IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-231

Filed: 15 November 2016

Cleveland County, No. 15 CVS 76

TAMMY HUNTER, Plaintiff

v.

BRETT CLAYTON NIBLACK, MD; SHELBY WOMEN'S CLINIC, PA, Defendants

Appeal by plaintiff from order entered 24 September 2015 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 7 September 2016.

Ted A. Greve & Associates, P.A., by Justin L. Lowenberger, for plaintiff-appellant.

Northup McConnell & Sizemore, PLLC, by Katherine M. Pomroy and Isaac N. Northup, Jr., for defendant-appellees.

CALABRIA, Judge.

Where plaintiff was not engaged in a continuing course of treatment with her physician, and more than one year had passed after she discovered the presence of a surgical sponge in her pelvis, the trial court did not err in granting defendants' motion for summary judgment based upon the statute of limitations.

I. Factual and Procedural Background

On 3 May 2007, Dr. Brett Niblack ("Niblack"), a doctor practicing at Shelby Women's Clinic, P.A. ("Shelby"), performed a Total Vaginal Hysterectomy ("TVH") on Tammy Hunter ("plaintiff"). Subsequently, plaintiff experienced pain and discomfort in the pelvic and vaginal regions, in response to which Niblack performed an ultrasound and laparoscopy in April of 2008.

On 21 December 2012, plaintiff underwent a bladder sling operation, after complaining of incontinence. On 6 November 2013, plaintiff underwent a CT of the abdomen and pelvis, which indicated a roughly 3.8 cm mass in her pelvis. The technician noted that the mass was "very suspicious for a retained surgical sponge with associated inflammatory reaction." On 23 January 2014, plaintiff underwent another laparoscopy, which discovered and removed a surgical sponge.

On 20 January 2015, plaintiff filed the complaint in the instant case against Niblack and Shelby (collectively, "defendants") and the Charlotte-Mecklenburg Hospital Authority, alleging that the surgical sponge ultimately removed from her pelvis was left there from her TVH in 2007. Her complaint alleged medical malpractice and *res ipsa loquitur*. The complaint also challenged the provisions of Rule 9(j) of the North Carolina Rules of Civil Procedure, which require the filing of an expert opinion in medical malpractice actions.

On 18 February 2015, defendants filed their answer to plaintiff's complaint, and raised as a defense the statute of limitations. On 20 February 2015, defendants

filed an amended answer, raising the same defense. On 25 March 2015, the Charlotte-Mecklenburg Hospital Authority filed its answer, along with a motion to dismiss. On 15 May 2015, plaintiff voluntarily dismissed all claims against the Charlotte-Mecklenburg Hospital Authority.

On 26 June 2015, defendants filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, alleging that "there are no genuine issues as to any material facts and Defendants are entitled to judgment as a matter of law because the action was filed outside the applicable statutes of limitations and/or repose." Defendants offered an affidavit and exhibits in support of this motion. In response to defendants' motion for summary judgment, plaintiff filed her own affidavit, averring that she first discovered that the mass inside of her was a surgical sponge from the 2007 TVH after this fact was revealed to her during her 2014 laparoscopy.

On 24 September 2015, the trial court entered an order on defendants' motion, determining that "there is no genuine issue as to any material fact in that this action is barred by the applicable time limits as set forth in G.S. 1-15(c) and the case law as presented and argued by counsel." The trial court therefore granted summary judgment in favor of defendants, and dismissed plaintiff's complaint.

Plaintiff appeals.

II. Summary Judgment

In her sole argument on appeal, plaintiff contends that the trial court erred in granting summary judgment in favor of defendants. We disagree.

A. Standard of Review

"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, 524, 649 S.E.2d 382, 385 (2007)).

At the trial court, once a defendant raises a statute of limitations defense, the burden of demonstrating that the action was instituted within the appropriate period rests on the plaintiff. *Pembee Mfg. Corp. v. Cape Fear Const. Co., Inc.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985).

B. Analysis

Plaintiff contends that the trial court erred in concluding that, as a matter of law, the appropriate statutes of limitation and repose barred this action.

Our General Statutes provide for the following statute of limitations with respect to professional malpractice actions:

> 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 that whenever there is bodily injury to the person, economic or

> monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, *suit must be commenced within one year from the date discovery is made*: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, 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: *Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided*, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

N.C. Gen. Stat. § 1-15(c) (2015) (emphasis added). Our Supreme Court has further noted that "the one-year-from-discovery provision in G.S. 1-15(c) can and should be interpreted to include an awareness by plaintiff that wrongful conduct was involved." *Black v. Littlejohn*, 312 N.C. 626, 645, 325 S.E.2d 469, 482 (1985).

Plaintiff contends, first, that the action could still be brought pursuant to the continuing course of treatment doctrine. This doctrine provides that, so long as the relationship of surgeon and patient continues, the statute of limitations tolls. *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 137, 472 S.E.2d 778, 780-81 (1996). This doctrine applies not only to physicians, but to health care institutions. *Id.* at 138, 472

S.E.2d at 781. However, "[i]n order to benefit from the continuing course of treatment doctrine, a plaintiff must show both a continuous relationship and subsequent treatment from that physician." *Whitaker v. Akers*, 137 N.C. App. 274, 278, 527 S.E.2d 721, 725 (2000) (citation and quotations omitted).

In the instant case, plaintiff's complaint and affidavit are completely devoid of any allegations or evidence that her treatment with Niblack continued beyond the procedures performed in April of 2008. The record shows that plaintiff's 2012 bladder sling was performed by Dr. Paul Rodenberger at Gaston Memorial Hospital, her 2013 CT was also performed by Dr. Rodenberger, and the post-operative notes on her 2014 laparoscopy were written by Dr. Ingeborg Collins at Cleveland Regional Medical Center.

While it is true that some of plaintiff's subsequent treatments were pursued with Shelby, nothing in the record shows any further contact with Niblack. Pursuant to *Horton* and *Whitaker*, plaintiff's burden is not only to show the existence of a continuing course of treatment with Shelby, but specifically with her treating physician, namely Niblack. She has failed to show that she had any further contact with Niblack beyond the laparoscopy in April of 2008, and as such, that is the latest date that the continuing course of treatment could have tolled the statute of limitations.

Plaintiff further argues that the case of *Hensell v. Winslow*, 106 N.C. App. 285, 416 S.E.2d 426 (1992), does not apply to the instant case. Plaintiff's contentions are misplaced.

In *Hensell*, the defendant surgeon performed two procedures on the plaintiff in 1984. On 21 March 1989, the plaintiff's chiropractor informed her that an x-ray had revealed an unusual mass in her abdomen. The chiropractor informed the defendant, who sent the plaintiff two letters, advising the plaintiff to make an appointment so that the defendant could check the abnormality, and advising the plaintiff that a piece of surgical drain had been left in her body. The defendant removed the piece of surgical drain in 1990. The plaintiff brought an action on 21 May 1990 concerning the retained piece of surgical drain, and the trial court granted partial summary judgment in favor of the defendant on that issue, citing the statute of limitations and N.C. Gen. Stat. § 1-15(c). *Id.* at 287, 416 S.E.2d at 428.

On appeal, this Court noted that plaintiff's suit was "barred by the four year outer limits provision of G.S. 1-15(c) so that in order to proceed, she must have filed suit within the one year post-discovery period provided for malpractice actions relating to foreign objects left inside the body. *Id.* at 288, 416 S.E.2d at 428. We noted that, pursuant to N.C. Gen. Stat. § 1-15(c), a plaintiff has one year after discovery of the foreign object to file her claim. We further noted that the plaintiff was informed by her chiropractor that a foreign object was left inside her, and that

there was the potential for severe illness or death if that object remained. We held that this satisfied our Supreme Court's decision in *Black v. Littlejohn* that the plaintiff must be aware of a foreign object, and that its presence was the result of wrongful conduct. We therefore held that the plaintiff had one year after her meeting with her chiropractor on 21 March 1989 to file her claim. Given that her claim was filed on 21 May 1990, more than one year later, we held that the plaintiff had not filed within the time allowed, and that the trial court did not err in granting partial summary judgment based upon the statute of limitations.

In the instant case, plaintiff was first advised on 6 November 2013 of a suspicious mass located in her pelvis. Additionally, the record shows that, at least as of 8 January 2014, plaintiff was aware of the nature and origins of the surgical sponge. In consultation notes dated 8 January 2014, Dr. Collins noted that plaintiff "is here because she says she went to a urologist and found . . . a sponge left in after surgery." Plaintiff therefore knew that it was a surgical sponge, originating from a surgery. We hold therefore that the sponge was "discovered" under the meaning of N.C. Gen. Stat. § 1-15(c) either on 6 November 2013, when she became aware of a mass that was "very suspicious for a retained surgical sponge with associated inflammatory reaction[,]" or on 8 January 2014, when she expressed awareness of "a sponge left in after surgery." Plaintiff had one year from discovery to file a claim

regarding the object. Her complaint, filed on 20 January 2015, fell outside of the one-year limitations period, and is thus barred by the statute of limitations.

Plaintiff nonetheless contends that she did not know what the source of the object was. She attempts to distinguish the facts in the instant case from *Hensell*, in which the plaintiff had undergone only procedures with the defendant previously, by noting that she had undertaken numerous procedures with multiple physicians. She cites *Black v. Littlejohn*, in which our Supreme Court held that "[w]here causation of an injury is unknown, the action accrues when both the injury and its cause have been (or should have been) discovered." *Black*, 312 N.C. at 645, 325 S.E.2d at 482 (citation omitted). She thus argues that, because she did not know which surgeon's actions resulted in the presence of the surgical sponge at the time of discovery, the statute of limitations did not begin to run.

At this point, plaintiff's contentions are self-defeating. Either plaintiff knew that the sponge originated from her surgery with Niblack, in which case the very latest she could have filed her complaint was 8 January 2015, one year after her meeting with Dr. Collins; or she did not know the specific origin of the sponge, in which case her complaint lacked adequate specificity to demonstrate that defendants were liable for the harm that she suffered. Plaintiff had multiple surgeries over an extended period, with multiple surgeons, before and after the 2007 TVH; if, as she says, she could not reasonably determine the origin of the sponge, then necessarily

she cannot demonstrate whether it was defendants who were responsible for it, or whether some other physician caused the harm of which she complains. Given her extensive surgical history, her contentions in her complaint that Niblack is uniquely and solely responsible lack credibility or supporting evidence beyond the mere presence of the surgical sponge.

We hold, therefore, that plaintiff failed to show any genuine issue of material fact. Either defendants were entitled to judgment as a matter of law based upon the statute of limitations, or defendants were entitled to judgment as a matter of law based upon plaintiff's inability to forecast evidence of causation in her complaint. The trial court did not err in granting summary judgment in favor of defendants.

AFFIRMED.

Judge TYSON concurs.

Judge DAVIS concurs in the result only.

Report per Rule 30(e).