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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1158

Filed: 20 August 2019

Buncombe County, No. 18-CVS-218

SCOTT GOSS AND NICOLE GOSS, Plaintiffs,

v.

SOLSTICE EAST, LLC, Defendant.

Appeal by Plaintiffs from orders entered on 5 June 2018 by Judge Alan Z. Thornburg and 3 August 2018 by Judge Marvin Pope in Buncombe County Superior Court. Heard in the Court of Appeals 22 May 2019.

Everett Gaskins Hancock LLP, by E. D. Gaskins, Jr., and Katherine A. King, for Plaintiff-Appellants.

Hedrick Gardner Kincheloe & Garofalo LLP, by David L. Levy, M. Duane Jones, Linda Stephens, and Lauren E. Bohdan, for Defendant-Appellee.

BROOK, Judge.

Scott Goss and Nicole Goss (“Plaintiffs”) appeal the trial court’s orders granting Solstice East, LLC’s (“Defendant”) motions to dismiss. Plaintiffs argue that the trial court erred in granting Defendant’s motions because Plaintiffs’ claims for breach of contract and breach of fiduciary duty were properly pleaded, and that these claims

do not implicate Rule 9(j) of the North Carolina Rules of Civil Procedure. Because Plaintiffs appeal the dismissal of their claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, our recitation of the facts is based on the allegations in Plaintiffs' complaint, as well as the allegations in their amended complaint. For the following reasons, we affirm the trial court's order.

I. Background

A. Factual Background

Plaintiffs are residents of Florida who have a daughter, "M.G."¹ At age 13, M.G. was diagnosed with Major Depressive Disorder, Attention Deficit Disorder, and Attention Deficit/Hyperactivity Disorder. Educational consultants recommended to Plaintiffs that M.G. enroll on a short-term basis in Second Nature Wilderness Program ("Second Nature") for treatment of her mental health diagnoses. Upon enrollment at Second Nature on 2 February 2015, an assessment showed M.G. suffered from depression, anxiety, substance and alcohol abuse, and ADD. Treatment at Second Nature managed M.G.'s symptoms. M.G. graduated from treatment at Second Nature on 22 April 2015.

Defendant, a residential treatment center for adolescent girls between the ages of 14 and 18, was one of several programs Plaintiffs considered for long-term placement for M.G. Located in Buncombe County, Defendant specializes in

¹ Because she was a minor during the events at issue, we use initials to refer to Plaintiffs' daughter.

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treatment for young women who struggle with depression, anxiety, substance and alcohol abuse, eating disorders, ADD/ADHD, and family conflict. Defendant's online advertising touts a "holistic approach" that treats "mind, body, and soul." Additional online advertising presents "[p]sychotherapy care and medication management" as "an integral part of [this] holistic approach." Defendant advertises a "conservative approach regarding the use of medication in treating mental health issues in adolescents[,] emphasizing the possibility of "significantly reduc[ing] or even eliminat[ing] the need for" certain medications, depending on treatment response. Defendant also identifies the importance of family involvement in the therapeutic process in its online advertising.

Plaintiffs selected Defendant as a long-term placement for M.G. to be "cared for, educated, and treated psychologically." On or about 12 April 2015, Plaintiffs entered into an Admissions Agreement ("Agreement") with Defendant. M.G. enrolled beginning 22 April 2015. The Agreement did not provide for a discharge date. Under the Agreement, Defendant "promise[d] to undertake and provide the following services for the student and sponsors: clinical, educational, and academic services, room and board, nursing services (as needed), selected psychological and educational evaluations and assessments for the student, personal supervision[.]" Plaintiffs entrusted Defendant with the "complete care and custody of M.G."

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At the same time the Agreement was executed, Plaintiffs also executed a Power of Attorney (“POA”). The POA appointed Defendant as M.G.’s “true and lawful attorney-in-fact . . . for the purpose of providing custodial care, educational, and clinical services.” The POA stated that it was a “general Power of Attorney delegated and assigned by the sponsors[.]” “Without limiting or qualifying the general Power of Attorney[.]” the sponsors further “specifically grant[ed] Solstice East” additional powers pertaining to M.G.’s medical treatment, discipline, and participation in activities, as well as powers pertaining to pursuing M.G. if she ran away, restricting M.G.’s access to calls, materials, and visitors, and resolving grievances. The POA further instructed that “a parent, legal guardian, or child” who has a “grievance” should “speak directly with a Primary Therapist to resolve the grievance.” Were this approach not to resolve a specific concern, the POA instructed the concerned party to consult the Executive Director of Defendant. By its terms, the POA was to remain in effect until M.G.’s discharge from treatment.

M.G. arrived at Defendant’s facility on 22 April 2015. While there, M.G. erroneously received “five times the appropriate dose” of the prescription drug Lamictal for two consecutive days during the second month of her treatment. Defendant “became aware of the initial overdose two days prior to [M.G.]’s hospitalization.” After M.G. was admitted to the hospital, Defendant informed Plaintiffs of the overdose. Following M.G.’s release from the hospital, Defendant

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continued to administer a dose of Lamictal “in excess of the recommended amount” for two months. M.G. exhibited “bizarre and irrational behavior” and “hallucinate[d].” Plaintiff Scott Goss expressed concern to Defendant’s employees about the Lamictal dosage provided to M.G., requesting “updates on her medications, behavior, and therapy.” Defendant’s employees subsequently sent emails to one another containing “demeaning and derogatory comments” about Mr. Goss’s concerns. During the time M.G. was overmedicated, Defendant isolated her for behavioral issues. She had not previously been isolated. On 7 August 2015, Plaintiffs removed M.G. from Defendant’s care and enrolled her at another treatment center.

B. Procedural History

On 11 January 2018, Plaintiffs filed a complaint against Defendant alleging a claim for breach of contract. On 26 March 2018, Defendant filed a motion to dismiss Plaintiffs’ breach of contract claim pursuant to Rules 12(b)(6) and (7) of the North Carolina Rules of Civil Procedure. The motion came on for hearing before the Honorable Alan Z. Thornburg on 8 May 2018 in Buncombe County Superior Court. Judge Thornburg rendered a ruling granting Defendant’s motion in open court, which was entered on 5 June 2018. However, the trial court’s dismissal of Plaintiffs’ claim for breach of contract was without prejudice.

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On 24 May 2018, Plaintiffs filed an amended complaint. The amended complaint included two additional claims: (1) a breach of fiduciary duty claim based on the POA; and (2) an unfair and deceptive practices claim.

On 25 June 2018, Defendant moved to dismiss the amended complaint and the claims for breach of fiduciary duty and unfair and deceptive practices pursuant to Rules 12(b)(6) and (7) of the North Carolina Rules of Civil Procedure. Plaintiffs voluntarily dismissed the unfair and deceptive practices claim on 20 July 2018, without prejudice.

Defendant's motion to dismiss Plaintiffs' claim for breach of fiduciary duty came on for hearing before the Honorable Marvin Pope on 31 July 2018 in Buncombe County Superior Court. On 3 August 2018, Judge Pope entered an order dismissing Plaintiffs' claim for breach of fiduciary duty, without prejudice.

Plaintiffs entered timely notice of appeal to this Court on 28 August 2018.

II. Standard of Review

On appeal from an order dismissing an action pursuant to Rule 12(b)(6), we conduct *de novo* review. A Rule 12(b)(6) dismissal is appropriate when the complaint fails to state a claim upon which relief can be granted. We have determined that a complaint fails in this manner when: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true. In conducting our

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analysis, we also consider any exhibits attached to the complaint because a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Krawiec v. Manly, 370 N.C. 602, 606, 811 S.E.2d 542, 546, (2018) (citations, internal quotations, and brackets omitted).

III. Analysis

The primary issues in this appeal are whether Plaintiffs can state causes of action for breach of contract and breach of fiduciary duty, and whether their claims constitute an action for medical malpractice as defined by N.C. Gen. Stat. § 90-21.11 in whole or in part. Plaintiffs argue that “claims for damages they suffered arising from the breach of contract Solstice required them to sign and the breach of trust in connection with the power of attorney” obtained by Defendant when promising to care for M.G. are separate and distinct from any malpractice claims M.G. might bring in the future for her injuries as a result of Defendant’s actions. Defendant maintains conversely that Plaintiffs “seek damages solely on the basis of the *medical treatment* provided to their daughter[.]” According to Defendant, Plaintiffs claimed a “deviation” from the “standard of care” and were thus required to comply with pleading a medical malpractice cause of action.

A. Definitional Framework

N.C. Gen. Stat. § 90-21.11(2)(a) defines a medical malpractice action as “[a] civil action for damages for personal injury or death arising out of the furnishing or

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failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.” N.C. Gen. Stat. § 90-21.11(2)(a) (2017). This Court has interpreted “damages for personal injury” capaciously to include everything from medical complications following surgery, *see Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 135-36, 472 S.E.2d 778, 780 (1996), to “a health care provider’s unauthorized disclosure of a patient’s confidences,” *see Jones v. Asheville Radiological Group, P.A.*, 129 N.C. App. 449, 456, 500 S.E.2d 740, 744 (1998). Further, this Court has understood the term “professional services” broadly, to include any “act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, [where] the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.” *Lewis v. Setty*, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998) (citations, quotation marks, and brackets omitted). And by statute a health care provider includes “[a] person who . . . is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with . . . medicine . . . pharmacy . . . nursing . . . psychiatry . . . or psychology[]” as well as those who “act[] at [their] direction or under [their] supervision[.]” N.C. Gen. Stat. § 90-21.11(1)(a), (d) (2017).

An action that falls within the statutory definition of medical malpractice must meet pleading requirements; otherwise, dismissal is required. *See* N.C. Gen. Stat.

§ 1A-1, Rule 9(j) (2017). Specifically, in the absence of *res ipsa loquitur*, actions for medical malpractice must contain a certification that all pertinent and available medical records have been reviewed by a person reasonably expected to qualify as an expert under Rule 702 of North Carolina Rules of Evidence and who will testify that the medical care did not meet the applicable standard of care. *Id.*

A review of case law from our Court provides guidance in drawing the line between such medical malpractice claims requiring pleading compliance with Rule 9(j) and actions unrelated to the provision of professional medical or health care services.

In *Watts v. Cumberland County Hospital System*, the plaintiff patient sought to hold the defendant health care provider liable for his alleged unauthorized disclosure of confidential information about her, claiming such disclosure breached his duty of confidentiality. 75 N.C. App. 1, 9, 330 S.E.2d 242, 248 (1985), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986). It was a case of first impression as to whether such a cause of action could be maintained against a health care provider. *See id.* at 9, 330 S.E.2d at 248-49. This Court noted that “[a]lthough negligence is the predominant theory of liability in a medical malpractice action, it is not the only theory on which a plaintiff may proceed[,]” and “[m]alpractice consists of any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct.” *Id.* at 10, 330 S.E.2d

at 249 (internal citation omitted). This Court held on the facts in *Watts* that claims of invasion of privacy, breach of implied contract, and breach of fiduciary duty or confidentiality should all be treated as claims for medical malpractice. *See id.* at 10, 330 S.E.2d at 248-49.

In *Bennett v. Hospice & Palliative Care Center of Alamance-Caswell*, the plaintiff, whose mother was deceased, filed a complaint against several health care providers alleging claims against them “arising out of the circumstances surrounding the death of her mother[.]” 246 N.C. App. 191, 192, 783 S.E.2d 260, 261, *disc. review denied*, 368 N.C. 917, 787 S.E.2d 374 (2016). The plaintiff listed eleven claims and made only general allegations in her complaint. *Id.* at 192-93, 783 S.E.2d at 262. Based on these allegations, the plaintiff sought damages for injuries caused by certain acts of the defendants that occurred *prior to* her mother’s death, and for certain acts of some of the defendants which occurred *after* her mother’s death. *Id.* at 193, 783 S.E.2d at 262. We held that all of the plaintiff’s claims stemming from actions leading up to the death of her mother concerned the provision of health care services to her mother. *Id.* at 195, 783 S.E.2d at 263. We therefore held that the trial court did not err in dismissing these claims for failure to include the required certification pursuant to Rule 9(j) of the Rules of Civil Procedure. *Id.*

We went on to hold in *Bennett*, however, that the plaintiff’s claims arising out of actions by certain of the defendants after the death of her mother, including a

breach of contract claim for failing to provide plaintiff with bereavement services, did not fall within the ambit of Rule 9(j). 246 N.C. App. at 196, 783 S.E.2d at 263-64. Accordingly, we concluded that the trial court erred in dismissing *these* claims for failure to include a Rule 9(j) certification. *Id.*

B. Plaintiffs' Claims

With this background, we consider whether Plaintiffs' breach of contract and fiduciary duty claims are separate and distinct from, or grounded in medical malpractice arising from Defendant's care for M.G.²

1. Breach of Contract

Plaintiffs first allege a breach of contract, where Defendant breached specific terms and implied covenants of their contract with Plaintiffs. Defendant argues that Plaintiffs' allegations are merely medical malpractice claims repackaged to avoid compliance with the requirements of Rule 9(j). We conclude that this cause of action is most accurately characterized as one for medical malpractice.

The allegations on which Plaintiffs based their claim for breach of contract include, in relevant part, that they entered into a contract with Defendant in the form of an Admissions Agreement, and that Defendant was responsible for providing appropriate clinical, nursing, and psychological services to M.G., with rights granted

² It is undisputed that Plaintiffs' amended complaint does not meet the Rule 9(j) pleading requirements. As a consequence, if Plaintiffs' claims sound in medical malpractice then we must affirm the trial court's dismissal. *See* N.C. Gen. Stat. § 1A-1, Rule 9(j) (2017).

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to Defendant through the POA to do so. Specifically, Paragraph 28 of the amended complaint alleges Defendant failed to do the following:

- A. Promptly seek emergency medical care for [M.G.] upon discovering that she had received a drug overdose;
- B. Promptly and properly inform Scott and Nicole Goss that [M.G.] had received an overdose of the prescription drug Lamictal;
- C. Provide appropriate clinical, nursing, and psychological services to [M.G.];
- D. Keep Scott and Nicole Goss fully informed concerning [M.G.]’s care, education, and clinical services, including the failure to fully apprise of the dosage of Lamictal being administered to [M.G.];
- E. Belittling concerns of Scott and Nicole Goss with derogatory written communications among Solstice East staff; and
- F. Failing to display appropriate behavior consistent with a residential treatment center for young women and their families struggling with serious and sensitive mental health issues.

In addition to alleging a breach of the specific terms of the Agreement, Plaintiffs allege in Paragraph 29 a breach of “obligations” owed to Plaintiffs, “including the implied covenant of good faith and fair dealing[.]”

Defendant acknowledges entering an Admissions Agreement for the enrollment of M.G. into its treatment program. Defendant also acknowledges the program included “clinical, education and academic services, room and board, nursing

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services[,] . . . selected psychological and educational evaluations and assessments[,] . . . personal supervision, supervised use of recreational equipment and facilities, supervised work experience[,] . . . [and] bookkeeping and clerical assistance[.]”

We hold that Plaintiffs’ allegations in Paragraph 28 arise out of Defendant furnishing or failing to furnish professional services in providing health care to M.G. *See Bennett*, 246 N.C. App. at 196, 783 S.E.2d at 262; *Watts*, 75 N.C. App. at 9, 330 S.E.2d at 248-49. Without doubt, the contract’s primary purpose was M.G.’s psychiatric and behavioral development—both of which are rooted in professional services. Claims A and C directly relate to the failure to provide sufficient medical or health care to M.G. The remaining allegations assert a health care provider failed to properly communicate with or behave toward Plaintiffs with regard to the health care services being provided or not provided to M.G. and the consequences flowing therefrom.³ Unlike in *Bennett*, where the claims to which Rule 9(j) of the North Carolina Rules of Civil Procedure did not apply arose exclusively out of actions taken and not taken after the deceased had passed away and, therefore, bore no relation to medical or health care, *see* 246 N.C. App. at 196, 783 S.E.2d at 263-64, Plaintiffs here allege Defendant demonstrated an “unreasonable lack of skill” in carrying out

³ Plaintiffs cannot sidestep the pleading requirement of Rule 9(j) by focusing on the harm Defendant allegedly visited upon them given the statute’s focus on the origins of that injury. *See, e.g.*, N.C. Gen. Stat. § 90-21.11(2)(a) (2017) (defining a medical malpractice action as one “for damages . . . arising out of the furnishing or failure to furnish professional services”) (emphasis added).

“professional . . . duties” pertaining to M.G.’s medical and health care as in *Watts*, see 75 N.C. App. at 10, 330 S.E.2d at 248.

Taking Plaintiffs’ allegations as true, and giving every reasonable inference in favor of Plaintiffs, these breach of contract claims still sound in medical malpractice. They “aris[e] out of the furnishing or failure to furnish professional services in the performance of medical . . . or other health care[.]” N.C. Gen. Stat. § 90-21.11(2)(a) (2017). Accordingly, we hold the trial court did not err in dismissing these claims for failure to include a certification pursuant to Rule 9(j).

2. Breach of Fiduciary Duty

Plaintiffs next allege a breach of fiduciary duty, where Defendant “did not act with the utmost good faith and with due regard for [Plaintiffs] and their concerns and responsibilities as parents for their minor daughter.” Specifically, in Paragraph 34, Plaintiffs allege that Defendant breached its fiduciary duty of loyalty, care, and good faith owed by engaging in or forbearing from the following:

- A. Administering five times the recommended dose of prescription drug Lamictal to minor [M.G.] for two consecutive days;
- B. Failing to promptly seek emergency medical care for [M.G.] upon discovering that she had received a drug overdose despite having exclusive control over [M.G.] as a result of the Power of Attorney;
- C. Failing to promptly and properly inform Scott and Nicole Goss that [M.G.] had received an overdose of the prescription drug Lamictal;

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- D. Overmedicating minor [M.G.] for over two months;
- E. Punishing [M.G.] for behavior occurring concomitant with Solstice East's overmedication of her; and
- F. Intentionally failing to keep Scott and Nicole Goss fully informed concerning [M.G.]'s care, education, and clinical services, including the failure to fully apprise of the dosage of Lamictal being administered to [M.G.];
- G. Belittling the concerns of Scott and Nicole Goss with derogatory written communications among Solstice East staff; and
- H. Failing to display appropriate behavior consistent with a residential treatment center for young women and their families struggling with serious sensitive mental health issues.

We hold that these allegations are also claims of medical malpractice as defined by N.C. Gen. Stat. § 90-21.11(1)(a), (d), and (2)(a), consistent with our Court's interpretation of the language of these statutory provisions. Claims A, B, and D directly relate again to the medical or health care furnished to M.G. Claim E relates to how Defendant managed the consequences of the allegedly negligent medical care it provided to M.G. Claims C, F, G, and H arise from Defendant's failure to properly communicate with or behave toward Plaintiffs with regard to the medical and health care being provided or not provided to M.G and the consequences stemming therefrom. Though not the direct provision of medical or health care, such alleged mismanagement and miscommunication is a professional service arising out of a

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health care provider’s treatment of M.G. because it “aris[es] out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, [where] the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.” *Lewis*, 130 N.C. App. at 608, 503 S.E.2d at 674. Plaintiffs’ claim for breach of fiduciary duty, at bottom, is that Defendant demonstrated an “unreasonable lack of skill or fidelity in professional or fiduciary duties” in the provision of M.G.’s medical care, *i.e.*, medical malpractice as in *Watts*. *See* 75 N.C. App. at 10, 330 S.E.2d at 249.

We therefore hold that the trial court properly dismissed Plaintiffs’ complaint.

IV. Conclusion

Plaintiffs’ claims for breach of contract and breach of fiduciary duty arise out of Defendant’s provision of professional medical and counseling services to a patient, their daughter, M.G. Such claims were subject to Rule 9(j) of the North Carolina Rules of Civil Procedure and were thus properly dismissed by the trial court for failure to include the required Rule 9(j) certification. We therefore affirm the orders of the trial court.

AFFIRMED.

Judges STROUD and HAMPSON concur.

Report per Rule 30(e).