NO. COA09-1540

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

CARL ALSTON, ADMINISTRATOR
OF THE ESTATE OF JEARLENE ALSTON,

v. Granville County
No. 09 CVS 306

GRANVILLE HEALTH SYSTEM
(FORMERLY Granville Medical Center, A
County Owned Hospital and Agency of
Granville County), GRANVILLE MEDICAL
CENTER BOARD OF TRUSTEES, and
DR. REGINALD HALL.

Appeal by Plaintiff from orders entered 24 and 27 July 2009 by Judge Henry W. Hight, Jr. in Superior Court, Granville County. Heard in the Court of Appeals 28 April 2010.

D. Lynn Whitted for Plaintiff.

Smith Anderson Blount Dorsett Mitchell & Jernigan, L.L.P., by Timothy P. Lehan and Bryan A. McGann, for Defendants Granville Health System and Granville Medical Center Board of Trustees.

Young Moore and Henderson P.A., by William P. Daniell, Elizabeth P. McCullough, and Kelly E. Street, for Defendant Reginald Hall, M.D.

STEPHENS, Judge.

On 19 March 2009, Carl Alston ("Plaintiff"), Administrator of the Estate of Jearlene Alston ("Decedent"), filed an action against Granville Health System, Granville Medical Center Board of Trustees, and Dr. Reginald Hall (collectively, "Defendants") alleging that under the doctrine of *res ipsa loquitur*, Defendants

were liable for negligence in allowing Decedent to fall off a hospital gurney while under Defendants' care. On 18 May 2009, Defendants Granville Health System and Granville Medical Center Board of Trustees filed an answer and motions to dismiss. On 22 May 2009, Defendant Dr. Reginald Hall filed an answer and motion to dismiss. This matter was heard in Granville County Superior Court, the Honorable Henry W. Hight, Jr. presiding, on 13 July 2009. Judge Hight entered orders allowing Defendants' motions to dismiss on 24 and 27 July 2009 pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. From these orders, Plaintiff appeals.

I. Standard of Review

An appellate court conducts a *de novo* review when considering a trial court's dismissal of a complaint under North Carolina Rule of Civil Procedure 12(b)(6). *Elliott v. Elliott*, __ N.C. App. __, __, 683 S.E.2d 405, 409 (2009). We determine whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). Dismissal is warranted if an examination of the complaint reveals that no law supports the claim, or that sufficient facts to make a good claim are absent, or that facts are disclosed which necessarily defeat the claim. *Id.* "While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule

12(b)(6)." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988).

II. Notice Pleading

Plaintiff argues that the complaint complied with Rule 8(a) of the North Carolina Rules of Civil Procedure, and thus, the trial court erred in dismissing the complaint for failure to state a claim. We agree.

Rule 8(a) provides in pertinent part that

> [a] pleading which sets forth a claim for relief . . . shall contain . . . [a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and . . . [a] demand for judgment for the relief to which he deems himself entitled.

N.C. Gen. Stat. § 1A-1, Rule 8(a) (2009).

North Carolina is a notice pleading State, and detailed fact pleading generally is not required. *Benfield v. Costner*, 67 N.C. App. 444, 445, 313 S.E.2d 203, 205 (1984). Under notice pleading, only claims for fraud, duress, libel, and slander have to be pleaded with any particularity at all. *Newton v. Whitaker*, 83 N.C. App. 112, 114, 349 S.E.2d 333, 335 (1986). In all other instances, the complaint is sufficient if it gives the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved, showing that the pleader is entitled to relief. *Id.*

"The function of a complaint is not the narration of the evidence but a statement of the substantive and constituent facts

upon which the plaintiff's claim to relief is founded. The bare statement of the ultimate facts is all that is required . . . ." *Foster v. Holt*, 237 N.C. 495, 497, 75 S.E.2d 319, 321 (1953) (citation and quotation marks omitted). Additionally, "[t]o be valid, a pleading or motion must include a request or demand for the relief sought, or for the order the party desires the trial court to enter[.]" *In re McKinney*, 158 N.C. App. 441, 444, 581 S.E.2d 793, 795 (2003).

A. Res Ipsa Loquitur

The doctrine of *res ipsa loquitur* applies when (1) direct proof of the cause of an injury is not available, (2) the instrumentality involved in the accident is under the defendant's control, and (3) the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission. *Grigg v. Lester*, 102 N.C. App. 332, 333, 401 S.E.2d 657, 657-58 (1991). The rule of *res ipsa loquitur* merely authorizes the jury to infer negligence upon the facts shown. The rule does not require such inference, nor does it shift the burden of proving the facts by a preponderance of the evidence to defendant. *See, e.g.*, *Page v. Camp Mfg. Co.*, 180 N.C. 330, 333, 104 S.E. 667, 669 (1920) (In an action for damages caused by fire, an instruction which imposed on defendant the burden of satisfying the jury by a preponderance of the evidence that it was not negligent after the plaintiff had made a *prima facie* case was erroneous.).

Plaintiff's complaint alleged the following:[1]

> 12. After November 9, 2003, while in the care of [Defendants], and while Plaintiff[2] was in a state of unconsciousness, and while plaintiff was in the operating room of Granville Medical Center, the Defendants, its agents and employees did not secure Plaintiff Alston while she was in the operating room, and for some unknown reason to Plaintiff, she was negligently allowed to fall off the gurney onto the floor of the hospital where she injured herself; suffered from a fractured arm; injured her right leg and collar bone causing the pins and screws to fall from her leg and a contusion to the back of her head. Plaintiff has no knowledge of how she was injured, whereupon Plaintiff relies upon the doctrine of Res IPSA Loquitur in that the Plaintiff verily believes that the defendants, its agents, and employees were negligent by allowing her to fall, while in a state of unconsciousness, to the floor and injure herself.
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> 13. Plaintiff has been permanently injured and has not walked since the date of her injuries.
>
> 14. During her prolonged injuries, Plaintiff, Jearlene Alston died intestate on JANUARY 13, 2007.
>
> ALLEGATION OF NEGLIGENCE UNDER THE DOCTRINE OF RES IPSA LOQUITUR
>
> 15. Plaintiff Jearlene Alston verily believes and so alleges that her fall from the gurney at Granville Medical center was not common to nor an inherent hazard in the surgical procedure being undertaken by the defendant

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[1] The pertinent allegations of the complaint are reproduced verbatim here as they appear in the Record on Appeal, with no correction of punctuation, spelling, and similar errors attempted.

[2] Plaintiff erroneously refers to Decedent as "Plaintiff" throughout his complaint. However, it is clear that Decedent, Plaintiff's intestate, was the individual injured by falling off the gurney, and Plaintiff is the individual seeking relief on behalf of Decedent's estate.

> Dr. Reginald Hall and therefore was not an inherent risk of the surgery, being performed. "Falling off the gurney" either before or after surgery, was unrelated to each other [sic].
>
> 16. The fall from the operating table and the resuiting [sic] injuries Plaintiff's intestate received, while in an unconscious state and while under anesthesia, were caused diretly [sic] by the negligence of Dr. Reginald Hall who was under a duty to make sure that Plaintiff's (now interstate [sic]) was securely strapped to the operating table.
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> 17. Direct proof of the cause of the injuries herein before complained of is not available to Plaintiff's intestate and was not available before she died in that Plaintiff Jearleae [sic] Alston was under a general anesthetic during her operation and therefore had no knowledge of the occurrences which is [sic] the subject of this action.
>
> . . . .
>
> 19. Plaintiff's interstate [sic] verily believes and so alleges that the injuries Jearlene Alston received would not have occurred had the defendant, Dr. Reginald Hall exercised his best judgment.
>
> 20. Plaintiff's intestate verily believes and so alleges that at the time Jearlene Alston was injured Dr. Reginald Hall was an agent, servant and employee of Granville Health System and Granville Medical Center.

Despite its confusing nature, we nevertheless conclude that Plaintiff's complaint sufficiently alleges the requisite elements to support a cause of action under a theory of *res ipsa loquitur*. Plaintiff's complaint alleges that while Decedent was unconscious and under Defendants'[3] care, she fell off a gurney and was injured.

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[3] Contrary to Defendant Granville Health System's and Granville Medical Center Board of Trustees' contention, Plaintiff's complaint sufficiently alleges negligence on behalf of all

This is sufficient "to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief" under a theory of *res ipsa loquitur*. N.C. Gen. Stat. § 1A-1, Rule 8(a)(1).

In *Parks v. Perry*, 68 N.C. App. 202, 314 S.E.2d 287 (1984), this Court held that the doctrine of *res ipsa loquitur* was applicable, and that the trial court improperly granted summary judgment for the defendant nurse. In *Parks*, a doctor performed a hysterectomy on the plaintiff while she was under general anesthesia. *Id.* at 204, 314 S.E.2d at 290. Upon awakening, the plaintiff experienced numbness and weakness in her fingers, which was later identified as damage to the ulnar nerve in her right arm. *Id.* The defendant nurse argued on appeal that the availability of *res ipsa loquitur* was limited in medical cases to "either 'foreign object' cases or cases in which there is manifest such an obviously [*sic*] gross want of care and skill as to afford, of itself, an almost conclusive inference of negligence." *Id.* at 206, 314 S.E.2d at 289 (quotation marks omitted). This Court disagreed, noting that

> "where proper inferences may be drawn by ordinary men from proved facts which give rise to *res ipsa loquitur* without infringing this principle, there should be no reasonable

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Defendants. Plaintiff's complaint alleges Decedent was injured "while in the care of the Defendants, Granville Health System And Granville Medical Center, [and] Dr. Reginald Hall[.]" Plaintiff's complaint alleges that Decedent was a patient of Dr. Hall's at Granville Medical Center, which is owned by Granville Health System.

> argument against the availability of the doctrine in medical and surgical cases involving negligence, just as in other negligence cases, where the thing which caused the injury does not happen in the ordinary course of things[.]"

Id. (quoting *Mitchell v. Saunders*, 219 N.C. 178, 182, 13 S.E.2d 242, 245 (1941)). Thus, this Court held "that the use of *res ipsa loquitur* in this case [was] justified[,]" and that the trial court erred in granting summary judgment for the defendant nurse on this issue. *Id.* at 207, 314 S.E.2d at 289.

In contrast, our Court held in *Grigg* that the doctrine of *res ipsa loquitur* did not apply where a patient suffered an unrepairable tear in the rear wall of her uterus "while defendant obstetrician was undertaking to deliver [the patient's] child by cesarean section[.]" *Grigg*, 102 N.C. App. at 333, 401 S.E.2d at 657. We noted that

> [t]he common knowledge, experience and sense of laymen qualifies them to conclude that some medical injuries are not likely to occur if proper care and skill is used; included, *inter alia*, are injuries resulting from surgical instruments or other foreign objects left in the body following surgery and injuries to a part of the patient's anatomy outside of the surgical field.

Id. at 335, 401 S.E.2d at 659. However, "the cause or causes of tears in the uterus during a cesarean section is [sic] neither so apparent nor well known as the cause of those and similar injuries." *Id.* Thus, we held that the doctrine of *res ipsa loquitur* was inapplicable in that case.

The injury incurred by Decedent, however, is more closely analogous to the injury at issue in *Parks* than the injury in *Grigg*.

Here, Decedent allegedly was injured by falling off a gurney in an operating room while unconscious. We believe this is the type of injury in which "[t]he common knowledge, experience and sense of laymen" would qualify them to conclude that Decedent would not have been injured if proper care and skill were used. *Grigg*, 102 N.C. App. at 335, 401 S.E.2d at 659. Plaintiff's complaint alleges that it is unknown how Decedent fell off the gurney; that Decedent and the gurney were under Defendants' control; and that this injury would not have occurred in the absence of negligence. *Id.* at 333, 401 S.E.2d at 657-58. Thus, we conclude that Plaintiff's complaint alleged sufficient facts to establish a *prima facie* case of negligence under the doctrine of *res ipsa loquitur* to survive Defendants' 12(b)(6) motion.

B. Rule 9(j)

Defendants further argue, however, that Plaintiff's complaint was properly dismissed because Plaintiff failed to comply with the special pleading requirements of Rule 9(j). We disagree.

Rule 9(j) of the North Carolina Rules of Civil Procedure provides that complaints

> *alleging medical malpractice by a health care provider* as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;

> (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) *The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur*.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2009) (emphasis added).

In *Anderson v. Assimos*, 356 N.C. 415, 572 S.E.2d 101 (2002), our Supreme Court held that "[t]he certification requirements of Rule 9(j) apply only to medical malpractice cases where the plaintiff seeks to prove that the defendant's conduct breached the requisite standard of care [and] not to *res ipsa loquitur* claims." *Id.* at 417, 575 S.E.2d at 103. In *Anderson*, the plaintiff asserted a claim of negligence based on a theory of *res ipsa loquitur* due to the defendants' alleged failure to inform her fully of risks associated with a particular drug and to monitor the side effects. *Id.* The Court noted that "*[r]es ipsa loquitur* claims are normally based on facts that permit an inference of defendant's negligence[,]" and that because the plaintiff asserted only a *res ipsa loquitur* claim, "the certification requirements of Rule 9(j) [were] not implicated." *Id.*; *see also Estate of Waters v. Jarman*, 144 N.C. App. 98, 104, 547 S.E.2d 142, 146 (2001) (Claims against hospital for negligence in continuation of hospital privileges, failure to follow hospital policies, failure to monitor and oversee performance of physicians, and failure to adequately assess

credentials of physicians prior to granting privileges were not "medical malpractice actions" that were subject to expert certification requirement; claims asserted administrative and management deficiencies and did not arise out of furnishing of professional services in performance of medical, dental, or other health care.); *Taylor v. Vencor, Inc.*, 136 N.C. App. 528, 529, 525 S.E.2d 201, 202 (2000) (Claim that nursing home was negligent in failing to supervise resident whose nightgown caught on fire while she was smoking constituted a claim for ordinary negligence, not for medical malpractice, and thus patient's daughter's wrongful death complaint was not required to comply with Rule 9(j).).

By contrast, in *Sturgill v. Ashe Mem'l. Hosp., Inc.*, 186 N.C. App. 624, 652 S.E.2d 302 (2007), this Court concluded that the certification requirements of Rule 9(j) were necessary to the viability of the cause of action therein alleged. In *Sturgill*, a patient incurred multiple injuries when he fell out of his hospital bed. *Id.* at 625, 652 S.E.2d at 304. The patient's estate filed a complaint alleging that the hospital was negligent in failing to place restraints on the patient. *Id.* at 626, 652 S.E.2d at 304. The trial court granted the hospital's motion for summary judgment on the grounds that the complaint failed to comply with Rule 9(j). *Id.* In affirming the trial court's ruling, our Court noted that the plaintiff's complaint did not allege ordinary negligence, but rather alleged that the patient's injuries resulted from his "*being unrestrained*[.]" *Id.* at 629, 652 S.E.2d at 306.

> It [was] undisputed in the record that the use of restraints is a medical decision that

> normally "requires an order written by a physician or physician's assistant." It [was] also undisputed in the record that "[a] medical assessment for the use of restraints can be delicate and complex, and as such, requires the application of clinical judgment."

Id. Thus, because the complaint was based solely on the lack of restraints on the patient — which the evidence established was a medical malpractice action — and the complaint failed to comply with Rule 9(j), the action was properly dismissed. *Id.* at 631, 652 S.E.2d at 307.

This case is readily distinguishable from *Sturgill*. Here, Plaintiff's sole cause of action alleges only ordinary negligence based on the doctrine of *res ipsa loquitur*, whereas in *Sturgill*, the plaintiff's sole claim for relief was based on a medical malpractice theory. Because Plaintiff herein elected to proceed solely on a *res ipsa loquitur* theory, Plaintiff is bound by that theory. *See Anderson*, 356 N.C. at 417, 572 S.E.2d at 103 (Where plaintiff's complaint asserted *res ipsa loquitur* as the sole basis for her negligence claim, plaintiff was bound by that theory and precluded from asserting a contradictory theory.). We also reiterate that this case is before us on motions to dismiss at the pleading stage of the lawsuit, whereas *Sturgill* was decided at summary judgment after the defendant hospital had produced affidavits establishing that "[b]ecause the decision to apply restraints is a medical decision requiring clinical judgment and intellectual skill, . . . it is a professional service." *Sturgill*, 186 N.C. App. at 630, 652 S.E.2d at 306.

Here, Plaintiff's sole cause of action is for ordinary negligence under a theory of *res ipsa loquitur*. Having elected to proceed solely on such theory and having sufficiently pled the elements of a *res ipsa loquitur* claim, it was not necessary for Plaintiff to comply with Rule 9(j) in order to state a claim for negligence against Defendants under the factual circumstances herein alleged. *See Anderson*, 356 N.C. at 417, 575 S.E.2d at 103. The trial court's orders of dismissal are therefore

REVERSED.

Judges HUNTER and GEER concur.

Report per Rule 30(e).