NO. COA12-218
NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2012

MARITTA LOUISE HUDGINS,
Plaintiff,

v. Mitchell County
No. 08 CVS 271

RLB MANAGEMENT, INC.,
Defendant.

Plaintiff appeals from orders entered 2 February 2010 and 16 November 2011 by Judge Alan Z. Thornburg in Mitchell County Superior Court. Heard in the Court of Appeals 29 August 2012.

Tin, Fulton, Walker & Owen, by S. Luke Largess, for plaintiff-appellant.

York Williams & Lewis, L.L.P., by Gregory C. York, for defendant-appellee.

HUNTER, Robert C., Judge.

Plaintiff Maritta Louise Hudgins appeals from the trial court's order granting defendant RLB Management, Inc.'s motion for summary judgment as to plaintiff's claims for breach of contract, negligent infliction of emotional distress, and punitive damages arising from the death of plaintiff's six-year-old granddaughter. Plaintiff also entered notice of appeal from

the trial court's 16 November 2011 order denying plaintiff's motion for reconsideration. After careful review, we affirm the 2 February 2010 order granting summary judgment.

Background

Plaintiff was the grandmother of Sarah Carpenter ("Sarah"). Sarah was six years old at the time of her death in January 2007. Since 2003, plaintiff was Sarah's court-appointed general guardian. On 12 January 2007, plaintiff and her partner, Lowery Sparks ("Mr. Sparks"), took Sarah and their son, Dustin, to participate in an overnight "lock-in" at an activity center in Spruce Pine, North Carolina, called the Pinebridge Center. Plaintiff alleges the Pinebridge Center was, at the time of the lock-in, owned and operated by defendant.

When plaintiff and Mr. Sparks arrived at the Pinebridge Center with Sarah and Dustin, plaintiff completed a form registering Sarah for the lock-in. The form indicated that plaintiff paid the activity center $10.00, and it contained a clause entitled "Parent/Participant Contract Agreement." This clause provided that plaintiff agreed to pick up her children by 8:00 a.m. or pay additional fees if plaintiff arrived late. Plaintiff learned during the registration that one of the activities to be provided during the lock-in was swimming. The

flyer advertising the lock-in listed several activities that would be offered during the event but did not list swimming as one of the activities. Plaintiff spoke with Deborah Hughes ("Ms. Hughes"), who was stationed at the registration table. Plaintiff told Ms. Hughes that Sarah did not know how to swim, and that plaintiff did not want Sarah to get into the pool. According to plaintiff, Ms. Hughes assured her that Sarah would not be allowed into the pool but would be involved in other activities. Two parents, Vicki Austin and Alice Buchanan, were present for this conversation with Ms. Hughes. They too stated that they did not want their children swimming, and they testified via affidavits that Ms. Hughes assured them all that their children would not be swimming during the lock-in.

Plaintiff alleges that based on the promise that Sarah would not be allowed to swim that night, she left the Pinebridge Center with Mr. Sparks and drove to Asheville. Shortly thereafter, some of the children staying at the lock-in were allowed into the swimming pool. Sarah was provided a swimming suit from the activity center's lost-and-found collection. During the swimming activity, one of the adults found Sarah lying at the bottom of the pool and pulled her out of the water.

Two of the lock-in chaperons attempted cardiopulmonary resuscitation on Sarah while waiting for paramedics to arrive.

Approximately one hour after leaving Sarah at the lock-in, plaintiff received a call from an unidentified person at the Pinebridge Center who told plaintiff that Sarah had been in a serious accident; the caller would not provide further details. Plaintiff attempted to call the person back and to call the emergency contact she was provided at the lock-in registration, but both calls were unanswered. Plaintiff and Mr. Sparks immediately drove back to Spruce Pine. During the drive back, plaintiff experienced intermittent cellphone coverage but received a voicemail from a law enforcement official stating that Sarah had been airlifted to a hospital in Johnson City, Tennessee.

Medical personnel were able to start Sarah's heart after she drowned, but she did not regain consciousness and was placed on a ventilator. For the next two days, plaintiff remained by Sarah's side. Sarah showed no signs of brain activity, and her doctors concluded that she would never regain consciousness. Plaintiff then agreed to donate Sarah's organs and remained with Sarah until doctors asked her to leave so that they could begin to harvest Sarah's organs. In 2009, plaintiff's psychologist

diagnosed plaintiff as having suffered from an episode of severe depression and chronic posttraumatic stress disorder as a result of Sarah's drowning.

On 12 November 2008, plaintiff filed the underlying action against defendant claiming breach of contract, negligent infliction of emotional distress, and punitive damages. Defendant filed a motion to dismiss for failure to state a claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6); the motion was denied. After discovery, defendant filed a motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. Following a hearing on the motion, the trial court held that defendant was entitled to a judgment as a matter of law as to each of plaintiff's claims. On 17 February 2010, plaintiff filed a motion asking the trial court to reconsider its grant of summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. When more than one year passed without a hearing on plaintiff's motion, defendant filed a motion to dismiss for lack of prosecution. Both motions were denied. On 12 December 2011, plaintiff entered notice of appeal from the order granting summary judgment and the order denying her motion for reconsideration of the summary judgment order.

Discussion

Plaintiff's claim for compensatory damages due to severe emotional distress is based on two theories: breach of contract and the tort of negligent infliction of emotional distress. Under each theory, we conclude defendant was entitled to judgment as a matter of law.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). Under this standard, "[t]he movant's papers are carefully scrutinized; those of the adverse party are indulgently regarded. All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted).

A claim for negligent infliction of emotional distress requires the plaintiff to allege "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress

(often referred to as 'mental anguish'), and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). An allegation of ordinary negligence is sufficient to support the claim, but the emotional distress must be "severe" rather than "temporary fright." *Id.* Such severe distress must manifest as a mental or an emotional disorder or condition that is "generally recognized and diagnosed by professionals trained to do so." *Id.*

As to plaintiff's claim for negligent infliction of emotional distress, the record contains evidence that Sarah's drowning caused plaintiff to experience more than the type of temporary fright rejected by our caselaw. The determinative issue in plaintiff's tort claim, however, is the foreseeability of plaintiff's severe emotional distress. "[A] plaintiff may recover for his or her severe emotional distress arising due to concern for another person, *if* the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence." *Id.*

Factors to be considered for determining the foreseeability of a plaintiff's harm include "the plaintiff's proximity to the

negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." *Id.* at 305, 395 S.E.2d at 98. The record establishes that plaintiff did not witness, and was not in proximity to, defendant's negligent act. After leaving Sarah at the Pinebridge Center, plaintiff and Mr. Sparks drove to Asheville. There, plaintiff received a phone call by which she was notified that Sarah had been in an accident. She then drove to the hospital to which Sarah had been airlifted. In this respect, the facts presented here are similar to those presented in *Gardner v. Gardner*, 334 N.C. 662, 663-64, 435 S.E.2d 324, 326 (1993).

The plaintiff-mother in *Gardner* sought damages for negligent infliction of emotional distress where her child died as a result of a car accident that she did not witness. *Id.* at 664, 435 S.E.2d at 326. Upon learning of the accident, the mother rushed to the hospital where she witnessed medical personnel attempting to resuscitate her child. *Id.* at 663-64, 435 S.E.2d at 326. The child died soon thereafter, and the mother was asked for permission to donate her child's organs. *Id.* at 664, 435 S.E.2d at 326. Citing the foreseeability

factors discussed in *Ruark*, our Supreme Court ordered an entry of summary judgment in favor of the defendant noting that the plaintiff was several miles away at the time of the accident, and that she did not witness or "perceive immediately" the injuries suffered by her child. *Id.* at 667-68, 435 S.E.2d at 328 ("[The plaintiff-mother's] absence from the scene at the time of [the] defendant's negligent act, while not in itself decisive, militates against the foreseeability of her resulting emotional distress.").

The relationship between plaintiff and Sarah was akin to a relationship between a parent and child. Yet, as this Court has previously noted, the parent-child relationship in *Gardner* was not sufficient to overcome the plaintiff's lack of proximity to, or observation of, the defendant's negligent act. *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 274, 542 S.E.2d 346, 352, *disc. review denied*, 353 N.C. 725, 551 S.E.2d 437 (2001). This is in contrast to the facts presented in *Fox-Kirk*, where, when a child was injured in an automobile accident, the plaintiff-mother's observation of the negligent act, her presence in the car, and her immediate perception of her child's injuries were sufficient to establish the foreseeability of the mother's resulting emotional distress. *Id.* at 275, 542 S.E.2d at 352. Here,

plaintiff was not present at the time of the drowning, did not observe defendant's negligent act, and did not immediately perceive the injuries suffered by Sarah. Under these facts, we conclude plaintiff failed to establish the element of reasonable foreseeability. The trial court did not err in granting summary judgment in favor of defendant as to plaintiff's claim for negligent infliction of emotional distress.

In addition to her tort claim, plaintiff alleged that her emotional distress was a foreseeable result of defendant's breach of a contract to keep Sarah out of the swimming pool during the lock-in. Our Supreme Court has firmly established that recovery for severe emotional distress may be based on either theory. *Ruark*, 327 N.C. at 296, 395 S.E.2d at 93 ("'It makes no difference, as this Court has always held, whether the action or claim to recover damages for mental suffering is based upon breach of contract or upon tort.'" (quoting *Byers v. Express Co.*, 165 N.C. 542, 545-46, 81 S.E. 741, 742 (1914), *rev'd on other grounds*, 240 U.S. 612, 60 L. Ed. 825 (1916))). In those cases

> where the plaintiff and [the] defendant have a contractual relationship, the correct rule was and is that the contractual relationship provides a strong factual basis to support *either* a claim for emotional distress based upon a breach of the contract *or* a finding

> of proximate causation and foreseeability of injury sufficient to establish a tort claim for emotional distress.

Id. at 297, 395 S.E.2d at 93. There are additional limitations, however, on emotional distress claims involving a breach of contract. In *Ruark*, our Supreme Court reaffirmed its prior holding that recovery for emotional distress from a breach of contract requires: (1) that "the contract was not one concerned with trade and commerce with concomitant elements of profit involved"; (2) that "pecuniary interests were not the dominant motivating factor in the decision to contract"; and (3) that "the benefits contracted for relate *directly* to matters of dignity, mental concern or solicitude, or the sensibilities of the party to whom the duty is owed, and which *directly* involves interests and emotions recognized by all as involving great probability of resulting mental anguish if not respected." *Id.* at 301, 395 S.E.2d at 96 (quoting *Stanback v. Stanback*, 297 N.C. 181, 194, 254 S.E.2d 611, 620 (1979), *disapproved of on other grounds by Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981)) (quotation marks omitted). While we agree that the parties' contract was not concerned with trade or commerce nor dominated by pecuniary interests, we conclude their contract did not relate *directly* to plaintiff's dignity, mental concern,

solicitude, or sensibilities. Therefore, plaintiff has failed to establish a genuine issue of material fact as to her claim of severe emotional distress resulting from defendant's breach of contract. Defendant was entitled to judgment as a matter of law.

Conclusion

Because we conclude the trial court did not err in granting defendant's motion for summary judgment as to plaintiff's breach of contract and negligent infliction of emotional distress claims, we need not reach plaintiff's argument regarding her claim for punitive damages. As plaintiff has presented no argument regarding the trial court's order denying her motion for reconsideration of its order granting summary judgment, we deem her appeal from the 16 November 2011 order abandoned. N.C. R. App. P. 28(b)(6) (2012). The trial court's 2 February 2010 order granting summary judgment in favor of defendant is affirmed.

AFFIRMED.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).