IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1279

Filed: 5 September 2017

Robeson County, No. 15 CVS 2084

GENEVA T. BULLARD, Administratrix of the Estate of VONNIE LEE BULLARD, Plaintiff,

v.

PRIME BUILDING COMPANY, INC. OF NORTH CAROLINA, Defendant.

Appeal by Plaintiff from order entered 19 September 2016 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 17 May 2017.

KENNEDY, KENNEDY, KENNEDY, AND KENNEDY, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, for Plaintiff-Appellant.

YATES, McLAMB & WEYHER, L.L.P., by Rodney E. Petty and David M. Fothergill, for Defendant-Appellee.

HUNTER, JR. Robert N., Judge.

Geneva T. Bullard, Administratrix of the Estate of Vonnie Lee Bullard, ("Plaintiff") appeals the from the trial court's 19 September 2016 order granting summary judgment in favor of Prime Building Co., Inc., ("Defendant").

I. Factual and Procedural History

Plaintiff's forecast of evidence tends to show the following. Vonnie Lee Bullard, ("Bullard") was an employee of Peak Steel, Inc. ("Peak").[1] Defendant subcontracted with Peak for the installation of structural steel for a construction project in Wake County. On 27 May 2011, Peak's employees left a 700 pound beam of tube steel on steel pads or saddles welded onto two vertical steel columns. Peak's employees attached the beam to a center mounting tab located on the columns to secure it. Unfortunately, the workers failed to weld either end of the beam to the saddles. Peak's employees mistakenly loosened the two center bolts on the center mounting tab. This caused the beam to fall from the saddles. The beam fell twelve to fifteen feet. As the beam fell, it crashed in to a piece of machinery then ricocheted off of a concrete slab, and then, hit Bullard in his upper back, neck, and head.

Ambulances soon arrived at the construction site. Bullard told the EMS paramedics his body was numb from the chest down. EMS took Bullard to WakeMed emergency room in Raleigh where doctors diagnosed him with an acute and serious injury to his C6-C7 spinal segment. This resulted in total paralysis below his neck. Bullard "suffered severe and excruciating pain as a result of his serious injuries."

[1] Plaintiff does not allege this in her complaint. This Court takes judicial notice of this fact since Plaintiff asserted it in her previous lawsuit against another Defendant, Peak Steel, L.L.C. *See Bullard v. Peak Steel, L.L.C.,* No. COA15-188, 2016 WL 47920 (unpublished) (N.C. Ct. App. January 5, 2016).

Doctors performed multiple surgeries on Bullard to remove pieces of shattered bone from his body. On 12 June 2011, Bullard died.[2]

On 5 April 2013, Plaintiff filed a complaint against Peak ("original complaint") in Robeson County Superior Court. Plaintiff alleged negligence and wrongful death claims, as well as a *Woodson* claim. Specifically, Plaintiff alleged Bullard died "from acute traumatic injury to his spine and from bilateral pulmonary emboli, proximately caused by [Peak's] negligence." Plaintiff further alleged Bullard's death "was proximately caused by [Peak's] negligence" on 27 May 2011.

On 19 May 2014, Plaintiff amended her original complaint to add Prime as a Defendant ("amended complaint"). Plaintiff's amended complaint set forth a "survival action" against Defendant Prime, whereby Plaintiff sought damages against Defendant Prime for Bullard's injuries. Plaintiff alleged Defendant Prime was either directly or vicariously liable for Bullard's injuries. Plaintiff also alleged Defendant Prime was "independently negligent in failing to effectively monitor the construction site so as to make sure that the construction site was safe at all times." Finally, Plaintiff alleged because of Defendant Prime's negligence, Bullard "sustained serious and painful bodily injuries and mental suffering as alleged in Paragraph XII[3] of the

[2] The record does not indicate the hospital ever discharged Bullard.

[3] Paragraph XII of the original complaint set forth allegations pursuant to the Wrongful Death Statute, N.C. Gen. Stat. § 28A-18.2.

[original] Complaint. Plaintiff brings this action against Defendant Prime Building Company, Inc. of North Carolina pursuant to N.C.G.S. § 28A-18-1."[4]

On 2 June 2014, Defendant Prime moved to dismiss the amended complaint. Before the trial court heard Defendant Prime's motion, Plaintiff voluntarily dismissed her action against Defendant Prime without prejudice on 18 August 2014. On 18 July 2013, Peak filed an answer and made a Rule 12(b)(1) motion to dismiss Plaintiff's complaint for lack of subject matter jurisdiction, and a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted. On 19 May 2014, the trial court conducted a motions hearing. On 29 September 2014, the trial court granted Peak's 12(b)(1) motion and dismissed Plaintiff's complaint for lack of subject matter jurisdiction because the North Carolina's Workers' Compensation Act provided the Industrial Commission with exclusive jurisdiction over Plaintiff's claims. This Court affirmed the trial court's order on 5 January 2016.

On 10 August 2015, Plaintiff re-filed her complaint ("current complaint") and only named Prime as a Defendant. Here Plaintiff sought recovery for the 27 May 2011 accident by asserting two claims: (1) a survival action under N.C. Gen. Stat. § 28A-18-1[5] to recover compensatory damages for Bullard's pain, suffering, and medical expenses, and (2) a cause of action for punitive damages. Plaintiff made identical

[4] This statute is entitled "Survival of actions to and against personal representative."

[5] N.C. Gen. Stat. § 28A-18-1 (2016) provides "[u]pon the death of any person, all demands whatsoever, and rights to prosecute or defend any action . . . shall survive to and against the personal representative or collector of the person's estate."

factual allegations in this current complaint as in her original complaint and amended complaint. Plaintiff alleged due to Defendant's negligence, Bullard "sustained serious and painful bodily injuries and mental suffering."

As to damages, Plaintiff alleged she was "entitled to recover compensatory damages, including damages for pain and suffering and medical expenses as a result of Defendant's negligence[.]" Plaintiff also sought punitive damages since Defendant's conduct was "willful, wanton and in reckless disregard of the life and safety of the decedent."

On 30 December 2015, Defendant answered Plaintiff's current complaint. In its answer, Defendant alleged in its Sixth Defense "As a further answer and defense to the Complaint, Defendant denies that any act of commission or omission by it was a proximate cause of any injury or damage to Plaintiff, and Defendant relies on this lack of proximate cause as a bar to any claim by Plaintiff."

On 31 May 2016, Plaintiff filed a motion for a peremptory trial setting and the trial court set the case peremptorily for the week of 7 November 2016. On 29 August 2016, Defendant filed a motion to dismiss, a motion for judgment on the pleadings, and a motion for summary judgment. In support of its motion, Defendant contended "all claims against Defendant are time-barred by the applicable statutes of limitation and/or repose." Here, Defendant also argued:

> [T]he relevant case law, well as evidence of record, establishes that Defendant did not breach a duty owed to

> the Plaintiff or Plaintiff's decedent, as no employee or agent of Defendant injured the decedent; the work of the decedent was not inherently dangerous; and there is no evidence to support Plaintiff's negligent hiring claim.

The trial court conducted a hearing on Defendant's motion on 13 September 2016. Defendant sent its brief in support of its motions on or about 7 September 2016.[6] On 22 September 2016, the trial court "convert[ed] all Defendant's motions to Defendant's Motion for Summary Judgment." The trial court then granted Defendant's summary judgment motion on all claims.[7] Plaintiff timely filed notice of appeal on 7 October 2016.

II. Standard of Review

This Court reviews the trial court's grant of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). This Court must review the record in the light most favorable to the non-movant and draw all inferences in the non-movant's favor. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). *See also Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

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[6] This was four business days prior to the hearing.

[7] From this Court's reading of the record and both briefs, it does not appear a transcript of the summary judgment hearing was ordered by either party. The record does not contain a copy of the contract with the transcriptionist, a delivery certificate for the transcript, or a transcript designation page.

there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2016). A party opposing a motion for summary judgment must only establish the existence of a genuine issue of material fact, and it need not show it would prevail on the issue at trial. *In re Will of Edgerton*, 29 N.C. App. 60, 63, 223 S.E.2d 524, 526 (1976).

III. Analysis

Plaintiff first contends the trial court erred in granting summary judgment in favor of Defendant because Defendant changed its defense four days prior to the hearing on the motion for summary judgment. Plaintiff asserts Defendant's actions amount to improper "gamesmanship." We disagree.

Defendant's Sixth Defense of its Answer, served on Plaintiff on 30 December 2015 states:

> As a further answer and defense to the Complaint, Defendant denies that any act of commission or omission by it was a proximate cause of any injury or damage to Plaintiff, and Defendant relies on this lack of proximate cause as a bar to any claim by Plaintiff.

Plaintiff then asserts Defendant sent Plaintiff its Memorandum in Support of its Motion to Dismiss, Motion for Judgment on the Pleadings and Motion for Summary Judgment on 13 September 2016. Plaintiff contends Defendant here, for the first time, changed its entire defense and admitted Defendant's conduct on 27 May 2011 caused Bullard's injuries. In the Memorandum, Defendant states "the undisputed

evidence conclusively establishes that decedent died as a result of the injuries he sustained on May 27, 2011."

Based on our review of the record, Defendant has consistently advanced the following two primary theories of defense:

> (1) [T]hat all of Plaintiff's claims against Defendant are time barred by the applicable statutes of limitation and/or repose; (2) and that the relevant case law, well as evidence of record, establishes that Defendant did not breach a duty owed to the Plaintiff or Plaintiff's decedent, as no employee or agent of Defendant injured the decedent; the work of the decedent was not inherently dangerous; and there is no evidence to support Plaintiff's negligent hiring claim.

Further, this Court stated "we have held that absent prejudice to plaintiff, an affirmative defense may be raised by a motion for summary judgment regardless of whether or not it was pleaded in the answer." *Miller v. Talton,* 112 N.C. App. 484, 487, 435 S.E.2d 793, 796 (1993). Therefore, even if we concluded Defendant's motion for summary judgment contained an entirely new affirmative defense, it would have been appropriate for Defendant to add this defense at the summary judgment stage.

Plaintiff's argument is without merit.

Plaintiff next contends the trial court erred in granting summary judgment in Defendant's favor since she pled a valid survival action against Defendant. We disagree.

At common law, the death of an injured person extinguished his right to a cause of action against the tortfeasor causing the injury. *See McInnis v. Provident*

Life & Acc. Ins. Co., 21 F.3d 586, 589 (4th Cir. 1994). As a consequence, the decedent's estate could not assert claims for injuries causing the decedent's death. *Id.* at 589. Now, there are "[w]idely enacted survival statues in the various states [which] have altered [the common law rule] by providing that damage claims of decedents survive death and may be maintained by representatives of the decedents' estates." *Id.* at 589. *See also Wrongful Death Damages in North Carolina,* 44 N.C.L.Rev. 402, 404 (1966) (reporting several states, including North Carolina, have enacted survival statutes.) The nature and the amount of damages asserted under a survival claim is the same "as that the decedent would have had if he had not died." *Id.* at 589. "Damages thus might include the decedent's lost earnings, medical expenses (if the decedent was responsible for them), and compensation for pain and suffering." *Id.* at 589; *See generally Restatement (Second) of Torts* § 926 cmt. a (1977).

At common law, a decedent's marital relation or other relatives did not have a cause of action for damages caused *to them* by the decedent's wrongful death. *Id.* at 589. "Lord Campbell's Act" of 1846 initially changed this situation in England by enacting the first statutory right of action for wrongful death. *Id.* at 589; *See also Wrongful Death Damages,* 44 N.C.L.Rev. at 402-03 (1966). Now, all fifty states have similar "wrongful death" statutes. *Id.* at 589. These "wrongful death" acts allow a decedent's close relatives a cause of action against the tortfeasor causing a decedent's wrongful death. *Id.* at 589.

The distinction between survival and wrongful death actions "turns on the difference between those claims based on damages *preceding death* which were inflicted on and belonged to the decedent, and those claims based on damages *caused by* the decedent's death which belonged to family members." *Id.* at 589.

The North Carolina Legislature contemplated a cause of action for wrongful death when it enacted N.C. Gen. Stat. § 28A-18.2 in 1969. The current Wrongful Death statute states:

> (a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled the injured person to an action for damages therefor, the person or corporation that would have been so liable, and the personal representatives or collectors of the person or corporation that would have been so liable, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent . . .
>
> (b) Damages recoverable for death by wrongful act include:
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> (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
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> (2) Compensation for pain and suffering of the decedent;
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> (3) The reasonable funeral expenses of the decedent;
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> (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected;
>
> a. Net income of the decedent,

> b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
>
> c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;
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> (5) Such punitive damages as the decedent could have recovered pursuant to Chapter 1D of the General Statutes had the decedent survived, and punitive damages for wrongfully causing the death of the decedent through malice or willful or wanton conduct, as defined in G.S. 1D-5;
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> (6) Nominal damages when the jury so finds.

N.C. Gen. Stat. § 28A-18-2 (2016). The statute of limitations for a wrongful death claim is two years. N.C. Gen. Stat. § 1-53 (2016).

Plaintiff contends she has a valid survival action against Defendant under N.C. Gen Stat. § 28A-18-1, which provides, "[u]pon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of the person's estate." N.C. Gen. Stat. § 28A-18-1 (2016). A survival action under this statute has a three-year statute of limitations. N.C. Gen. Stat. § 1-52 (2016).

"[W]here, upon reading the complaint as a whole, the complaint appear[s] to allege only a single claim for wrongful death, a plaintiff ha[s] not stated a claim for a

survivorship action." *Alston v. Britthaven, Inc.*, 177 N.C. App. 330, 336, 628 S.E.2d 824, 829 (2006). Therefore, where there is no explanation for a decedent's death, other than the defendant's wrongful or negligent acts, the singular claim available is for wrongful death. *Id.* at 340, 628 S.E.2d at 831. In interpreting the Wrongful Death and Survival Action Statutes, this Court most recently stated:

> [W]e hold that when a single negligent act of the defendant causes a decedent's injuries and those injuries unquestionably result in the decedent's death, the plaintiff's remedy for the decedent's pain and suffering and medical expenses lies only in a wrongful death claim. Such claim is encompassed by the wrongful death statute and must be asserted under that statute. To hold otherwise would allow plaintiffs to circumvent the two-year statute of limitations for wrongful death actions set forth in N.C. Gen. Stat. § 1-53(4) (2005) by waiting an additional year before filing the same claim, titled as a survivorship claim.

State Auto Ins. Co. v. Blind, 185 N.C. App. 707, 713, 650 S.E.2d 25, 29 (2007) (internal citations and quotation marks omitted).

Plaintiff relies upon this Court's reasoning in *Alston v. Britthaven* in support of her contention she has a valid survival action. 177 N.C. App. 330, 628 S.E.2d 829 (2006). In *Alston,* this Court allowed a plaintiff to bring both a wrongful death action and survival action in the same lawsuit. *Id.* at 339, 628 S.E.2d at 831. This Court held "wrongful death and survivorship claims may be brought as alternative claims for the same negligent acts." *Id.* at 339, 628 S.E.2d at 831. This Court ruled when a "viable alternate explanation, other than defendant's negligence or wrongful act,

exists for the cause of decedent's death, but the evidence also indicates defendant's negligence or wrongful act caused the decedent pain and suffering and/or medical expenses prior to his death," a plaintiff may bring a separate survival action for the pre-death claims of pain, suffering, and medical expenses. *Id.* at 340, 628 S.E.2d at 831. In *Alston,* this Court allowed the plaintiff to bring both claims because she presented substantial evidence at trial to allow the jury to "reasonably determine" decedent's death resulted from his Alzheimer's disease and defendant nursing home's negligent care. *Id.* at 338-39, 628 S.E.2d at 831.

In *Alston* this Court stated:

> It is vital to distinguish this case from those where no alternate explanation exists as to the cause of death. In such cases, pursuant to the 1969 statutory changes, the survivorship claims included in the wrongful death statute, which are pain and suffering, medical costs, and punitive damages, may be pursued as part of a wrongful death action. However, where a viable alternate explanation, other than defendant's negligence or wrongful act, exists for the cause of decedent's death, but the evidence also indicates defendant's negligence or wrongful act caused the decedent pain and suffering and/or medical expenses prior to his death, a plaintiff has the right to present those pre-death claims to a jury separately from the wrongful death claim. Otherwise, the plaintiff might be prevented from even a single recovery for those injuries as they would never reach the jury for consideration.

Id. at 340, 628 S.E.2d at 831-32 (internal citations omitted).

Plaintiff states in her brief the trial court allowed Plaintiff to introduce at the summary judgment hearing a Mayo Clinic document, entitled "Symptoms and

Causes" of pulmonary emboli. According to Plaintiff, this document lists two major risk factors Bullard had for pulmonary embolism: "smoking and being overweight." Plaintiff argues Bullard's medical records tend to show he was both overweight and a smoker. Plaintiff contends this evidence presents an "alternate explanation" for Bullard's death. However, Plaintiff did concede Bullard did not suffer from pulmonary emboli prior to the 27 May 2011 accident, and that Bullard's pulmonary emboli were "proximately caused" by the 27 May 2011 accident.[8] *See J.M. Parker & Sons, Inc. v. William Barber, Inc.*, 208 N.C. App. 682, 690, 704 S.E.2d 64, 69 (2010) (explaining defendants cannot create a genuine issue of material fact where they are bound by their Rule 36 admissions, the conclusive effect of which not even an affidavit can overcome).

The record also contains further evidence tending to show Bullard's death was proximately caused by the trauma of the accident. Dr. Jeffrey Abrams was Bullard's treating physician. In his deposition, Dr. Abrams testified Bullard "suffered a spinal cord injury with injury to the C6-C7 spine with associated spinal cord injury and associated complications that go with a spinal cord injury." A pulmonary embolism is a known complication of spinal cord injuries. Bullard's accident caused his spinal injury and his pulmonary embolism. Bullard's spinal injury, along with his

[8] On 1 April 2016, Plaintiff responded to Defendant's first request for admissions by admitting: (1) Bullard did not suffer from a bilateral pulmonary embolism before the events of 27 May 2011; (2) Bullard's spinal injury was proximately caused by the events of 27 May 2011; and (3) Bullard's "bilateral pulmonary emboli were proximately caused by the events" on 27 May 2011.

pulmonary embolism, caused his death. Dr. Abrams could not remember whether Bullard's medical records indicated he had a preexisting condition related to his death. Dr. Abrams believed Bullard's large size put him at a higher risk for a pulmonary embolism. Even though Bullard's size was a risk factor, it held nowhere near the significance of a risk factor as the significance of a spinal cord injury. Bullard did not have a pulmonary embolism before he came into WakeMed Hospital on 27 May 2011. There was no other explanation for Bullard's death other than Bullard's accident.

We conclude Plaintiff's claims against Defendant for "compensatory damages, including damages for pain and suffering and medical expenses" are all damages which fall within the wrongful death statute. Therefore, these claims should have been pled as part of a wrongful death action within the applicable two year statute of limitations. However, Plaintiff failed to name Prime as a Defendant until 19 May 2014, which was approximately eleven months after the expiration of the wrongful death statute of limitations. The trial court correctly allowed Defendant's motion for summary judgment.

Because Plaintiff should have asserted her claims under the wrongful death statute, and because the statute of limitations bars Plaintiff's wrongful death claim, we need not address Plaintiff's remaining issues as to whether Plaintiff proved a

prima facie case for Defendant's negligence and whether Plaintiff was entitled to punitive damages.

The trial court's order granting summary judgment in favor of Defendant is affirmed.

AFFIRMED.

Judges DAVIS and MURPHY concur.

Report per Rule 30(e).