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NO. COA01-410

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

MARGARET K. LEBEL,  
Administratrix of the Estate of  
REJEAN LEBEL,  
Plaintiff

v.

Bladen County  
No. 00 CVS 000127

BLADEN COUNTY HOSPITAL,  
Defendant

Appeal by plaintiff from order entered 17 January 2001 by Judge James F. Ammons, Jr., in Bladen County Superior Court. Heard in the Court of Appeals 24 January 2002.

*Skager Law Firm, by Philip R. Skager, for plaintiff-appellant.*

*Marshall, Williams & Gorham, LLP, by John D. Martin, for defendant-appellee.*

MARTIN, Judge.

Plaintiff, Margaret K. Lebel, as Administratrix of the Estate of Rejean Lebel, brought this action alleging that during Mr. Lebel's stay in defendant hospital, ". . . Mr. Lebel fell to the floor suffering serious bodily injuries that combined with his pre-existing conditions to cause Mr. Lebel's death on February 17, 1998." Plaintiff further asserted that Mr. Lebel's injuries from his fall were proximately caused by the negligence of defendant's agents or employees in failing to fix in place Mr. Lebel's bed

rails contrary to doctor's orders; failing to provide Mr. Lebel a bedpan; and failing to respond to Mr. Lebel's requests for assistance. She sought compensatory damages "for the wrongful death of Rejean Lebel." Defendant filed an answer denying the material allegations of the complaint, asserting that Mr. Lebel's death was not proximately caused by any negligence on its part, and asserting affirmative defenses. Defendant moved for summary judgment.

The materials before the trial court at the summary judgment hearing show that Rejean Lebel was admitted to defendant hospital on 6 February 1998 with a primary diagnosis of cirrhosis of the liver with ascites as a result of alcohol abuse. He was examined in the defendant's emergency department, where it was noted that he had a history of alcohol abuse, diffuse ascites, elevated transaminase, dark urine, jaundice, and cellulitis of his left lower extremity. The examination also revealed that Mr. Lebel had a distended abdomen with enlarged liver, which is indicative of advanced liver disease. Mr. Lebel had a thirty-five year history of heavy beer consumption but had reduced his consumption to four or five beers a day for the six months prior to his admission to the hospital. The diagnosis and assessment of the admitting physician, Dr. Stephen Bridgers, was as follows:

1. Cirrhosis with ascites.
2. Elevated transaminase secondary to #1.
3. Cellulitis of left lower extremity secondary to trauma.
4. Anemia, probably of chronic disease and ETOH abuse.
5. ETOH abuse.
6. Thrombocytopenia secondary to ETOH.

7. Hypertension.
8. Heme-positive stool. Rule out gastritis, alcohol induced.

Dr. Bridgers also noted that Mr. Lebel's family was made aware of the seriousness of Mr. Lebel's condition. Dr. Bridgers further noted that he was concerned that Mr. Lebel would go into DTs.

Nurse Tiffany Collins, a registered nurse employed at defendant hospital, stated in an affidavit that she was assigned to care for Mr. Lebel during the 2300 - 0700 shift on 8 February 1998. She stated that she had made rounds to Mr. Lebel's room at least every hour. At 3:30 a.m. on 8 February 1998, Mr. Lebel had been up and to the bathroom without assistance. Throughout the night, the side rails were up on his bed, the call button was within his reach and, although he had bathroom privileges, there was a urinal available and within his reach. She stated that during her shift there was no occasion when a nurse had failed to respond when Mr. Lebel's call button had been activated. At 7:30 a.m., Nurse Collins checked on Mr. Lebel and found him sitting on the side of his bed. He told her that he had fallen on his way back from the bathroom. No apparent injury was noted and Nurse Collins stated that Mr. Lebel had not called the nurses' station for assistance to go to the bathroom. According to Nurse Collins, the physician's orders were for "activity as tolerated," and the physician had directed that Mr. Lebel have bathroom privileges, meaning that he was able to go to the bathroom without assistance. Nurse Collins asserted that there were no written nor verbal physician's orders that Mr. Lebel be confined to his hospital bed with the railings up

unless accompanied by a staff person.

According to plaintiff's affidavit, her husband's bed rails were supposed to be up due to the medications that he was being given, the presence of an IV tube in his arm, and the possibility of suffering alcohol withdrawal symptoms. Sarita Johnson gave an affidavit in which she stated that she visited a patient who shared the hospital room with Mr. Lebel on the 7<sup>th</sup> and 8<sup>th</sup> of February 1998. She stated that she observed Mr. Lebel turning on his call light several times for the nurse, but no one responded. Ms. Johnson stated that Mr. Lebel finally got out of bed and went to the bathroom area, and fell on the floor. The side rails were down on his bed. She helped him back into bed and activated the call light but after no nurse responded, she went to the nurse's station to get someone to check on Mr. Lebel. She thought that there was a urinal near Mr. Lebel's bed but she did not recall seeing a bedpan.

On 15 February 1998, seven days after his fall, Mr. Lebel was transferred to Duke University Medical Center after developing a retroperitoneal bleed. The admitting diagnosis was alcoholic hepatitis/cirrhosis. He died on 17 February 1998. Dr. William King, an expert medical witness for defendant, stated in an affidavit that based on his review of Mr. Lebel's medical records and autopsy report "Mr. Lebel's condition deteriorated with acute oliguric renal failure, adult respiratory distress syndrome (ARDS), DIC, progressive hepatic failure, and refractory hypotension." Dr. King stated that "[t]he Duke University Medical Center discharge diagnoses were: (1) death, secondary to fulminant hepatic failure

with multi-organ failure, (2) alcohol abuse, and (3) retroperitoneal hemorrhage." Dr. King further stated that an autopsy, performed at Duke University Medical Center Department of Pathology concluded that Mr. Lebel's clinical cause of death was hepatic failure. At the time of Mr. Lebel's admission to Bladen County Hospital on 6 February 1998, Dr. King opined that his chances of survival were less than 50%. Dr. King also opined that ". . . Mr. Lebel suffered from liver disease due to chronic alcohol abuse which led to his death, which is a common and typical consequence of end stage liver disease and failure as was exhibited in this patient." Additionally, Dr. King stated that in his opinion, ". . . nothing the health care providers at Bladen County Hospital did or did not do would have prevented Mr. Lebel's death or increased his chances or [sic] survival."

The trial court granted summary judgment in favor of defendant. Plaintiff appeals.

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Plaintiff's sole assignment of error is that the trial court erred in granting defendant's motion for summary judgment. We affirm.

Summary judgment is properly granted where

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 defendant moving for summary judgment has the initial burden of showing either that an essential

element of the plaintiff's claim does not exist as a matter of law or that plaintiff cannot produce evidence to support an essential element of the claim. *Evans v. Appert*, 91 N.C. App. 362, 372 S.E.2d 94, *disc. review denied*, 323 N.C. 623, 374 S.E.2d 584 (1988). If the defendant carries that burden, then the plaintiff must then offer a forecast of evidence which shows that there is a genuine issue for trial with respect to the issues raised by the defendant. *Id.*; N.C. Gen. Stat. § 1A-1, Rule 56(e). "[T]he evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). "Summary judgment is a somewhat drastic remedy and should be granted cautiously, especially in actions alleging negligence as a basis of recovery." *Dumouchelle v. Duke University*, 69 N.C. App. 471, 473, 317 S.E.2d 100, 102 (1984). However, summary judgment should be granted ". . . where the forecast of evidence before the trial court demonstrates that a plaintiff cannot support an essential element of his claim." *Patterson v. Pierce*, 115 N.C. App. 142, 143, 443 S.E.2d 770, 771, *disc review denied*, 337 N.C. 803, 449 S.E.2d 749 (1994).

Plaintiff and defendant disagree as to the nature of the claim asserted; plaintiff contends that her complaint is based on ordinary negligence law while defendant claims the action is one for medical malpractice requiring expert testimony, which plaintiff failed to produce. In either event, however, an essential element of plaintiff's claim is that Mr. Lebel's death was proximately

caused by defendant's conduct, whether ordinary negligence or medical malpractice. See *Von Viczay v. Thoms*, 140 N.C. App. 737, 538 S.E.2d 629 (2000), *affirmed*, 353 N.C. 445, 545 S.E.2d 210 (2001); *Noell v. Kosanin*, 119 N.C. App. 191, 457 S.E.2d 742 (1995). "Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred . . . ." *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984).

In support of its motion for summary judgment, defendant submitted Dr. King's affidavit in which he opined that Mr. Lebel had advanced liver disease with less than a 50% chance of survival on admission to Bladen County Hospital, and that nothing Bladen County Hospital did or did not do would have prevented the death of Mr. Lebel. Dr. King further stated that an autopsy concluded that Mr. Lebel's clinical cause of death was hepatic failure, which, in his opinion, was due to chronic alcohol abuse. Through Dr. King's evidence, defendant carried its initial burden of showing the absence of evidence of the essential element of proximate cause, shifting the burden to plaintiff to produce a forecast of evidence showing the existence of a genuine issue of material fact with respect to proximate cause. See *Evans*, 91 N.C. App. at 365, 372 S.E.2d at 96.

Neither of the affidavits submitted by plaintiff in opposition to the motion for summary judgment disclosed any facts which would create a triable issue of fact with respect to the question of

whether Mr. Lebel's death was caused by any act or failure to act on defendant's part.

Plaintiff argues, however, that the doctrine of *res ipsa loquitur* applies in this case to overcome summary judgment. We disagree. "Res ipsa applies when direct proof of the cause of an injury is not available, the instrumentality involved in the accident is under the defendant's control, and the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission." *Russell v. Sam Solomon Co.*, 49 N.C. App. 126, 130, 270 S.E.2d 518, 520 (1980), *disc. review denied*, 301 N.C. 722, 274 S.E.2d 231 (1981). In the instant case, *res ipsa* does not apply because direct proof of the circumstances of decedent's fall was available to plaintiff through the affidavit of Ms. Johnson, who stated that she witnessed Mr. Lebel's fall. Ms. Johnson's affidavit, however, does nothing to establish the fall as the proximate cause of Mr. Lebel's death, a fact refuted by the affidavit of Dr. King. Therefore, there was no genuine issue as to the existence of facts material to the issue of proximate cause, an essential element of plaintiff's claim, and defendant was entitled to judgment as a matter of law. Summary judgment must be affirmed.

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

Report per Rule 30(e).