IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1190

Filed: 6 September 2016

Pasquotank County, No. 15 CVS 54

DESIREE KING, by and through her Guardian ad Litem, G. ELVIN SMALL, III; and AMBER M. CLARK, Individually, Plaintiffs

v.

ALBEMARLE HOSPITAL AUTHORITY d/b/a ALBEMARLE HEALTH/ALBEMARLE HOSPITAL; SENTARA ALBEMARLE REGIONAL MEDICAL CENTER, LLC d/b/a SENTARA ALBEMARLE MEDICAL CENTER; NORTHEASTERN OB/GYN, LTD.; BARBARA ANN CARTER, M.D.; AND ANGELA McWALTER, CNM, Defendants

Appeal by plaintiff, by and through her guardian *ad litem*, from order entered 27 July 2015 by Judge Cy A. Grant in Pasquotank County Superior Court. Heard in the Court of Appeals 9 March 2016.

Hammer Law, P.C., by Amberley G. Hammer, and Ashcraft & Gerel, LLC, by Wayne M. Mansulla, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Robert E. Desmond and Samuel G. Thompson, for defendant-appellees Northeastern Ob/Gyn, Ltd.; Barbara Ann Carter, M.D.; and Angela McWalter, CNM.

Harris, Creech, Ward & Blackerby, P.A., by Jay C. Salsman and Charles E. Simpson, Jr., for defendant-appellees Albemarle Hospital Authority and Sentara Albemarle Regional Medical Center, LLC.

CALABRIA, Judge.

Desiree King ("plaintiff"), a minor, appeals from an order dismissing her medical malpractice action as barred by the statute of limitations. We reverse and remand.

I. Background

On 4 February 2005, plaintiff was born to Amber Clark ("Ms. Clark") at Albemarle Hospital. Barbara Ann Carter, M.D. ("Dr. Carter"), Ms. Clark's obstetrician, and Angela McWalter, CNM ("CNM McWalter"), Ms. Clark's nurse midwife, managed her care and delivered plaintiff. Shortly after her birth, medical staff discovered that plaintiff had a brain injury.

On 10 January 2008, the trial court entered an order appointing G. Elvin Small, III ("Small"), as plaintiff's guardian *ad litem* for the purpose of bringing a medical malpractice action on plaintiff's behalf. On that same date, plaintiff, by and through Small, filed an action alleging that her brain injury resulted from the medical malpractice and negligence of Albemarle Hospital and Dr. Carter. On 31 October 2008, for reasons unclear from the record or transcript, plaintiff's action was voluntarily dismissed without prejudice pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure.

On 30 January 2015, the trial court entered another order appointing Small to represent plaintiff "for the purpose of commencing a civil action on her behalf[.]" On that same date, plaintiff, by and through Small, initiated another medical

malpractice action, this time alleging that her brain injury resulted from the medical malpractice and negligence of Dr. Carter; CNM McWalter; Dr. Carter and CNM McWalter's employer, Northeastern Ob/Gyn, Ltd.; Albemarle Hospital Authority; and Sentara Albemarle Regional Medical Center, LLC (parties collectively, "defendants"). In response, defendants filed motions to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that the statute of limitations had expired.

After a hearing, the trial court entered an order on 27 July 2015 granting defendants' motions to dismiss plaintiff's claims pursuant to Rule 12(b)(6), "as [her] claims [were] barred by the applicable statute of limitations."[1] Plaintiff appeals.

II. Analysis

Plaintiff contends that the trial court erred by dismissing her action on the grounds that it was barred by N.C. Gen. Stat. § 1-15(c)'s three-year limitations period, because the plain language of N.C. Gen. Stat. § 1-17(b) tolled the limitations period until 4 February 2024 when plaintiff will turn nineteen years old. We agree.

The statute of limitations for "a cause of action for malpractice arising out of the performance of or failure to perform professional services" is three years from the date the action accrued, which is "the last act of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-15(c) (2015). The parties do not dispute that N.C. Gen.

[1] Initially, Ms. Clark was also a party to plaintiff's action against defendants. The trial court dismissed her claims on 27 July 2015, and she did not join this appeal.

Stat. § 1-15(c)'s three-year limitations period applies to plaintiff's malpractice action and that her action accrued when she was born on 4 February 2005. Therefore, the statute of limitations, absent a tolling provision, expired on 4 February 2008. The issue on appeal is whether the disability tolling provision of N.C. Gen. Stat. § 1-17(b) extended N.C. Gen. Stat. § 1-15(c)'s three-year limitations period.

Where, as here, there are no relevant facts in dispute, the issue of whether a statute of limitations bars an action is a question of law reviewed *de novo* on appeal. *See Taylor v. Hospice of Henderson Cty., Inc.*, 194 N.C. App. 179, 184, 668 S.E.2d 923, 926 (2008). Issues of statutory construction are also questions of law reviewed *de novo*. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citation omitted). "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Id.* (quoting *Burgess v. Your House of Raleigh, Inc.,* 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990)). "When construing statutes, this Court first determines whether the statutory language is clear and unambiguous. If the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction." *Wiggs v. Edgecombe Cty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (internal citation omitted); *see also High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012) ("[W]hen . . . [a] specific statute is clear and unambiguous, we are not permitted to engage in statutory

construction in any form."). Moreover, the "[l]egislature is presumed to know the existing law and to legislate with reference to it." *State v. Davis*, 198 N.C. App. 443, 452, 680 S.E.2d 239, 246 (2009).

N.C. Gen. Stat. § 1-15(c) sets forth limitation periods applicable to actions for professional negligence and provides in pertinent part:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action. . . . Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided . . . that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action. . . .

N.C. Gen. Stat. § 1-17 (2009)[2] tolled certain limitation periods if a claim accrues when a claimant is under a disability, such as infancy, and provided in pertinent part:

> (a) A person entitled to commence an action who is under a disability at the time the cause of action accrued may bring [the] action within the time limited in this Subchapter after the disability is removed . . . when the person must commence his or her action . . . within three years next after the removal of the disability, and at no time thereafter.
>
> (b) Notwithstanding the provision of subsection (a) . . . , an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional

[2] Effective 1 October 2011 and applicable to claims arising on or after that date, N.C. Gen. Stat. § 1-17(b) was amended to reduce the minor's age requirement from nineteen to ten years. Because plaintiff's action accrued when she was born in 2005, her claims are governed by N.C. Gen. Stat. § 17(b)'s age requirement of nineteen years.

> services shall be commenced within the limitations of time specified in G.S. 1-15(c), except that if those time limitations expire before the minor attains the full age of 19 years, the action may be brought before the minor attains the full age of 19 years.

N.C. Gen. Stat. § 1-17(b) "deals exclusively with minors and their rights to commence a malpractice action prior to attaining the full age of 19, when the statute of limitations in G.S. 1-15(c) has nevertheless expired." *Osborne v. Annie Penn Mem'l Hosp., Inc.*, 95 N.C. App. 96, 102, 381 S.E.2d 794, 797 (1989). This Court has interpreted the interplay between N.C. Gen. Stat. § 1-15(c) and N.C. Gen. Stat. § 1-17(b) and has stated:

> Our examination indicates that the language contained in G.S. 1-17(b) is quite clear. First, it refers specifically to malpractice actions brought on behalf of a minor plaintiff-the exact circumstances in the case *sub judice*. Secondly, it requires that the action to be commenced within the time limitations specified in G.S. 1-15(c), but then provides for the exact situation before us. *If* the time limitations (as set forth in G.S. 1-15(c)) expire "before such minor attains the full age of 19 years, the action may be brought *before* said minor attains the full age of 19 years." Here, the time limitation *has* expired and the minor *has not* attained the full age of 19 years. The statute, therefore, expressly allows the minor plaintiff in this case to commence the action. When the language of a statute is clear, such as the language in this case, we are required to give the statute its logical application.

Id. We agree that the plain language of N.C. Gen. Stat. § 1-17(b) is clear and unambiguous. It provides that minors' malpractice actions are subject to N.C. Gen. Stat. § 1-15(c)'s limitations periods, "except that if those time limitations expire before

the minor attains the full age of 19 years." N.C. Gen. Stat. § 1-17(b). In such a situation, as here, "the action *may be brought* before the minor attains the full age of 19 years." *Id.* (emphasis added).

Despite this clear statutory language, defendants argue that pursuant to *Rowland v. Beauchamp*, 253 N.C. 231, 116 S.E.2d 720 (1960) (holding that the statute of limitations begins to run against a minor upon the appointment of a guardian charged with the duty of initiating an action on his behalf), N.C. Gen. Stat. § 1-15(c)'s three-year limitations period began running when Small was appointed as plaintiff's guardian *ad litem* on 10 January 2008 and ran uninterrupted until its expiration on 10 January 2011. Therefore, defendants contend, plaintiff's malpractice action, initiated in 2015, was properly barred because the applicable statute of limitations had expired. However, *Rowland* is readily distinguishable and, therefore, its holding is inapplicable to the instant case. *Rowland* involved the tolling of a minor's personal injury action, not the tolling of a minor's professional negligence action. *See* 253 N.C. at 234, 116 S.E.2d at 722. Additionally, the *Rowland* decision was based on the general tolling provision of N.C. Gen. Stat. § 1-17, later codified as § 1-17(a), not the more specific tolling provision of N.C. Gen. Stat. § 1-17(b). *See id.*

As a secondary matter, defendants advance a slippery-slope argument that it would "lead to potentially absurd results" if we hold that the *Rowland* doctrine does not apply to plaintiff's action and that her 2008 voluntary dismissal has no bearing

on her ability to refile within the limitation period established by N.C. Gen. Stat. § 1-17(b). Defendants assert that "[t]aking this position to its logical extreme would theoretically permit a minor plaintiff to file, voluntarily dismiss, and refile an infinite number of suits until the minor reaches" the age specified by the relevant version of N.C. Gen. Stat. § 1-17(b). We disagree.

Plaintiff's action is still subject to the North Carolina Rules of Civil Procedure. Rule 41(a)(1) provides in pertinent part:

> [T]he dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal . . . .

N.C. Gen. Stat. § 1A-1, Rule 41(a) (2015). " '[T]he effect of a judgment of voluntary [dismissal] is to leave the plaintiff exactly where he [or she] was before the action was commenced.' " *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000) (alterations in original) (quoting *Gibbs v. Carolina Power & Light Co.,* 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965)). In the instant case, plaintiff filed one voluntary dismissal, without prejudice, pursuant to Rule 41(a)(1). If plaintiff filed a subsequent voluntary dismissal, it would still "operate[] as an

adjudication upon the merits" pursuant to Rule 41(a)(1), regardless of N.C. Gen. Stat. § 1-15(c)'s limitations period or the tolling provision of N.C. Gen. Stat. § 1-17(b).

III. Conclusion

Plaintiff's medical malpractice action is not barred by the statute of limitations because she brought her action within the limitation period extended by N.C. Gen. Stat. § 1-17(b). The *Rowland* doctrine does not apply to this case. Additionally, plaintiff's one voluntary dismissal pursuant to Rule 41(a)(1) merely left her in the same position as if she had never commenced the action in 2008; it did not bar her 2015 action. Therefore, the trial court erred by granting defendants' motions to dismiss on the grounds that plaintiff's claims were barred by the statute of limitations. Accordingly, we reverse the trial court's order and remand the case for further proceedings.

REVERSED AND REMANDED.

Judges DILLON and DIETZ concur.