See N.C. Gen. Stat. § 8C-1, R. 702(b). And, in many contexts, the standard turns on whether providing the information would have altered the outcome. See supra pp 10-11. The Joneses demonstrate no good reason to recognize an amorphous decision-making injury that is not tied to outcome.

B. The Joneses' constructive fraud theory is inconsistent with North Carolina law.

The Joneses' arguments also seek relaxation of current law on constructive fraud, which has been stable for many years. See Rhodes v. Jones, 232 N.C. 547, 548, 61 S.E.2d 725, 726 (1950) (discussing the elements of constructive fraud); Terry v. Terry, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (discussing the same elements); Hewitt v. Hewitt, 252 N.C. App. 437, 442, 798 S.E.2d 796, 800 (2017) (same). These elements consistently have included that the plaintiff prove that the defendant sought to benefit him or herself. See Piles v. Allstate Ins. Co., 187 N.C. App. 399, 406, 653 S.E.2d 181, 186 (2007). This case does not show a need to change good law.

The Joneses seek to get past summary judgment by relaxing the benefit requirement, where they did not demonstrate that the defendants sought or gained an advantage from their daughter's surgery apart from performing services and receiving a standard fee. Courts repeatedly have rejected similar attempts to get around the benefit requirement. See, e.g., NationsBank of N.C. v. Parker, 140 N.C. App. 106, 114, 535 S.E.2d 597, 602 (2000); Bryant v. Wake Forest Univ. Baptist Med. Ctr., 281 N.C. App. 630, 638, 870 S.E.2d 269, 275 (2022). While the Joneses list other "possible benefits" to the defendants in their opening brief, they cite no evidence that the defendants, indeed, sought these speculated benefits, much less at the relevant time. See Ironman Med'l Props. v. Chodri, 268 N.C. App. 502, 513, 836 S.E.2d 682, 691 (2019) (the breach must be "with the intent to benefit himself"); Opening Br. 20-21.

Allowing the Joneses' constructive fraud claim to proceed could effectively alter an essential element of such a claim. See Sterner v. Penn, 159 N.C. App. 626, 631, 583 S.E.2d 670, 674 (2003) (discussing the benefit element as an essential one). "The requirement of a benefit to defendants follows logically from the requirement that a defendant harm the plaintiff by taking advantage of their relationship of trust and confidence." Barger v. McCoy Hillard & Parks, 346 N.C. 650, 667, 488 S.E.2d 215, 224 (1997). Relaxing the benefit element to permit plaintiffs to rely on a continued business relationship and collection of a fee for service may invite similar

claims against other types of professionals when the only advantage gained by a challenged transaction is that the defendant maintained the client's business and collected a standard fee. Under such an approach, if a financial transaction of any kind is involved, the benefit requirement could be satisfied.

* * *

In that constructive fraud and breach of fiduciary duty claims arise in many industries, relaxing the law in this area risks subjecting various professionals across North Carolina to liability in ways that have not existed to date. Because the medical malpractice framework provided redress for any legal harms that arose from Skylar Jones's surgery, this Court need not alter the current law to provide a remedy for her parents, and others like them, who do not bring their claims within the existing framework.

CONCLUSION

The NCADA respectfully requests that this Court affirm the judgment of the trial court.

Respectfully submitted, this 19th day of March, 2025.

ELLIS & WINTERS LLP

/s/ Electronically submitted
Michelle A. Liguori
N.C. State Bar. No. 52505
michelle.liguori@elliswinters.com
P.O. Box 33550
Raleigh, NC 27636

(919) 865-7000

N.C. App. R. 33(b) Certification: I certify that the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Madeleine M. Pfefferle
N.C. State Bar No. 50932
madeleine.pfefferle@elliswinters.com
P.O. Box 33550
Raleigh, NC 27636

David A. Keirstead
N.C. State Bar No. 59623
david.keirstead@elliswinters.com
P.O. Box 2752
Greensboro, NC 27402

Counsel for Amicus Curiae North Carolina Association of Defense Attorneys

CERTIFICATE OF COMPLIANCE

I certify that pursuant, to Rule 28.1(b)(d) of the North Carolina Rules of Appellate Procedure, the foregoing brief, which was prepared using 13-point, Century Schoolbook font, contains no more than 3,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, and appendixes), as reported by counsel's word-processing software.

This the 19th day of March 2025.

/s/ Electronically submitted
Michelle A. Liguori

CERTIFICATE OF FILING AND SERVICE

I further certify that I caused the foregoing to be filed with the Court of Appeals' electronic filing system and served on counsel of record by email at the addresses listed below:

Matthew W. Sawchak
Erik R. Zimmerman
ROBINSON, BRADSHAW & HINSON, P.A.
msawchak@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com

Attorneys for Defendants-Appellees Michael R. Mill, M.D. and Pamela Ro, M.D.

Barry S. Cobb
Dennis W. Dorsey
WALKER ALLEN, LLP
barry@walkerallenlaw.com
dennis@walkerallenlaw.com

Attorneys for Defendant-Appellee Michael R. Mill, M.D.

Pankaj K. Shere
Katherine Hilkey-Boyatt
Rachel Samuelson
HUFF POWELL & BAILEY, PLLC
pkshere@huffpowellbailey.com
kboyatt@huffpowellbailey.com
rsamuelson@huffpowellbailey.com

Attorneys for Defendant-Appellee Pamela Ro, M.D.

Phyllis Lile-King, Esq.
THE LILE-KING FIRM
phyllis@lileking.com
Jon R. Moore, Esq.
Matthew C. Berthold, Esq.
BROWN MOORE & ASSOCIATES, PLLC
jmoore@brownmoorelaw.com
mcb@brownmoorelaw.com

Attorneys for Plaintiffs-Appellants

Jon Ward
TATUM & ATKINSON, PLLC
jward@tatumatkinson.com

Attorney for Amicus Curiae North Carolina Advocates for Justice

MaryAnne M. Hamilton
MILLER LAW GROUP, PLLC
maryanne@millerlawgroupnc.com

Attorney for Amicus Curiae North Carolina Advocates for Justice

This the 19th day of March 2025.

/s/ Electronically submitted
Michelle A. Liguori

APPENDIX

Table of Contents

294 N.C.App. 315
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
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.
Court of Appeals of North Carolina.

Tracy Michelle BECK and Charles Bill Beck, Plaintiffs,
v.
Charles J. DEPAOLO, M.D., Charles J. DePaolo, M.D., P.A., and Mission Hospital, INC., Defendant.

No. COA23-764
|
Filed June 4, 2024

Appeal by Plaintiff from an order entered 3 January 2023 by Judge Lisa C. Bell in Buncombe County Superior Court. Heard in the Court of Appeals 5 March 2024. Buncombe County, No. 20 CVS 4200

Attorneys and Law Firms

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Adam L. Ross, and Jennifer M. Houti, for plaintiffs-appellants.

Roberts & Stevens, P.A., by David C. Hawisher, for Mission Hospital, Inc., defendant-appellee.

Opinion

WOOD, Judge.

***1** Tracy Beck ("Mrs. Beck") and Charles Beck (together, the "Becks" or "Plaintiffs") sued Dr. Charles DePaolo ("Dr. DePaolo"), Dr. DePaolo's business entity ("DePaolo Orthopedics"), and Mission Hospital on 23 November 2020 for medical malpractice and loss of consortium. The trial court granted Mission Hospital's motion for summary judgment. For the reasons stated below, we affirm.

I. Factual and Procedural History

Mrs. Beck was first evaluated by Dr. DePaolo on 20 June 2018 because she was experiencing significant pain in her left hip. After discussing treatment options with Mrs. Beck, Dr. DePaolo recommended an anterior approach total hip replacement to which Mrs. Beck agreed.

On 5 July 2018, Dr. DePaolo performed an anterior approach left total hip replacement on Mrs. Beck at a Mission Hospital-owned facility. Mission Hospital provided its staff to work in the operating room ("OR") with Dr. DePaolo. Two of Mission Hospital's circulating nurses were responsible for operating the Hana table on which Mrs. Beck's surgery was performed. The Hana table is a specially designed operating table often used in anterior approach hip replacements to allow nurses to manipulate the patient's leg and apply traction to open up the hip joint and provide visibility and access to the surgeon. During her recovery from the surgery, Mrs. Beck experienced numbness and weakness in her leg, which was discovered to be the result of an injury to her femoral nerve.

The Becks filed a complaint on 23 November 2020 and an amended complaint on 2 July 2021 against all three defendants, Dr. DePaolo, DePaolo Orthopedics, and Mission Hospital for medical malpractice and loss of consortium. Mission Hospital answered and denied liability, as did the DePaolo Defendants. On 2 September 2022, Mission Hospital filed a motion for summary judgment on the Becks' claims against it. On 2 October 2022, Mission Hospital also filed a motion to dismiss for the Becks' alleged failure to meet the certification requirements for medical malpractice pleadings under N.C. R. Civ. P. 9(j). On 15 October 2021, Plaintiffs filed a designation of expert witness giving notice that they intended to call Dr. Brandon Boyce ("Dr. Boyce") as an expert witness at trial. Mission Hospital's motions came on for hearing on 21 November 2022. On 3 January 2023, the trial court granted Mission Hospital's motion for summary judgment and dismissed all of Plaintiff's claims against Mission Hospital with prejudice. Plaintiffs filed written notice of appeal on 13 January 2023.

II. Analysis

Plaintiffs argue the trial court erred by granting Mission Hospital's motion for summary judgment because there are genuine issues of material fact regarding whether it committed medical malpractice. Plaintiffs also argue that to the extent the trial court dismissed their claims on the basis of a failure to comply with N.C. R. Civ. P. 9(j), the trial

court erred because their expert witness was willing to testify Mission Hospital did not comply with the applicable standard of care. We address the issues in turn.

A. Interlocutory Appeal

***2** Plaintiffs argue that although the summary judgment order is not certified for immediate appeal pursuant to N.C. R. Civ. P. 54(b), it is immediately appealable under the "substantial right" doctrine. N.C. Gen. Stat. § 1-277(a) (2023) (allowing appeal from an order of a superior court that affects a substantial right); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2023) (same).

Addressing interlocutory appeals, this Court has explained:

> Our Supreme Court has held that a grant of summary judgment as to fewer than all of the defendants affects a substantial right when there is the possibility of inconsistent verdicts, stating that it is the plaintiff's right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries. This Court has created a two-part test to show that a substantial right is affected, requiring a party to show (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exist.

Camp v. Leonard, 133 N.C. App. 554, 557–58, 515 S.E.2d 909, 912 (1999) (citation, quotation marks, and ellipsis omitted).

Specifically, Plaintiffs argue a risk of inconsistent verdicts exists if Plaintiffs and the DePaolo Defendants were to proceed to trial and if this Court subsequently were to reverse the trial court's grant of summary judgment to Mission Hospital. We agree. First, the same factual issues exist with regard to both the DePaolo Defendants and Mission Hospital. Plaintiffs' claim of medical malpractice arises out of one procedure, the hip replacement. Dr. DePaolo performed the hip replacement assisted by nurses employed by Mission Hospital. One of the prominent issues in the case is the factual issue of causation—that is, whether Dr. DePaolo committed medical malpractice by improper retractor placement or whether a nurse employed by Mission Hospital committed medical malpractice by implementing improper leg traction. Therefore, the same factual issues would be present in both trials. As for the possibility of inconsistent verdicts, two different juries potentially could reach conflicting verdicts in this case. For example, the first jury could find only the DePaolo Defendants liable for malpractice, while the second jury could find Mission Hospital, through the actions of one or more of its nurses, solely or jointly and severally liable with the DePaolo Defendants. Therefore, the possibility of inconsistent verdicts exists. Accordingly, the trial court's grant of summary judgment as to fewer than all defendants affects Plaintiffs' substantial right.

In contesting this Court addressing Plaintiffs' interlocutory appeal, Mission Hospital argues this Court's holding in *Myers v. Barringer* stands for the proposition that because Mission Hospital provided a facility for Dr. DePaolo to practice medicine, the factual issues and relevant standards of care are different as to the DePaolo Defendants and Mission Hospital. 101 N.C. App. 168, 398 S.E.2d 615 (1990). *Myers* involved the plaintiffs' claims of medical malpractice against two doctors, an anesthesiologist, Wake Anesthesiology Associates, Inc. ("Anesthesiology Associates"), and Wake Psychiatric Hospital, Inc. ("Holly Hill"). *Id.* at 170, 398 S.E.2d at 616. One of the plaintiffs, Mr. Myers, received treatment at Holly Hill for depression and migraine headaches. His primary doctor recommended electroconvulsive therapy ("ECT"). *Id.* The plaintiffs sued Mr. Myers's primary doctor for misdiagnosis and negligently failing to recommend proper treatment; the doctor who administered the ECT treatments for negligent administration of such treatment, failure to adequately diagnose Mr. Myers's condition, and failure to recommend proper treatment; the anesthesiologist and Anesthesiology Associates for improperly advising Mr. Myers of the side effects associated with ECT and for taking improper precautions; and Holly Hill because, through its employees, it allegedly failed to document and ensure Mr. Myers's treating physicians were aware of his complaints of pain and soreness and for failing to properly advise him of certain risks associated with the treatments. *Id.* at 170–71, 398 S.E.2d at 616–17.

***3** The trial court granted summary judgment in favor of Holly Hill. *Id.* at 170, 398 S.E.2d at 616. The plaintiffs appealed that interlocutory order, and this Court analyzed whether the order affected a substantial right of the plaintiffs.

Id. at 172, 398 S.E.2d at 617. This Court held the interlocutory order did not implicate a substantial right because the plaintiffs' claims

> involve[d] medical malpractice claims against defendants, each of whom had a separate and distinct contract from the others and each of whom owed a different duty to the Myers. *An independent contractor physician stands legally apart from a hospital which provides an environment for the physician to practice medicine.* Thus, the claim against Holly Hill involves issues which are not factually the same, particularly the duty a hospital owes a patient and the duty owed by an independent contractor physician to his patient, and this appeal is premature.

Id. at 173, 398 S.E.2d at 618 (emphasis added) (citation omitted).

However, *Myers* is distinguishable from the case *sub judice*. The plaintiffs in *Myers* brought claims of medical malpractice based on distinct theories. For example, they claimed Mr. Myers's primary doctor committed medical malpractice through misdiagnosis and negligently failing to recommend proper treatment. Their theory of Holly Hill's medical malpractice was separate and distinct. The plaintiffs alleged Holly Hill, "through its employees, failed to document and [e]nsure that the physicians treating Mr. Myers were aware of his complaints of pain and soreness .... [and] that Holly Hill failed to properly advise Mr. Myers of the risks of seizures and muscle contractions associated with ECT treatments." *Id.* at 171, 398 S.E.2d at 617.

We do not interpret the statement, "[a]n independent contractor physician stands legally apart from a hospital which provides an environment for the physician to practice medicine" to mean that in all cases in which a hospital provides an environment for a physician to practice medicine, there is no possibility of this Court hearing the merits of an interlocutory appeal. In *Myers*, for example, the primary doctor provided the diagnosis and recommend a particular treatment, while different providers administered the treatment. Here, Plaintiffs' claim of medical malpractice is not distinct as to the DePaolo Defendants and Mission Hospital. Unlike in *Myers*, Dr. DePaolo worked directly with nurses employed by Mission Hospital during the single procedure which Plaintiffs allege is the cause of Mrs. Beck's injury. Although the question of causation is focused on which defendant(s) in fact caused the injury, that factual question cannot be answered by different juries without creating the risk of arriving at inconsistent verdicts. Accordingly, we address the merits of Plaintiffs' appeal.

B. Summary Judgment

Plaintiffs argue the trial court erroneously awarded Mission Hospital summary judgment. They argue genuine issues of material fact exist as to whether Mission Hospital's nursing staff deviated from the applicable standard of care and whether the deviation proximately caused Mrs. Beck's rare femoral nerve injury.

This Court has articulated the proper standard of review of a trial court's order on summary judgment in the following manner:

> Summary judgment is appropriate 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). A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party.
>
> ***4** Upon a motion for summary judgment, the moving party carries the burden of establishing the lack of any triable issue and may meet his or her burden by proving that an essential element of the opposing party's claim is nonexistent. If met, the burden shifts to the nonmovant to produce a forecast of specific evidence of its ability to make a *prima facie* case, which requires medical malpractice plaintiffs to prove, in part, that the treatment caused the injury.

Cousart v. Charlotte-Mecklenburg Hosp. Auth., 209 N.C. App. 299, 302, 704 S.E.2d 540, 542–43 (2011) (cleaned up). A plaintiff in a medical malpractice lawsuit "must offer evidence that establishes the following essential elements: (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the

plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Id.* at 303, 704 S.E.2d at 543 (quotation marks omitted).

We only reach the issue of whether Plaintiffs can offer evidence establishing causation. "[E]xpert opinion testimony is required to establish proximate causation of the injury in medical malpractice actions." *Id.* at 303, 704 S.E.2d at 543. The Court in *Cousart* explained a plaintiff's burden in establishing proximate causation:

> While proximate cause is often a factual question for the jury, evidence based merely upon speculation and conjecture is no different than a layman's opinion, and as such, is not sufficiently reliable to be considered competent evidence on issues of medical causation.
>
> ...
>
> Thus, Plaintiffs must be able to make a prima facie case of medical negligence at trial, which includes articulating proximate cause with specific facts couched in terms of probabilities.

Id. at 303–04, 704 S.E.2d at 543 (quotation marks and ellipsis omitted). In other words, an expert witness's testimony regarding proximate causation cannot rest "upon mere speculation or possibility." *Id.* at 303, 704 S.E.2d at 543.

As a threshold matter, we must determine Plaintiff's burden for demonstrating proximate causation. Mission Hospital cites *Parkes v. Hermann* in arguing for a "more likely than not" standard. 376 N.C. 320, 852 S.E.2d 322 (2020). Mission Hospital argues that a plaintiff at the summary judgment stage must demonstrate by a "more likely than not" standard that a defendant caused her injury. The plaintiff in *Parkes* alleged the defendant failed to diagnose timely and administer a tissue plasminogen activator ("tPA"), a time-sensitive stroke treatment, causing neurological damage. *Id.* at 322, 852 S.E.2d at 323. "[T]here was only a 40% chance that plaintiff's condition would have improved if defendant had properly diagnosed plaintiff and timely administered tPA. By presenting evidence of only a 40% chance, plaintiff failed to show it was *more likely than not* that defendant's negligence caused plaintiff's current condition." *Id.* at 322, 852 S.E.2d at 323–24 (emphasis added) (citation omitted).

The plaintiff further "claimed that the loss of the 40% chance itself was a cognizable and separate type of injury—her loss of chance at having a better neurological outcome—that warranted recovery." *Id.* at 322–23, 852 S.E.2d at 324. In considering whether to establish loss of chance as a new and distinct negligence cause of action, our Supreme Court analyzed *Gower v. Davidian*, 212 N.C. 172, 193 S.E. 28 (1937), in which "the plaintiff sustained a neck fracture during a motor-vehicle accident." *Id.* at 324, 852 S.E.2d at 325 (2020) (citing *Gower*, 212 N.C. at 173, 193 S.E. at 29). The court in *Gower* "considered whether a physician was negligent in failing to timely diagnose the neck fracture, which resulted in approximately a thirteen-day delay in diagnosis." *Parkes*, 376 N.C. at 324, 852 S.E.2d at 325 (citing *Gower*, 212 N.C. at 174, 193 S.E. at 29). The plaintiff in *Gower* "argued that the delay in the diagnosis caused the fracture to develop a callus, preventing it from being set properly once diagnosed." *Parkes*, 376 N.C. at 324, 852 S.E.2d at 325 (citing *Gower*, 212 N.C. at 174, 193 S.E. at 29–30). The plaintiff's expert testified "that had this case received immediate attention and had that fracture and dislocation reduced, his chances for further recovery, or for perfect recovery, would have been much greater." *Gower*, 212 N.C. at 175, 193 S.E. at 30. The court in *Gower* held that the expert's "opinion in this respect is based entirely upon an actual reduction of the fracture, which the evidence discloses could not be reduced, and he merely says that the chances for further recovery would have been much greater. The rights of the parties cannot be determined upon chance." *Id.* at 176, 193 S.E. at 30. Having considered *Gower*, our Supreme Court in *Parkes* stated:

> ***5** Even if the Court in *Gower* did not outright reject what is today called a loss-of-chance claim, *it firmly framed medical malpractice claims within the confines of traditional proximate cause, which allows a negligence claim to proceed when the evidence shows that the negligent act more likely than not caused the injury.* If the evidence falls short of this causation standard, then there is no recovery. The Court [in *Gower*] did not relax the proximate cause requirement for a medical malpractice claim when presented with the opportunity.

376 N.C. at 325, 852 S.E.2d at 325 (emphasis added). Ultimately, our Supreme Court declined to establish "loss of

chance" as a new cause of action. *Id.* at 321, 852 S.E.2d 322, 322–23.

Our Supreme Court's focus on the phrase "more likely than not" originates from this Court's opinion in *Parkes*, which our Supreme Court affirmed in its opinion discussed above. 265 N.C. App. 475, 828 S.E.2d 575 (2019). This Court stated, "To establish proximate cause, the plaintiff must show that the injury was more likely than not caused by the defendant's negligent conduct." *Id.* at 477, 828 S.E.2d at 577 (citing *White v. Hunsinger*, 88 N.C. App. 382, 386, 363 S.E.2d 203, 206 (1988)) ("Proof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery."). This Court further stated:

> Under the "traditional" approach, a plaintiff may not recover for the loss of a less than 50% chance of a healthier outcome. But, if the chance of recovery was over 50%, a plaintiff may recover for *the full value of* the healthier outcome itself that was lost by merely showing, more likely than not (greater than 50%), that a healthier outcome would have been achieved, but for the physician's negligence.

Id. at 478, 828 S.E.2d at 578 (emphasis in original). In its use of the "more likely than not" phrase, this Court cited a Tennessee loss of chance case, *Valadez v. Newstart, LLC*, No. W2007-01550-COA-R3-CV, 2008 WL 4831306, at *5 (Tenn. Ct. App. Nov. 7, 2008), which states:

> We are persuaded that the loss of chance theory of recovery is fundamentally at odds with the requisite degree of medical certitude necessary to establish a [causal link] between the injury of a patient and the tortious conduct of a physician. A plaintiff in Tennessee must prove that the physician's act or omission more likely than not was the cause in fact of the harm.

(brackets and ellipsis omitted).

Thus it appears the specific verbiage "more likely than not" is applicable in loss of chance cases related to untimely diagnosis or treatment. Further persuading us of this interpretation is this Court's statement in *Seraj v. Duberman*, "the rule that proximate causation requires a showing plaintiff probably would have been better off is not applicable in this case. The rule applies when there is a negligent delay in treatment or diagnosis." 248 N.C. App. 589, 600, 789 S.E.2d 551, 558 (2016). Plaintiffs argue this means the "more likely than not" standard is inapplicable in this case because it does not concern a negligent delay in treatment or diagnosis. We agree.

Nevertheless, regardless of whether we apply the standard of proximate cause as explained in *Cousart* or the "more likely than not standard," we agree with Mission Hospital that Plaintiffs fail to meet their burden of causation in this case.

***6** Here, the record shows Dr. Boyce believed the cause of Mrs. Beck's injury was one of two things—retractor placement or traction. During surgery, the doctor initially places the retractors on the patient's tissue to open it up, creating a "window" for the doctor to operate. The doctor then gives the retractors "to the assistants to hold," and they are supposed to apply pressure, or traction, to the patient who is positioned on the Hana table in order to hold open the patient's joint space. Generally, the assistants do not exercise independent judgment regarding how much traction to apply, although the doctor cannot "watch over everything." Both improper retractor placement and improper traction may injure the femoral nerve. Thus, the pertinent question is whether Dr. DePaolo's retractor placement or the OR assistants' application of traction on the Hana table caused Mrs. Beck's injury.

In his deposition, Dr. Boyce was asked to describe specifically what he believed Dr. DePaolo did incorrectly during the procedure. Dr. Boyce stated, "I think he was responsible for a nerve injury that occurred. Again, this femoral nerve injury doesn't occur without injury to the nerve, either from traction or more likely due to placement of the retractor around the hip joint." Dr. Boyce further testified, "My opinion is that the nerve injury occurred at the time of surgery, most likely due to

nerve -- or soft tissue retractor placement by Dr. DePaolo and/or during the traction on the leg itself by the employees that were in the operating room." This testimony reaffirms that either tractor placement or traction itself caused the injury.

As for which Defendant's conduct more likely caused the injury, Dr. Boyce testified, "Typically, it's from -- retractor placement is the most common, the anterior retractor." Asked if he had two theories as to how Mrs. Beck's injury occurred, Dr. Boyce responded, "[M]y opinion is that most likely [it] was due to retractor placement causing injury to the nerve at the joint. But the traction on the joint itself is the other most common way that the nerve can be injured." There was nothing specific within Mrs. Beck's medical records upon which Dr. Boyce relied in forming his opinion that traction was a possible cause of the injury; rather, his opinion was based on the statistics of how a femoral nerve injury may occur during a hip replacement. Dr. Boyce reiterated, "[L]ooking at the statistics and the numbers, it's much more likely that it occurred from retractor placement rather than the traction." Dr. Boyce testified it was fair to say that "it is *probable* that the injury occurred from the retraction [placement] and *possible* that it occurred from the traction." (Emphasis added). In fact, it was so much more probable that retractor placement caused the injury that, Dr. Boyce testified, "it's about ten to one due to misplaced retractors versus traction injury on the nerve."

We hold that in light of Dr. Boyce's testimony that retractor placement rather than traction more likely caused Mrs. Beck's injury by a ratio of ten-to-one, the possibility that it was traction was mere speculation, conjecture, or possibility. It follows that because Plaintiffs did not establish causation pursuant to the standard articulated in *Cousart*, they also failed to meet the *more likely than not* standard under *Parkes*. Through Dr. Boyce's testimony, Plaintiffs can demonstrate merely that Mission Hospital, vicariously through its nurses, *possibly* caused Mr. Beck's injury. Therefore, Plaintiffs failed to satisfy the burden of demonstrating proximate cause at the summary judgment stage. Accordingly, we affirm the trial court's order granting summary judgment in Mission Hospital's favor.

We note that even if traction could be conclusively determined to be the cause of the injury, Dr. Boyce's testimony contradicts the notion that Mission Hospital through its staff would be responsible for implementing improper traction. Dr. Boyce testified that even if improper traction caused the injury, "Dr. DePaolo ultimately was the one responsible for supervising those staff and making sure they were doing correct operation and positioning of the patient." He further testified that the surgeon directs the OR staff to apply traction until he says "stop" and that they are "really just doing whatever the surgeon tells them to do." Moreover, Dr. Boyce's opinion that traction possibly caused the injury was formed partially on the basis of what Dr. DePaolo allegedly told the Becks after the injury was discovered [1] and based on what Dr. DePaolo noted in Mrs. Beck's medical records. In other words, Dr. Boyce's review of the medical records did not indicate a medical reason to believe traction caused the injury. Dr. Boyce merely read that Dr. DePaolo had formed an opinion that the nurses used too much traction and therefore reached the conclusion that traction was a possible cause. While he was also aware traction could cause a femoral nerve injury based on the relevant statistics, that possibility was outweighed by the likelihood of improper retractor placement by a ratio of ten-to-one.

***7** Plaintiffs argue that Dr. DePaolo's post-operation explanation regarding the cause of the injury demonstrates OR staff, and therefore Mission Hospital, caused Mrs. Beck's injury. Defendant argues such evidence is inadmissible because it does not originate from Plaintiffs' expert, Dr. Boyce. Regardless of the admissibility of the statements, Plaintiffs are required to meet their evidentiary burden at the summary judgment stage through the testimony of an expert witness: "[E]xpert opinion testimony is required to establish proximate causation of the injury in medical malpractice actions." *Cousart*, 209 N.C. App. at 303, 704 S.E.2d at 543. Here, Dr. DePaolo is not Plaintiffs' expert witness. Accordingly, we decline to consider Dr. DePaolo's statements to the Becks and in the medical records in determining whether Plaintiffs satisfied their evidentiary burden in demonstrating proximate causation.

C. Rule 9(j)

Plaintiffs argue the trial court erred to the extent it granted Mission Hospital's motion to dismiss under Rule 9(j). Rule 9(j) requires that a

> complaint alleging medical malpractice ... shall be dismissed unless ... [t]he pleading specifically asserts that ... a person who is reasonably expected to qualify as an expert witness under Rule 702 of the

> Rules of Evidence ... is willing to testify that the medical care did not comply with the applicable standard of care."

N.C. R. Civ. P. 9(j)(1).

Here, in its order granting Mission Hospital's motion for summary judgment, the trial court noted it held a hearing on Mission Hospital's "Motion for Summary Judgment under Rule 56, and their Motion to Dismiss under Rules 9(j) and 56." However, the trial court simply "conclude[d] that there is no dispute of material fact and that Mission Hospital Inc. is entitled to judgment as a matter of law." Therefore, it appears the trial court did not address Mission Hospital's motion to dismiss under Rule 9(j). We need not address the issue because whether Plaintiffs complied with Rule 9(j) is immaterial as the trial court properly granted Mission Hospital's motion for summary judgment for the reasons herein stated.

III. Conclusion

Because Plaintiffs' expert testified it was more likely by a ratio of ten to one that Dr. DePaolo caused the injury through improper retractor placement and that it was only possible the nurses used improper traction, we hold Plaintiffs failed to produce evidence that Mission Hospital, through its OR staff, proximately caused Mrs. Beck's injury. Accordingly, we affirm the order of the trial court.

AFFIRMED.

Report per Rule 30(e).

Judges ZACHARY and THOMPSON concur.

All Citations

294 N.C.App. 315, 901 S.E.2d 462 (Table), 2024 WL 2828182

Footnotes

1 At her follow up appointments, Dr. DePaolo repeatedly told the Becks that the nerve injury had been caused by one of Mission Hospital's nurses using too much traction.

267 N.C.App. 130
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
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.
Court of Appeals of North Carolina.

Scott GOSS and Nicole Goss, Plaintiffs,
v.
SOLSTICE EAST, LLC, Defendant.

No. COA18-1158
Filed: August 20, 2019

Appeal by Plaintiffs from orders entered on 5 June 2018 by Judge Alan Z. Thornburg and 3 August 2018 by Judge Marvin Pope in Buncombe County Superior Court. Heard in the Court of Appeals 22 May 2019. Buncombe County, No. 18-CVS-218

Attorneys and Law Firms

Everett Gaskins Hancock LLP, Raleigh, by E. D. Gaskins, Jr., and Katherine A. King, for Plaintiff-Appellants.

Hedrick Gardner Kincheloe & Garofalo LLP, by David L. Levy, M. Duane Jones, Charlotte, Linda Stephens, Raleigh, and Lauren E. Bohdan, Charlotte, for Defendant-Appellee.

Opinion

BROOK, Judge.

***1** Scott Goss and Nicole Goss ("Plaintiffs") appeal the trial court's orders granting Solstice East, LLC's ("Defendant") motions to dismiss. Plaintiffs argue that the trial court erred in granting Defendant's motions because Plaintiffs' claims for breach of contract and breach of fiduciary duty were properly pleaded, and that these claims do not implicate Rule 9(j) of the North Carolina Rules of Civil Procedure. Because Plaintiffs appeal the dismissal of their claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, our recitation of the facts is based on the allegations in Plaintiffs' complaint, as well as the allegations in their amended complaint. For the following reasons, we affirm the trial court's order.

I. Background

A. Factual Background

Plaintiffs are residents of Florida who have a daughter, "M.G."[1] At age 13, M.G. was diagnosed with Major Depressive Disorder, Attention Deficit Disorder, and Attention Deficit/Hyperactivity Disorder. Educational consultants recommended to Plaintiffs that M.G. enroll on a short-term basis in Second Nature Wilderness Program ("Second Nature") for treatment of her mental health diagnoses. Upon enrollment at Second Nature on 2 February 2015, an assessment showed M.G. suffered from depression, anxiety, substance and alcohol abuse, and ADD. Treatment at Second Nature managed M.G.'s symptoms. M.G. graduated from treatment at Second Nature on 22 April 2015.

Defendant, a residential treatment center for adolescent girls between the ages of 14 and 18, was one of several programs Plaintiffs considered for long-term placement for M.G. Located in Buncombe County, Defendant specializes in treatment for young women who struggle with depression, anxiety, substance and alcohol abuse, eating disorders, ADD/ADHD, and family conflict. Defendant's online advertising touts a "holistic approach" that treats "mind, body, and soul." Additional online advertising presents "[p]sychotherapy care and medication management" as "an integral part of [this] holistic approach." Defendant advertises a "conservative approach regarding the use of medication in treating mental health issues in adolescents[,]" emphasizing the possibility of "significantly reduc[ing] or even eliminat[ing] the need for" certain medications, depending on treatment response. Defendant also identifies the importance of family involvement in the therapeutic process in its online advertising.

Plaintiffs selected Defendant as a long-term placement for M.G. to be "cared for, educated, and treated psychologically." On or about 12 April 2015, Plaintiffs entered into an Admissions Agreement ("Agreement") with Defendant. M.G. enrolled beginning 22 April 2015. The Agreement did not provide for a discharge date. Under the Agreement, Defendant "promise[d] to undertake and provide the following services for the student and sponsors: clinical, educational, and

academic services, room and board, nursing services (as needed), selected psychological and educational evaluations and assessments for the student, personal supervision[.]" Plaintiffs entrusted Defendant with the "complete care and custody of M.G."

***2** At the same time the Agreement was executed, Plaintiffs also executed a Power of Attorney ("POA"). The POA appointed Defendant as M.G.'s "true and lawful attorney-in-fact ... for the purpose of providing custodial care, educational, and clinical services." The POA stated that it was a "general Power of Attorney delegated and assigned by the sponsors[.]" "Without limiting or qualifying the general Power of Attorney[,]" the sponsors further "specifically grant[ed] Solstice East" additional powers pertaining to M.G.'s medical treatment, discipline, and participation in activities, as well as powers pertaining to pursuing M.G. if she ran away, restricting M.G.'s access to calls, materials, and visitors, and resolving grievances. The POA further instructed that "a parent, legal guardian, or child" who has a "grievance" should "speak directly with a Primary Therapist to resolve the grievance." Were this approach not to resolve a specific concern, the POA instructed the concerned party to consult the Executive Director of Defendant. By its terms, the POA was to remain in effect until M.G.'s discharge from treatment.

M.G. arrived at Defendant's facility on 22 April 2015. While there, M.G. erroneously received "five times the appropriate dose" of the prescription drug Lamictal for two consecutive days during the second month of her treatment. Defendant "became aware of the initial overdose two days prior to [M.G.]'s hospitalization." After M.G. was admitted to the hospital, Defendant informed Plaintiffs of the overdose. Following M.G.'s release from the hospital, Defendant continued to administer a dose of Lamictal "in excess of the recommended amount" for two months. M.G. exhibited "bizarre and irrational behavior" and "hallucinate[d]." Plaintiff Scott Goss expressed concern to Defendant's employees about the Lamictal dosage provided to M.G., requesting "updates on her medications, behavior, and therapy." Defendant's employees subsequently sent emails to one another containing "demeaning and derogatory comments" about Mr. Goss's concerns. During the time M.G. was overmedicated, Defendant isolated her for behavioral issues. She had not previously been isolated. On 7 August 2015, Plaintiffs removed M.G. from Defendant's care and enrolled her at another treatment center.

B. Procedural History

On 11 January 2018, Plaintiffs filed a complaint against Defendant alleging a claim for breach of contract. On 26 March 2018, Defendant filed a motion to dismiss Plaintiffs' breach of contract claim pursuant to Rules 12(b)(6) and (7) of the North Carolina Rules of Civil Procedure. The motion came on for hearing before the Honorable Alan Z. Thornburg on 8 May 2018 in Buncombe County Superior Court. Judge Thornburg rendered a ruling granting Defendant's motion in open court, which was entered on 5 June 2018. However, the trial court's dismissal of Plaintiffs' claim for breach of contract was without prejudice.

On 24 May 2018, Plaintiffs filed an amended complaint. The amended complaint included two additional claims: (1) a breach of fiduciary duty claim based on the POA; and (2) an unfair and deceptive practices claim.

On 25 June 2018, Defendant moved to dismiss the amended complaint and the claims for breach of fiduciary duty and unfair and deceptive practices pursuant to Rules 12(b)(6) and (7) of the North Carolina Rules of Civil Procedure. Plaintiffs voluntarily dismissed the unfair and deceptive practices claim on 20 July 2018, without prejudice.

Defendant's motion to dismiss Plaintiffs' claim for breach of fiduciary duty came on for hearing before the Honorable Marvin Pope on 31 July 2018 in Buncombe County Superior Court. On 3 August 2018, Judge Pope entered an order dismissing Plaintiffs' claim for breach of fiduciary duty, without prejudice.

Plaintiffs entered timely notice of appeal to this Court on 28 August 2018.

II. Standard of Review

> On appeal from an order dismissing an action pursuant to Rule 12(b)(6), we conduct de novo review. A Rule 12(b)(6) dismissal is appropriate when the complaint fails to state a claim upon which relief can be granted. We have determined that a complaint fails in

> this manner when: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true. 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.

***3** *Krawiec v. Manly*, 370 N.C. 602, 606, 811 S.E.2d 542, 546, (2018) (citations, internal quotations, and brackets omitted).

III. Analysis

The primary issues in this appeal are whether Plaintiffs can state causes of action for breach of contract and breach of fiduciary duty, and whether their claims constitute an action for medical malpractice as defined by N.C. Gen. Stat. § 90-21.11 in whole or in part. Plaintiffs argue that "claims for damages they suffered arising from the breach of contract Solstice required them to sign and the breach of trust in connection with the power of attorney" obtained by Defendant when promising to care for M.G. are separate and distinct from any malpractice claims M.G. might bring in the future for her injuries as a result of Defendant's actions. Defendant maintains conversely that Plaintiffs "seek damages solely on the basis of the *medical treatment* provided to their daughter[.]" According to Defendant, Plaintiffs claimed a "deviation" from the "standard of care" and were thus required to comply with pleading a medical malpractice cause of action.

A. Definitional Framework

N.C. Gen. Stat. § 90-21.11(2)(a) defines a medical malpractice action as "[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." N.C. Gen. Stat. § 90-21.11(2)(a) (2017). This Court has interpreted "damages for personal injury" capaciously to include everything from medical complications following surgery, *see Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 135-36, 472 S.E.2d 778, 780 (1996), to "a health care provider's unauthorized disclosure of a patient's confidences," *see Jones v. Asheville Radiological Group, P.A.*, 129 N.C. App. 449, 456, 500 S.E.2d 740, 744 (1998). Further, this Court has understood the term "professional services" broadly, to include any "act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, [where] the labor or skill involved is predominantly mental or intellectual, rather than physical or manual." *Lewis v. Setty*, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998) (citations, quotation marks, and brackets omitted). And by statute a health care provider includes "[a] person who ... is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with ... medicine ... pharmacy ... nursing ... psychiatry ... or psychology[ ]" as well as those who "act[ ] at [their] direction or under [their] supervision[.]" N.C. Gen. Stat. § 90-21.11(1)(a), (d) (2017).

An action that falls within the statutory definition of medical malpractice must meet pleading requirements; otherwise, dismissal is required. *See* N.C. Gen. Stat. § 1A-1, Rule 9(j) (2017). Specifically, in the absence of *res ipsa loquitur*, actions for medical malpractice must contain a certification that all pertinent and available medical records have been reviewed by a person reasonably expected to qualify as an expert under Rule 702 of North Carolina Rules of Evidence and who will testify that the medical care did not meet the applicable standard of care. *Id.*

***4** A review of case law from our Court provides guidance in drawing the line between such medical malpractice claims requiring pleading compliance with Rule 9(j) and actions unrelated to the provision of professional medical or health care services.

In *Watts v. Cumberland County Hospital System*, the plaintiff patient sought to hold the defendant health care provider liable for his alleged unauthorized disclosure of confidential information about her, claiming such disclosure breached his duty of confidentiality. 75 N.C. App. 1, 9, 330 S.E.2d 242, 248 (1985), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986). It was a case of first impression as to

whether such a cause of action could be maintained against a health care provider. *See id.* at 9, 330 S.E.2d at 248-49. This Court noted that "[a]lthough negligence is the predominant theory of liability in a medical malpractice action, it is not the only theory on which a plaintiff may proceed[,]" and " '[m]alpractice consists of any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct.' " *Id.* at 10, 330 S.E.2d at 249 (internal citation omitted). This Court held on the facts in *Watts* that claims of invasion of privacy, breach of implied contract, and breach of fiduciary duty or confidentiality should all be treated as claims for medical malpractice. *See id.* at 10, 330 S.E.2d at 248-49.

In *Bennett v. Hospice & Palliative Care Center of Alamance-Caswell*, the plaintiff, whose mother was deceased, filed a complaint against several health care providers alleging claims against them "arising out of the circumstances surrounding the death of her mother[.]" 246 N.C. App. 191, 192, 783 S.E.2d 260, 261, *disc. review denied*, 368 N.C. 917, 787 S.E.2d 374 (2016). The plaintiff listed eleven claims and made only general allegations in her complaint. *Id.* at 192-93, 783 S.E.2d at 262. Based on these allegations, the plaintiff sought damages for injuries caused by certain acts of the defendants that occurred *prior to* her mother's death, and for certain acts of some of the defendants which occurred *after* her mother's death. *Id.* at 193, 783 S.E.2d at 262. We held that all of the plaintiff's claims stemming from actions leading up to the death of her mother concerned the provision of health care services to her mother. *Id.* at 195, 783 S.E.2d at 263. We therefore held that the trial court did not err in dismissing these claims for failure to include the required certification pursuant to Rule 9(j) of the Rules of Civil Procedure. *Id.*

We went on to hold in *Bennett*, however, that the plaintiff's claims arising out of actions by certain of the defendants after the death of her mother, including a breach of contract claim for failing to provide plaintiff with bereavement services, did not fall within the ambit of Rule 9(j). 246 N.C. App. at 196, 783 S.E.2d at 263-64. Accordingly, we concluded that the trial court erred in dismissing *these* claims for failure to include a Rule 9(j) certification. *Id.*

B. Plaintiffs' Claims

With this background, we consider whether Plaintiffs' breach of contract and fiduciary duty claims are separate and distinct from, or grounded in medical malpractice arising from Defendant's care for M.G. [2]

1. Breach of Contract

***5** Plaintiffs first allege a breach of contract, where Defendant breached specific terms and implied covenants of their contract with Plaintiffs. Defendant argues that Plaintiffs' allegations are merely medical malpractice claims repackaged to avoid compliance with the requirements of Rule 9(j). We conclude that this cause of action is most accurately characterized as one for medical malpractice.

The allegations on which Plaintiffs based their claim for breach of contract include, in relevant part, that they entered into a contract with Defendant in the form of an Admissions Agreement, and that Defendant was responsible for providing appropriate clinical, nursing, and psychological services to M.G., with rights granted to Defendant through the POA to do so. Specifically, Paragraph 28 of the amended complaint alleges Defendant failed to do the following:

A. Promptly seek emergency medical care for [M.G.] upon discovering that she had received a drug overdose;

B. Promptly and properly inform Scott and Nicole Goss that [M.G.] had received an overdose of the prescription drug Lamictal;

C. Provide appropriate clinical, nursing, and psychological services to [M.G.];

D. Keep Scott and Nicole Goss fully informed concerning [M.G.]'s care, education, and clinical services, including the failure to fully apprise of the dosage of Lamictal being administered to [M.G.];

E. Belittling concerns of Scott and Nicole Goss with derogatory written communications among Solstice East staff; and

F. Failing to display appropriate behavior consistent with a residential treatment center for young women and their families struggling with serious and sensitive mental health issues.

In addition to alleging a breach of the specific terms of the Agreement, Plaintiffs allege in Paragraph 29 a breach of "obligations" owed to Plaintiffs, "including the implied covenant of good faith and fair dealing[.]"

Defendant acknowledges entering an Admissions Agreement for the enrollment of M.G. into its treatment program. Defendant also acknowledges the program included "clinical, education and academic services, room and board, nursing services[,] ... selected psychological and educational evaluations and assessments[,] ... personal supervision, supervised use of recreational equipment and facilities, supervised work experience[,] ... [and] bookkeeping and clerical assistance[.]"

***6** We hold that Plaintiffs' allegations in Paragraph 28 arise out of Defendant furnishing or failing to furnish professional services in providing health care to M.G. *See Bennett*, 246 N.C. App. at 196, 783 S.E.2d at 262; *Watts*, 75 N.C. App. at 9, 330 S.E.2d at 248-49. Without doubt, the contract's primary purpose was M.G.'s psychiatric and behavioral development—both of which are rooted in professional services. Claims A and C directly relate to the failure to provide sufficient medical or health care to M.G. The remaining allegations assert a health care provider failed to properly communicate with or behave toward Plaintiffs with regard to the health care services being provided or not provided to M.G. and the consequences flowing therefrom.[3] Unlike in *Bennett*, where the claims to which Rule 9(j) of the North Carolina Rules of Civil Procedure did not apply arose exclusively out of actions taken and not taken after the deceased had passed away and, therefore, bore no relation to medical or health care, *see* 246 N.C. App. at 196, 783 S.E.2d at 263-64, Plaintiffs here allege Defendant demonstrated an "unreasonable lack of skill" in carrying out "professional ... duties" pertaining to M.G.'s medical and health care as in *Watts*, *see* 75 N.C. App. at 10, 330 S.E.2d at 248.

Taking Plaintiffs' allegations as true, and giving every reasonable inference in favor of Plaintiffs, these breach of contract claims still sound in medical malpractice. They "aris[e] out of the furnishing or failure to furnish professional services in the performance of medical ... or other health care[.]" N.C. Gen. Stat. § 90-21.11(2)(a) (2017). Accordingly, we hold the trial court did not err in dismissing these claims for failure to include a certification pursuant to Rule 9(j).

2. Breach of Fiduciary Duty

Plaintiffs next allege a breach of fiduciary duty, where Defendant "did not act with the utmost good faith and with due regard for [Plaintiffs] and their concerns and responsibilities as parents for their minor daughter." Specifically, in Paragraph 34, Plaintiffs allege that Defendant breached its fiduciary duty of loyalty, care, and good faith owed by engaging in or forbearing from the following:

A. Administering five times the recommended dose of prescription drug Lamictal to minor [M.G.] for two consecutive days;

B. Failing to promptly seek emergency medical care for [M.G.] upon discovering that she had received a drug overdose despite having exclusive control over [M.G.] as a result of the Power of Attorney;

C. Failing to promptly and properly inform Scott and Nicole Goss that [M.G.] had received an overdose of the prescription drug Lamictal;

D. Overmedicating minor [M.G.] for over two months;

E. Punishing [M.G.] for behavior occurring concomitant with Solstice East's overmedication of her; and

F. Intentionally failing to keep Scott and Nicole Goss fully informed concerning [M.G.]'s care, education, and clinical services, including the failure to fully apprise of the dosage of Lamictal being administered to [M.G.];

G. Belittling the concerns of Scott and Nicole Goss with derogatory written communications among Solstice East staff; and

H. Failing to display appropriate behavior consistent with a residential treatment center for young women and their families struggling with serious sensitive mental health issues.

We hold that these allegations are also claims of medical malpractice as defined by N.C. Gen. Stat. § 90-21.11(1)(a), (d), and (2)(a), consistent with our Court's interpretation of the language of these statutory provisions. Claims A, B, and D directly relate again to the medical or health care furnished to M.G. Claim E relates to how Defendant managed the consequences of the allegedly negligent medical care it provided to M.G. Claims C, F, G, and H arise from Defendant's failure to properly communicate with or behave toward Plaintiffs with regard to the medical and health care being provided or not provided to M.G and the consequences stemming therefrom. Though not the direct provision of medical or health care, such alleged mismanagement and miscommunication is a professional service arising out of a

health care provider's treatment of M.G. because it "aris[es] out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, [where] the labor or skill involved is predominantly mental or intellectual, rather than physical or manual." *Lewis*, 130 N.C. App. at 608, 503 S.E.2d at 674. Plaintiffs' claim for breach of fiduciary duty, at bottom, is that Defendant demonstrated an "unreasonable lack of skill or fidelity in professional or fiduciary duties" in the provision of M.G.'s medical care, *i.e.*, medical malpractice as in *Watts*. *See* 75 N.C. App. at 10, 330 S.E.2d at 249.

***7** We therefore hold that the trial court properly dismissed Plaintiffs' complaint.

IV. Conclusion

Plaintiffs' claims for breach of contract and breach of fiduciary duty arise out of Defendant's provision of professional medical and counseling services to a patient, their daughter, M.G. Such claims were subject to Rule 9(j) of the North Carolina Rules of Civil Procedure and were thus properly dismissed by the trial court for failure to include the required Rule 9(j) certification. We therefore affirm the orders of the trial court.

AFFIRMED.

Report per Rule 30(e).

Judges STROUD and HAMPSON concur.

All Citations

267 N.C.App. 130, 831 S.E.2d 121 (Table), 2019 WL 3936268

Footnotes

1 Because she was a minor during the events at issue, we use initials to refer to Plaintiffs' daughter.

2 It is undisputed that Plaintiffs' amended complaint does not meet the Rule 9(j) pleading requirements. As a consequence, if Plaintiffs' claims sound in medical malpractice then we must affirm the trial court's dismissal. *See* N.C. Gen. Stat. § 1A-1, Rule 9(j) (2017).

3 Plaintiffs cannot sidestep the pleading requirement of Rule 9(j) by focusing on the harm Defendant allegedly visited upon them given the statute's focus on the origins of that injury. *See, e.g.*, N.C. Gen. Stat. § 90-21.11(2)(a) (2017) (defining a medical malpractice action as one "for damages ... *arising out of* the furnishing or failure to furnish professional services") (emphasis added).

End of Document

"House Documents," North Carolina General Assembly,
2011-2012 Session, Audio Archives, 04-20-11
(embedded audio link)