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NO. COA13-303
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

JOSHUA I. VOGEL, M.D.,
Plaintiff

v.

New Hanover County
No. 12 CVS 3416

HEALTH SCIENCES FOUNDATION, INC. D/B/A COASTAL AREA HEALTH EDUCATION CENTER ALSO D/B/A SOUTHEAST AREA HEALTH EDUCATION CENTER, BRENT DEAN WRIGHT, M.D., JACQUELINE LOWRY WEBB, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MICHAEL ANDREW WEBB, AN INFANT,
Defendants

Appeal by plaintiff from order entered 20 December 2012 by Judge Russell J. Lanier, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 27 August 2013.

Manning Fulton & Skinner, P.A., by Michael T. Medford and Natalie M. Rice, for Plaintiff.

Ward and Smith, P.A., by A. Charles Ellis, for Defendants Health Sciences Foundation, Inc., and Brent Dean Wright, M.D.

Butler Daniel & Associates, by A.L. Butler Daniel, for Defendant Jacqueline Lowry Webb, individually and as guardian ad litem for Michael Andrew Webb.

ERVIN, Judge.

Plaintiff Joshua I. Vogel, M.D., appeals from an order granting Defendants' dismissal motions, which were predicated on lack of subject matter jurisdiction, ripeness, and prior action

pending considerations. On appeal, Plaintiff contends that the trial court erroneously dismissed his complaint because the trial court had jurisdiction to hear and decide the claims which he sought to assert against Defendants and because those claims were both ripe for decision and were not barred by the existence of a prior pending action. After careful consideration of Plaintiff's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

A. Substantive Facts

Plaintiff, a physician specializing in obstetrics and gynecology, contracted with Defendant Health Sciences Foundation, Inc., to provide coverage for the OB/GYN residency program at New Hanover Regional Medical Center, which was operated by HSF.[1] Although HSF employed full-time physicians to supervise the residency program during normal working hours, the agreement between Plaintiff and HSF provided that Plaintiff would provide such coverage on nights and weekends to the extent necessary. As a result, the contract between the parties required Plaintiff to remain at New Hanover Regional Medical

[1]Despite the fact that the contract in question was actually between Plaintiff and Defendant Coastal Area Health Education Center, we will treat HSF as the real party defendant in this case given that CAHEC appears to be a trade name under which HSF operated the residency program.

Center at specific times, to be available in the event that any resident needed assistance, and to maintain personal liability insurance. In addition, although the contract did not require Plaintiff to personally examine or evaluate each patient, it did specifically provide that "[a]ttending physicians are responsible for all OB/GYN services rendered during the time of their coverage, including all procedures performed, all visits, or all consults (inpatient, outpatient, L&D, H&O and ER), ob delivered/undelivered or Gyn." Although Dr. Brent Dean Wright, who served as program director for the residency program, understood that private attending physicians such as Plaintiff were responsible for the care provided by program residents, Plaintiff denied that he could be held liable for deficient care provided "to a patient he had never examined, never been consulted about, or even knew had presented to the hospital."

On 26 February 2005, Plaintiff was working at New Hanover Regional Medical Center when Defendant Jaqueline Lowry Webb, who was complaining of abdominal pain, was seen by residents. However, as the result of decisions made by these residents in the HSF program, Ms. Webb was not admitted to New Hanover Regional Medical Center. Plaintiff was never even informed of Ms. Webb's presence at New Hanover Regional Medical Center. On the following day, Ms. Webb gave birth to a son, Michael Andrew Webb. As a result of complications which had not been detected

at the time of Ms. Webb's visit to New Hanover Regional Medical Center on the preceding date, Michael Webb was born with cerebral palsy and suffered permanent brain injury.

On 11 January 2008, Ms. Webb, acting both individually and as Michael Webb's guardian *ad litem*, filed a professional negligence action against New Hanover Regional Medical Center and the attending residents for the purpose of seeking compensation for the injuries that she and her son had sustained. After the parties to that proceeding reached a settlement, Ms. Webb filed a complaint against multiple defendants, including Plaintiff and HSF, on 4 January 2011 in which she alleged that the residents had treated her in a negligent manner, that HSF was liable for the residents' negligence on the basis of *respondeat superior* considerations, and that various physicians, including Plaintiff, were liable on the basis, among other theories, of what were tantamount to negligent supervision principles.

<u>B. Procedural History</u>

On 30 August 2012, Plaintiff filed a complaint in the present action alleging that HSF had breached its contract with him "by attempting to impose . . . obligations not covered by said agreement" and seeking the entry of a judgment requiring HSF to indemnify him for costs incurred in defending the action that had been brought against him by Ms. Webb and declaring that

Plaintiff was not "personally financially responsible for the acts of resident physicians under circumstances where [Plaintiff] never examined the patient, never was consulted by the resident physicians concerning the patient, or had any knowledge as to the presence of the patient."[2] On 24 October 2012, HSF and Dr. Wright filed a responsive pleading in which they denied the material allegations of Plaintiff's complaint, asserted various affirmative defenses, and sought the dismissal of Plaintiff's complaint on subject matter jurisdiction and prior action pending grounds. Ms. Webb filed a similar responsive pleading on 28 November 2012.

On 3 December 2012, Defendants' motions came on for hearing before the trial court. On 20 December 2012, the trial court entered an order granting Defendants' dismissal motions. Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

"Jurisdiction in North Carolina depends on the existence of a justiciable case or controversy." *Creek Pointe Homeowner's*

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[2]Although Plaintiff named Ms. Webb, both individually and as guardian *ad litem* for Michael Webb, and Dr. Wright as defendants in his action, the only relief sought in his complaint would necessarily have to be provided by HSF. For that reason, we will treat HSF as the only defendant in this case throughout the remainder of this opinion.

Ass'n v. Happ, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001), *disc. review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002). "[T]he standard of review on a motion to dismiss under [N.C. Gen. Stat. § 1A-1,] Rule 12(b)(1) for lack of jurisdiction is *de novo*." *Welch Contracting, Inc. v. N.C. Dep't. of Transp.*, 175 N.C. App. 45, 50, 622 S.E.2d 691, 694 (2005) (first alteration in original) (quoting *Hatcher v. Harrah's N.C. Casino Co.*, 169 N.C. App. 151, 155, 610 S.E.2d 210, 212 (2005)) (quotation marks omitted). Although "[t]he allegations of a complaint determine a court's jurisdiction over the subject matter of the action," *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009) (citing *Peoples v. Norwood*, 94 N.C. 167, 172 (1886)), "a trial court may [also] consider and weigh matters outside the pleadings," *Munger v. State*, 202 N.C. App. 404, 410, 689 S.E.2d 230, 235 (2010) (quoting *Dep't of Transp. v. Blue*, 147 N.C. App. 596, 603, 556 S.E.2d 609, 617 (2001), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428-29 (2002)) (quotation marks omitted), *disc. review improvidently allowed*, 365 N.C. 3, 705 S.E.2d 734 (2011), when considering certain jurisdictional challenges, including lack of standing.

B. Justiciability of Plaintiff's Claims

1. Declaratory Judgment Claim

The claims that have been asserted in Plaintiff's complaint rest upon a contention that his agreement with HSF precluded him

from being held financially responsible for injuries sustained by patients whom he did not treat or whose treatment he did not personally supervise. In seeking to overturn the trial court's decision to dismiss his declaratory judgment claim, Plaintiff contends that, although the extent to which he was liable in the action which Ms. Webb had filed against him and others has not yet been resolved, he was entitled to a declaration of the type which he has sought in this case on the basis of the same considerations which render insurance coverage disputes justiciable. We do not find Plaintiff's argument persuasive.

According to N.C. Gen. Stat. § 1-254, "[a]ny person interested under a . . . written contract or other writings constituting a contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder . . . either before or after there has been a breach thereof." On the other hand, however, N.C. Gen. Stat. § 1-254 "does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942). As a result, "in order to invoke the provisions of the Declaratory Judgment Act[,] there must be a justiciable controversy between the parties." *City of New Bern v. New Bern-Craven Cnty. Bd. of*

Educ., 328 N.C. 557, 559, 402 S.E.2d 623, 624-25 (1991). "There is a justiciable controversy if litigation over the matter upon which declaratory relief is sought appears unavoidable." *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 656, 435 S.E.2d 309, 313 (1993).

In attempting to persuade us that he has a justiciable controversy with Defendant, Plaintiff places primary reliance on decisions such as *Smith v. Nationwide Mut. Ins. Co.*, 97 N.C. App. 363, 388 S.E.2d 624 (1990), *rev'd on other grounds*, 328 N.C. 139, 400 S.E.2d 44 (1991), in which the plaintiff sought a declaration that he was entitled to the benefit of certain insurance coverage. In *Smith*, after the plaintiff's daughter had been killed in a motor vehicle and while the underlying tort action was still pending, the plaintiff sought a declaration that the coverage available under two separate policies could be stacked. *Smith*, 97 N.C. App. at 365-66, 388 S.E.2d at 626. Although the carrier asserted that the plaintiff's claim was not ripe for adjudication, *id.*, we rejected this contention on the grounds that a wrongful death action had actually been filed; the tortfeasor's insurance company had tendered its policy limits, an action which triggered the availability of the disputed coverage; and the plaintiff could not effectively litigate his claims against the tortfeasor without knowing the extent to which he was entitled to obtain a recovery under both

policies. *Id.* at 366-67, 388 S.E.2d at 626-27. We believe that Plaintiff's reliance on *Smith* and similar decisions is misplaced.

The ultimate problem with Plaintiff's argument in reliance upon decisions such as *Smith* is that the issue before us in this case is simply not, contrary to Plaintiff's contention, "the functional equivalent of a declaratory judgment action in an insurance coverage dispute." In insurance coverage litigation, the court can make a binding determination concerning the extent, if any, to which the carrier is or is not required to provide coverage. On the other hand, the extent to which Plaintiff is liable to Ms. Webb, acting individually and as guardian *ad litem* for her son, under the circumstances present here depends upon the provisions of North Carolina law rather than upon the content of the agreement between Plaintiff and HSF. *Mozingo v. Pitt Cnty. Mem'l Hosp., Inc.*, 331 N.C. 182, 192, 415 S.E.2d 341, 347 (1992) (stating that "a contract providing for supervision of resident physicians in a manner which substantial evidence tends to show is negligent will not shield a supervising physician such as the defendant from legal liability for providing such negligent supervision, at least where, as here, the plaintiff patient was not a party to that contract"). Simply put, as a result of the fact that the agreement which Plaintiff seeks to have construed does not

control the extent to which Plaintiff is liable to Ms. Webb, a determination that the contract in question did not contemplate that Plaintiff "is not, and never agreed to be, personally financially responsible for the acts of resident physicians under circumstances where [P]laintiff never examined the patient, never was consulted by the resident physicians concerning the patient, or had any knowledge as to the presence of the patient" would amount to the rendition of an advisory opinion rather than the resolution of a controversy with actual, real world, consequences.

In addition, Plaintiff argues that the trial court erred by concluding that it lacked jurisdiction over the issues raised in his complaint on the grounds that a resolution of the underlying contractual dispute in his favor would compel the conclusion that HSF was obligated to indemnify him for his litigation-related expenses and any damages he was obligated to pay.[3] The fundamental problem with this aspect of Plaintiff's argument is that, according to well-established North Carolina law, "a

[3]In support of his indemnification argument, Plaintiff cites *Gregg v. City of Wilmington*, 155 N.C. 18, 24, 32, 70 S.E. 1070, 1073, 1076 (1911) for the proposition that, as a matter of law, he would, as the passively negligent party, be entitled to indemnification from the actively negligent party. Aside from the fact that Ms. Webb has asserted what amount to both vicarious liability and negligent supervision claims against Plaintiff in the underlying tort action, we are unable to see how the principle upon which Plaintiff relies has any bearing on the extent, if any, to which he is entitled to a determination of his right to be indemnified by Defendant at this time.

separate action for indemnity may not be commenced until after payment and satisfaction of the debt." *Ingram v. Smith*, 16 N.C. App. 147, 152, 191 S.E.2d 390, 394 (citing *Ingram v. Nationwide Mutual Ins. Co.*, 258 N.C. 632, 639, 129 S.E.2d 222, 228 (1963), *Ingram v. Nationwide Mutual Ins. Co.*, 266 N.C. 404, 406, 146 S.E.2d 509, 510 (1966), and *Hodges v. Armstrong*, 14 N.C. 253, 254-55 (1831)), *cert. denied*, 282 N.C. 304, 192 S.E.2d 195 (1972). As a result, Plaintiff's contention that a favorable decision with respect to the contract construction issue would have real world consequences does not justify a decision to overturn the trial court's order. Thus, the trial court did not err by dismissing Plaintiff's declaratory judgment claim for lack of subject matter jurisdiction.

2. Breach of Contract Claim

Secondly, Plaintiff contends that the trial court erred by dismissing the breach of contract claim that he sought to assert against Defendant. According to Plaintiff, the same considerations that justify a decision to overturn the trial court's decision with respect to the viability of the declaratory judgment action justify overturning the trial court's decision to dismiss his breach of contract claim. We do not find Plaintiff's arguments persuasive.

"The elements of a claim for breach of contract are (1) [the] existence of a valid contract and (2) [the] breach of the

terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). Although Plaintiff does allege that Defendant breached their agreement by "seeking to impose on [Plaintiff] a greater level of responsibility than agreed upon by the parties" and "attempting to impose upon [Plaintiff] obligations not covered by said agreement," he has not asserted that Defendant's alleged conduct violated any specific provision of the agreement and we are unable to ascertain from our study of the complaint how Defendant's alleged actions constitute a breach of the contract between the parties.

The fundamental problem with Plaintiff's breach of contract claim is that Ms. Webb, rather than Defendant, has asserted that Plaintiff is liable for the injuries which she and her son sustained on the basis of alleged common law, rather than contractual, obligations and that Plaintiff has not yet been held liable to Ms. Webb for failing to comply with those obligations.[4] Simply put, Defendant has never asserted that

[4]Although Plaintiff alleges that HSF's breach of the contract injured him by "forc[ing him] to incur costs and expenses associated with the 2011 litigation including . . . court costs, filing fees, expert witness fees, and attorneys' fees," the incurrence of these expenses stemmed from the fact that Ms. Webb initiated litigation against Plaintiff rather than from any action taken by Defendant. Moreover, nothing in the contract at issue in this case obligates Defendant to provide liability insurance coverage to Plaintiff. As a result, the fact that Plaintiff has incurred these expenses does not, as best we can tell, have any bearing on the proper outcome of Plaintiff's challenges to the trial court's order.

Plaintiff was liable to Ms. Webb, either individually or as guardian *ad litem* for her son, and Plaintiff has not, in fact, been held liable to her. Although Plaintiff has alleged that "Dr. Wright, who is employed by CAHEC and was the Program Director of the New Hanover OB/GYN Residency Training Program . . . was deposed in the 2011 litigation and testified that it was his belief and understanding that a private attending physician was, in fact, personally financially responsible for care delivered by resident physicians," this testimony represents nothing more than an expression of Dr. Wright's opinion, does not constitute any sort of assertion by HSF that Plaintiff is liable to Ms. Webb, and has no bearing on the extent, if any, to which Plaintiff is actually liable to Ms. Webb.[5] As a result, Plaintiff has not stated a viable claim against Defendant for breach of contract.[6]

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[5]In addition to the allegations discussed in the text of this opinion, Plaintiff alleged that he "ha[d] made a demand upon [HSF] to indemnify him, but that demand has been refused." However, given that, as we have already demonstrated, Defendant has no obligation to indemnify Plaintiff until he was been found liable to Ms. Webb and satisfied his obligation to her, Plaintiff has not pled a viable claim for breach of an indemnification obligation in his complaint.

[6]Although well-established North Carolina law recognizes that "a defendant breaches the contract if she repudiated her obligation under the contract before her performance was immediately due," a plaintiff seeking to assert an anticipatory repudiation claim must "show[] by the greater weight of the evidence . . . that [the] defendant engaged in positive and

III. Conclusion

Thus, for the reasons stated above, we conclude that the trial court did not err by dismissing Plaintiff's complaint for lack of subject matter jurisdiction.[7] As a result, the trial court's order should be, and hereby is affirmed.

AFFIRMED.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).

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unequivocal acts and conduct which were clearly inconsistent with the contract." *Dishner Developers, Inc. v. Brown*, 145 N.C. App. 375, 381, 549 S.E.2d 904, 907, *aff'd*, 354 N.C. 569, 557 S.E.2d 528 (2001). Aside from the fact that Plaintiff has not argued on appeal that he had stated an anticipatory repudiation claim in his complaint, *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (stating that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant"), Plaintiff's allegations establish, at most, that Defendant did not accept Plaintiff's contention that he could not be held liable to Ms. Webb under the circumstances at issue here and had declined, before any obligation to do so actually existed, to indemnify Plaintiff for the costs associated with the underlying tort action. As a result, we do not believe that Plaintiff has asserted a valid anticipatory repudiation claim even if the existence of such a claim had been explicitly asserted before this Court.

[7]In light of our decision with respect to the subject matter jurisdiction issue, we need not address Plaintiff's arguments that he had standing to assert his claims against Defendants and that the present case was not barred by the prior action pending doctrine.