An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA11-230
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

LARRY GREENE,
Plaintiff,

v.

Mecklenburg County
No. 09 CVS 19575

UPTOWN DAY SHELTER, INC. and UPTOWN SHELTER OF CHARLOTTE, and UNITED WAY OF CENTRAL CAROLINAS, INC. and Unknown Defendants,
Defendants.

Appeal by plaintiff from order entered 29 October 2010 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 August 2011.

Christopher W. Shelburn for plaintiff-appellant.

Davis & Hamrick, L.L.P., by H. Lee Davis, Jr. and Jason L. Walters, for defendant-appellee Uptown Day Shelter, Inc. and Uptown Shelter of Charlotte.

No brief for defendant United Way of Central Carolinas, Inc.

HUNTER, Robert C., Judge.

Larry Greene ("plaintiff") appeals from an order granting summary judgment in favor of defendant Uptown Day Shelter, Inc.,

doing business as Uptown Shelter of Charlotte,[1] (collectively "Uptown"). After careful review, we agree and reverse the trial court's order.

Background

Uptown operates a men's shelter at 1210 North Tryon Street, Charlotte, North Carolina (the "Shelter"). Plaintiff was a resident at the Shelter from sometime in 2004 through November 2006. Plaintiff filed the underlying action on 18 August 2009 alleging negligence against defendants for their failure to make safe a known dangerous condition in the bathroom at the Shelter. Plaintiff alleged that "in, about, or after the month of September, 2006" he fell at the Shelter as a result of a seat in the shower that failed to provide sufficient support. Greene alleged defendants had a duty to ensure the shower facilities were safe, but they failed to do so, despite that they knew or should have known the seat was unsafe. Plaintiff claimed to suffer multiple fractures in his spine as a result of the fall and sought damages in excess of $10,000.

As a condition of their stay at the Shelter, all residents were required to take a daily shower. Due to an injury to his

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[1] In its Answer to plaintiff's Complaint, Uptown Day Shelter, Inc. noted that it changed its name to Men's Shelter of Charlotte, Inc., effective 28 September 2009.

knee, plaintiff required the aid of crutches to walk and, consequently, he used the handicap accessible shower stall at the Shelter. During his stay at the Shelter, the Shelter removed the fixed seat in the handicap accessible stall and replaced it with a movable chair.

Plaintiff alleges that, despite his repeated complaints to the Shelter that the lack of the fixed seat made showering difficult, the Shelter did not reinstall a fixed seat. Plaintiff further alleges that as a result of the instability of the movable shower chair, he suffered three “hard impact” falls during his showers and was injured. Prior to falling in the Shelter’s shower, plaintiff had a history of lower back pain due to automobile accidents. The falls in the shower caused Greene’s lower back pain to intensify. Greene could not provide dates for the first two falls and did not seek medical treatment for any resulting injuries until his third fall months later, on 25 July 2006.

Plaintiff’s medical records show that he visited an emergency room on 27 July 2006 complaining of pain in his back, legs, and arms. Records of x-rays taken that day indicate no fractures were detected. Similarly, the record of an MRI on 4 August 2006 provides no indication of fractures.

On 11 September 2006, plaintiff visited another doctor complaining of pain in his right elbow and right hip. The doctor's notes from that visit state that plaintiff "fell grabbing a shower chair on the 25th of July and has had pain ever since." Other than a 2 October 2006 note from a doctor concerning insomnia and a record of a 20 October 2006 colonoscopy, there are no other medical records for plaintiff dated prior to his discharge from the Shelter in November 2006.

During his deposition, plaintiff provided conflicting statements as to when he last fell in the Shelter's shower. When asked directly if 25 July 2006 was the date of his last fall in the shower he replied, "Yeah, probably." However, when commenting on a record from a December 2006 doctor's visit that stated plaintiff fell on 25 July 2006, plaintiff claimed that was not the last time he fell in the Shelter's shower. Plaintiff also stated in his deposition that he did not have any medical records that indicated he fell after 25 July 2006. Finally, when asked by his attorney if he had fallen in the Shelter's shower after 25 July 2006, plaintiff replied, "More than once," and stated the last time was approximately two days before he was asked to leave the Shelter in November 2006.

Though not mentioned in plaintiff's deposition, the record contains the report of a doctor's visit on 10 December 2006 in which the doctor noted that plaintiff "has a history of trauma 2-3 months ago, falling in the shower twice." The doctor noted the results of plaintiff's MRI performed four days earlier, which showed vertebrate fractures and "some surrounding edema, indicating acute nature. However, patient states that his trauma was 2-3 months ago."

Uptown filed a Motion for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Uptown alleged there was no genuine issue as to any material fact and it was entitled to judgment as a matter of law. Uptown argued that as plaintiff's medical records indicate he fell on 25 July 2006 and his Complaint was filed on "August 29 [sic], 2009" plaintiff's claim was barred by the three-year statute of limitations.

After a hearing on the matter, the trial court entered an Order on 29 October 2010 granting Uptown's Motion. Plaintiff appeals from this Order.

Discussion

Plaintiff argues the trial court erred in granting Uptown's Motion for Summary Judgment as the evidence created a genuine

issue of material fact as to when the statute of limitations for his claim expired. We agree.

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). The statute of limitations for claims of personal injury is three years, and the cause of action does not accrue until the injury "becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C. Gen. Stat. § 1-52(16) (2009).

"[W]hether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 643, 643 S.E.2d 28, 33 (citation and quotation marks omitted), *disc. rev. denied*, 361 N.C. 694, 652 S.E.2d 647 (2007). The question should be submitted to a jury when the evidence "is sufficient to support an inference that the limitations period has not expired." *Id.* (citation and quotation marks omitted).

"'Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to

produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.'" *Van Reypen Associates, Inc. v. Teeter*, 175 N.C. App. 535, 540, 624 S.E.2d 401, 404-05 (2006) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810, *cert. denied*, 534 U.S. 950, 151 L. Ed. 2d 261 (2001)). Additionally, "'the opposing party is not entitled to have the motion denied on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out to the court something indicating the existence of a triable issue of material fact.'" *Id.* (quoting *Kidd v. Early*, 289 N.C. 343, 368, 222 S.E.2d 392, 409 (1976)).

In the present case, plaintiff argues his deposition testimony creates a genuine issue of material fact as to whether he suffered an injury resulting from defendants' negligence after 18 August 2006——three years prior to the filing of his Complaint. Specifically, plaintiff points to his testimony that he fell in the shower at the Shelter more than once after 25 July 2006, once as late as November 2006. Additionally, plaintiff's medical records show that on 10 December 2006 plaintiff's doctor noted that plaintiff "has a history of trauma

2-3 months ago, falling in the shower twice." This notation suggests that plaintiff fell in September or October 2006.

Uptown dismisses this evidence as "self-reported" and asks us to interpret the doctor's notes as implying skepticism of plaintiff's claims. Uptown thereby seeks this Court to accept one interpretation of the facts over another, and this we will not do. Decisions as to the weight of the evidence and credibility of the witnesses are a function of the jury. *Lord*, 182 N.C. App. at 644, 643 S.E.2d at 33.

While plaintiff's deposition testimony and his medical records contain conflicting statements regarding the date of his last fall at the Shelter, we conclude the evidence is sufficient to create an inference that plaintiff fell and suffered an injury after 18 August 2006——within the three year statute of limitations. As such, these conflicts in the evidence should be resolved by a jury and summary judgment was not proper.

Conclusion

For the reasons stated above, we conclude the trial court erred in granting Uptown's Motion for Summary Judgment. Accordingly, the trial court's order is reversed.

Reversed.

Judges STEELMAN and McCULLOUGH concur.

Report per Rule 30(e).