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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1247

Filed: 20 August 2019

Forsyth County, No. 16 CVS 2701

BRENDA MARTIN, Administratrix and Personal Representative of the Estate of Theresa Martin, deceased, Plaintiff

v.

RAJAKUMAR THOTAKURA, UMALAKSHMI THOTAKURA, and WINSTON PSYCHIATRIC ASSOCIATES, INC., jointly and severally, Defendants

Appeal by Plaintiff from Judgment entered 28 March 2018 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 24 April 2019.

Gray Newell Thomas, LLP, by Angela Newell Gray, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Robert E. Desmond and Timothy P. Lehan, for defendants-appellees.

HAMPSON, Judge.

Factual and Procedural Background

Brenda Martin (Plaintiff) as Administratrix and Personal Representative of the Estate of Theresa Martin (Decedent) appeals from a Judgment entered on a jury

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verdict in favor of Rajakumar Thotakura (Dr. R. Thotakura), Umalakshmi Thotakura (Dr. U. Thotakura), and Winston Psychiatric Associates, Inc. (WPA) (collectively, Defendants). The Record before us and the evidence presented at trial tend to show the following:

On 30 August 2016, Plaintiff, both in her personal capacity and in her role as Decedent's Administratrix and Personal Representative, filed a Complaint against UHS of Delaware, Inc. (UHS) and Defendants. The Complaint alleged Decedent lived with Plaintiff, her sister. Throughout her adult life, Decedent suffered from mental illness, including schizophrenia and bipolar disorder.

In late November 2013, Decedent began to display unusual behavior, including mental confusion. Plaintiff took her to Wake Forest Baptist Hospital for evaluation and observation. Decedent was released from the hospital on 4 December 2013. However, Plaintiff took Decedent back to the hospital on 15 December 2013 after Decedent began exhibiting additional symptoms, including insomnia, aggression, hyperactivity, and hallucinations. Decedent was kept in the hospital overnight, and when Plaintiff returned on 16 December 2013, the hospital informed her Decedent had been taken to Old Vineyard Behavioral Health (Old Vineyard), a 24-hour behavioral healthcare facility owned by UHS. According to the Complaint, Dr. R. Thotakura and Dr. U. Thotakura, co-owners of WPA, were employed by UHS to render healthcare to patients at Old Vineyard.

On 22 December 2013, Decedent was taken from Old Vineyard to the emergency room at Novant Health Forsyth Medical Center (Novant) due to life-threatening physical conditions. Upon admission, Decedent was diagnosed with mild rhabdomyolysis, volume depletion, dehydration, and severe hypernatremia. She was also exhibiting signs of delirium and was subsequently sedated, placed on a ventilator, and catheterized. Decedent was later admitted to the intensive care unit at Novant after suffering respiratory failure, where she remained from 25 December 2013 to 14 March 2014. In March of 2014, Decedent was transferred from Novant to Wake Forest Baptist Hospital, where she was admitted with a number of medical conditions, including pneumonia, respiratory failure, metabolic encephalopathy, and quadriparesis. Decedent was later transferred to Kindred Hospital before being discharged to Hospice of the Piedmont on 7 May 2014. Decedent died at Hospice of the Piedmont on 12 May 2014.

In her Complaint, Plaintiff alleged Decedent's medical conditions, hospitalizations, and death arose from negligent medical care at Old Vineyard under the supervision of Dr. R. Thotakura and Dr. U. Thotakura. Plaintiff contended, "This is a medical malpractice action as defined in NCGS § 90-21.11 and Rule 26(f1) of the North Carolina Rules of Civil Procedure, as well as an action for common-law corporate negligence." Plaintiff's Complaint asserted the following claims:

COUNT ONE: CORPORATE NEGLIGENCE

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The preceding numbered paragraphs are incorporated herein by reference as if fully set out. As a direct and proximate result of the negligence of the Defendants, the Defendants UHS and Winston Psychiatric Associates are jointly and severally liable for the Personal Injuries sustained by the Decedent, without any negligence or want of due care on the Decedent's part contributing thereto.

COUNT TWO: WRONGFUL DEATH

The preceding numbered paragraphs are incorporated herein by reference as if fully set out. As a direct and proximate result of the negligence of the Defendants, the Defendants are jointly and severally liable for the Wrongful Death of the Decedent, without any negligence or want of due care on the Decedent's part contributing thereto.

COUNT THREE: NEGLIGENT SUPERVISION

The preceding numbered paragraphs are incorporated herein by reference as if fully set out. As a direct and proximate result of the negligence of the Defendants, the Defendant UHS is liable for the Negligent Supervision, Hiring and Retention of Defendants [Dr. R. Thotakura] and [Dr. U. Thotakura] who were unqualified to provide care to the Decedent.

COUNT FOUR: SURVIVAL ACTION

The preceding numbered paragraphs are incorporated herein by reference as if fully set out. As a direct and proximate result of the negligence of the Defendants and the death of the Decedent, the Defendants are jointly and severally liable for loss of society and companionship of the Decedent, without any negligence or want of due care on the Decedent's part contributing thereto.

COUNT FIVE: NEGLIGENT INFLICTION OF EMOTIONAL
DISTRESS

The preceding numbered paragraphs are incorporated herein by reference as if fully set out. As a direct and proximate result of

the negligence of the Defendants, the Defendants are jointly and severally liable for Negligent Infliction of Emotional Distress, without any negligence or want of due care on the Decedent's part contributing thereto.

COUNT SIX: INTENTIONAL INFLICTION OF EMOTIONAL
DISTRESS

The preceding numbered paragraphs are incorporated herein by reference as if fully set out. As a direct and proximate result of the intentional or reckless acts of the Defendants, the Defendants are jointly and severally liable for Intentional Infliction of Emotional Distress, without any negligence or want of due care on the Decedent's part contributing thereto.

In the Prayer for Relief, Plaintiff sought the following from the trial court:

1. That it award the Plaintiffs compensatory damages for mental anguish, emotional distress, pain and suffering, and loss of companionship in excess of \$25,000.00.
2. That it award the Plaintiffs punitive damages in excess of \$25,000.00.
3. That it award the Plaintiffs the costs and expenses of this legal action, including reasonable attorney's fees.
4. That it award the Plaintiffs the costs and expenses associated with the care of the Decedent, including reasonable funeral expenses and costs, hospital, medical and ambulance expenses.
5. That all issues so triable be tried and determined by a jury.
6. For such other relief as the Court deems proper.

On 29 June 2017, Plaintiff voluntarily dismissed all claims against UHS with prejudice. Further, on 1 November 2017, Plaintiff dismissed her own claims against

the remaining Defendants without prejudice. Plaintiff's claims in her capacity as Administratrix and Personal Representative remained pending against Defendants, which included: Corporate Negligence against WPA only; Wrongful Death; the "Survival Action"; Negligent Infliction of Emotional Distress; and Intentional Infliction of Emotional Distress.

The parties tried this case before a jury between 5 March 2018 and 21 March 2018. Although the parties' Pre-Trial Order listed 20 potential witnesses, on appeal, the parties have only included in the Record transcripts of four witnesses' testimony. The Record also includes transcripts of various pre-trial motions of the parties and the charge conference. However, the Record does not include, *inter alia*, transcripts of any other witnesses' testimony, opening statements or closing arguments of the parties, and exhibits submitted during trial.

During the charge conference, the trial court began by listing its proposed jury instructions, explaining it intended to submit the following issues to the jury:

Was of [sic] the plaintiff, Brenda Martin, administratrix and personal representative of the estate of Theresa Martin, injured by the negligence of the defendant [Dr. R.] Thotakura? The second issue would read: What amount is the estate of Theresa Martin entitled to recover from defendant [Dr. R.] Thotakura for wrongful death. The third issue will read: Was [Dr. R.] Thotakura the agent of the defendant, Winston Psychiatric Associates Inc., at the time that [Dr. R.] Thotakura provided medical services to Theresa Martin? The fourth issue would read: Was the plaintiff, Brenda Martin, administratrix and personal representative of the estate of Theresa Martin, injured by the negligence of the defendant, [Dr. U.] Thotakura? The fifth issue read: What

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amount is the estate of Theresa Martin entitled to recover from defendant, [Dr. U.] Thotakura for wrongful death. The sixth issue will read: Was [Dr. U.] Thotakura an agent of the defendant, Winston [Psychiatric] Associates Inc. at the time that [Dr. U.] Thotakura provided medical services to Theresa Martin?

After discussing various changes to the proposed instructions, the trial court stood at ease in order to implement the parties' suggested revisions. When the trial court resumed discussions, Plaintiff's counsel stated, "Your Honor, I did think of an issue that is not on the verdict sheet, and I don't know if this is an option, to have the verdict sheet read in such a way that the jury could consider personal injuries and -- in addition to wrongful death." Specifically, Plaintiff's counsel contended the jury should "consider damages short of death, since there is a survival claim." In support of her position, Plaintiff cited to *Alston v. Britthaven, Inc.*, allowing for submission of a survivorship claim for recovery of pre-death injuries separate and distinct from a wrongful death claim. *See* 177 N.C. App. 330, 628 S.E.2d 824 (2006). The trial court took this request under advisement.

When the trial court reconvened, it heard arguments from both parties regarding whether to include Plaintiff's proposed issue of pre-death personal injuries of Decedent. The trial court then took another recess to further review the Complaint and *Alston* and upon returning ruled:

The Court, based on its review, finds that the complaint does not state a cause of action for ordinary negligence, several of the causes of action being dismissed and count four, survival action, not being in the nature of an ordinary negligence claim. The

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Court further notes that the prayer for relief in the complaint has, in paragraph one, one lump sum damage amount of \$25,000, not being broken apart with separate claims for relief as to each of the causes of action.

Consequently, the Court finds the case is distinguishable from the Alston case, which had those different allegations in its pleadings. Further, the Court notes the case has been tried as a wrongful death case. The Court[has] heard the evidence in the matter and, again, finds it to be distinguishable and is going to deny the request for additional instructions or issues being submitted on the verdict sheet, with regard to negligent injury separate and apart from the wrongful death claims.

The parties subsequently presented their closing arguments to the jury, and the trial court instructed the jury. Although we do not have a transcript of the jury charge, the Record does contain a printed copy of the jury instructions and verdict sheet, which shows the trial court instructed the jury on four issues: (1) Was the death of Theresa Martin proximately caused by the alleged negligence of Dr. R. Thotakura? (2) What amount is the Estate of Theresa Martin entitled to recover from Defendant Dr. R. Thotakura for wrongful death? (3) Was the death of Theresa Martin proximately caused by the alleged negligence of Defendant Dr. U. Thotakura? (4) What amount is the Estate of Theresa Martin entitled to recover from Defendant Dr. U. Thotakura for wrongful death?

At the close of trial, the jury returned its verdict finding Decedent's death was not proximately caused by the alleged negligence of Dr. R. Thotakura or Dr. U.

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Thotakura. On 28 March 2018, the trial court entered Judgment for Defendants and against Plaintiff consistent with the jury's verdict.

Issue

The dispositive issue in this case is whether the trial court abused its discretion in declining Plaintiff's request to submit a separate issue to the jury addressing a survivorship action for personal injuries suffered by Decedent prior to her death.

Analysis

I. Standard of Review

"The standard of review on appeal from a trial court's refusal to submit requested issues to a jury is whether the refusal was an abuse of the court's discretion." *Id.* at 334, 628 S.E.2d at 828. "[T]he trial court has wide discretion in presenting the issues to the jury and no abuse of discretion will be found where the issues are sufficiently comprehensive to resolve all factual controversies[.]" *Murrow v. Daniels*, 321 N.C. 494, 499-500, 364 S.E.2d 392, 396 (1988) (citation and quotation marks omitted). Further, "[i]t is well-settled that a trial court must submit to a jury all issues that are raised by the pleadings and supported by the evidence." *Alston*, 177 N.C. App. at 334, 628 S.E.2d at 828 (citations and quotation marks omitted).

II. Survivorship Claim

On appeal, Plaintiff contends the trial court erred by failing to instruct the jury on personal injuries suffered by Decedent prior to her death. Specifically, Plaintiff

asserts the pleadings and evidence at trial supported a jury instruction on a survivorship claim; therefore, under *Alston* the trial court erred by failing to submit the survivorship claim to the jury. Following our Court's guidance in *Alston*, "we must examine [P]laintiff's complaint to determine whether a survivorship claim for [Decedent's] pre-death injuries was sufficiently pled apart from the claim for [her] death[.]" *Id.* If we answer this question in the affirmative, "we must examine the entire record to determine whether this claim was supported by the evidence presented at trial." *Id.*

Section 28A-18-1 of our General Statutes provides that "[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(a) (2017). Claims filed under this Section are generally known as "survivorship actions."

Section 28A-18-2 of our General Statutes provides:

(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

(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;
- (2) Compensation for pain and suffering of the decedent;
- (3) The reasonable funeral expenses of the decedent;
- (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;
- (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;
- (6) Nominal damages when the jury so finds.

Id. § 28A-18-2(a)-(b) (2017). Claims filed under this Section are generally known as “wrongful death actions.”

Under both Statutes, a proper plaintiff can recover damages for the pain and suffering of a decedent and medical expenses incurred by a decedent. *See Locust v. Pitt Cty. Mem’l Hosp.*, 154 N.C. App. 103, 107, 571 S.E.2d 668, 671 (2002) (“[T]he

administratrix of an estate thus has the option of claiming damages for the decedent's pain and suffering and hospital care under either a survival or a wrongful death action.”), *rev'd on other grounds*, 358 N.C. 113, 591 S.E.2d 543 (2004). Further, *Alston* held that wrongful death and survivorship claims may be brought as alternative claims for the same negligent acts.¹ *Alston*, 177 N.C. App. at 339, 628 S.E.2d at 831.

In *Alston*, the plaintiff brought survivorship and wrongful death claims for alleged nursing home neglect that caused the decedent to suffer multiple bed sores. *Id.* at 331-32, 628 S.E.2d at 826-27. The plaintiff contended the bed sores caused septicemia, which ultimately resulted in the decedent's death, and sought recovery for the decedent's pain and suffering and medical expenses under both theories. *Id.* at 332, 628 S.E.2d at 827. In response, the defendant asserted that Alzheimer's disease caused the decedent's death. *Id.*

The trial court denied the plaintiff's request to include jury instructions on whether the defendant's alleged negligence caused the decedent's pre-death injuries, which fell under the survivorship claim, and whether the defendant's alleged negligence caused the decedent's death, which fell under the wrongful death claim. *Id.* at 332-33, 628 S.E.2d at 827. Our Court reversed the trial court's decision, explaining:

¹ While a plaintiff, in the appropriate case, may bring these two claims in the alternative, a plaintiff is not entitled to double recovery for the same injury. *Alston*, 177 N.C. App. at 340-41, 628 S.E.2d at 832.

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This Court has previously held that where, upon reading the complaint as a whole, the complaint appeared to allege only a single claim for wrongful death, a plaintiff has not stated a claim for a survivorship action. In [*Locust*], this Court undertook to “determine whether Plaintiff’s complaint alleged damages solely under the Wrongful Death Act [N.C. Gen. Stat. § 28A-18-2] or included a survival action as well.” The Court found that “[i]n her complaint, Plaintiff states a claim ‘for the wrongful death of [decedent]’ and then proceeds to plead all the damages listed in section 28A-18-2(b).” Similarly, in *In re Estate of Parrish*, 143 N.C. App. 244, 255, 547 S.E.2d 74, 81 (2001), proceeds from an action were held to be wrongful death proceeds rather than assets of the decedent’s estate where the “damages pled by [the plaintiff] are virtually identical to those available under the Wrongful Death Statute,” and the prayer for relief requested “all damages recoverable for [the decedent’s] wrongful death.” The Court in *Locust* noted that damages were alleged only once without any indication as to what amount of damages was sought pursuant to the wrongful death act and what amount was related to the survivorship claim. The Court stated, “it appears the damages sought were lumped together because they related to a single claim: wrongful death.”

Id. at 336-37, 628 S.E.2d at 829-30 (alteration in original) (citations omitted). In contrast to *Locust* and *Parrish*, the *Alston* Court reasoned that the plaintiff’s complaint had sufficiently alleged both causes of action, warranting submission of the survivorship claim to the jury. *Id.* at 337, 628 S.E.2d at 830. The *Alston* Court reached this conclusion for three separate reasons:

First, . . . plaintiff’s complaint listed five distinct claims, only one of which was entitled “Wrongful Death.” Second, except for the punitive damages claim, each claim included a request for “damages in excess of \$10,000.00.” Because the damages were not “lumped together” as in *Locust*, they did not give the appearance of relating to “a single claim” but rather separate claims for damages sustained by [the decedent] by reason of the

negligent actions of defendants during his lifetime as well as their negligence allegedly causing his death. Third, several of the damages plaintiff pled in the complaint, including “loss of dignity, . . . scars and disfigurement, mental anguish, inconvenience, loss of capacity for enjoyment of life, [and] discomfort,” are not damages recoverable under N.C. Gen. Stat. § 28A-18-2. Unlike *Locust* and *Parrish*, then, not all the damages pled were “virtually identical to those available under the Wrongful Death Statute.”

Id. (alterations in original) (citations omitted).

In keeping with *Alston*, we first review whether Plaintiff’s Complaint sufficiently alleged both causes of action. In her brief, Plaintiff correctly points out “as in *Alston*, [Plaintiff] sets out six (6) distinct causes of action with only one cause of action entitled wrongful death.” However, Plaintiff voluntarily dismissed her claims against UHS, which dismissed Count Three (Negligent Supervision) completely. Further, Counts Five (Negligent Infliction of Emotional Distress) and Six (Intentional Infliction of Emotional Distress) also cannot serve as a basis for Plaintiff’s survivorship claim, as it does not appear, at least on the limited Record before us, Plaintiff presented this theory to the trial court and Plaintiff has not argued to this Court that these two Counts alleged a survivorship action. *See* N.C.R. App. P. 28(b)(6).

Instead, Plaintiff argues that Counts One (Corporate Negligence) and Four (Survival Action) sufficiently alleged a survivorship action. However, as to Count Four, this claim appears to allege a claim for damages for loss of society and companionship of the Decedent, which are damages recoverable under the Wrongful

Death Statute. See N.C. Gen. Stat. § 28A-18-2(b)(4)(c) (allowing compensation for loss of reasonably expected “[s]ociety, companionship, comfort, guidance, kindly offices and advice of the decedent” (emphasis added)). Plaintiff effectively concedes as much in her briefing. Therefore, Count Four does not support the submission of an independent survivorship claim.

As to Count One, Plaintiff contends this Count is “nothing more than an ordinary negligence claim” and therefore that the Complaint sets out a cause of action for ordinary negligence based on the personal injuries sustained by Decedent. Assuming Plaintiff is correct in this regard, Plaintiff’s Complaint thus appears distinguishable from the plaintiffs’ complaints in *Locust* and *Parrish* and more in line with *Alston*.

However, turning to the second and third factors in *Alston*, the Prayer for Relief in Plaintiff’s Complaint has “lumped together” her damages, giving it the appearance of relating to “a single claim.” See *Alston*, 177 N.C. App. at 337, 628 S.E.2d at 830 (citation and quotation marks omitted). In addition, with the exception of “mental anguish” and “emotional distress,” all of the damages sought by the Complaint are “virtually identical to those available under the Wrongful Death Statute.” *Parrish*, 143 N.C. App. at 255, 547 S.E.2d at 81 (citation omitted). Further, Plaintiff’s Complaint fails to identify under what theory of recovery compensatory damages were sought and does not identify what party would recover the proceeds of

this action. *See Locust*, 154 N.C. App. at 108 n.3, 571 S.E.2d at 672 n.3 (“As the only difference between a claim for damages for pain and suffering and/or hospital care under a survival action or a wrongful death action relates to the distribution of the proceeds of a recovery, a plaintiff should carefully delineate in her complaint under which theory she seeks to recover.” (citation omitted)); *see also Parrish*, 143 N.C. App. at 253, 547 S.E.2d at 79 (recognizing that in a survival action, recovery goes to the estate; whereas, in a wrongful death action, the proceeds are distributed according to the Intestate Succession Act). Thus, at best, it is questionable as to whether Plaintiff’s Complaint sufficiently alleged a claim for a survival action independent of the wrongful death action.

Nevertheless, assuming *arguendo* Plaintiff’s Complaint did, in fact, allege a survival action, we cannot say the trial court abused its discretion in failing to instruct the jury on the survival claim. Under *Alston*, “we must examine the entire record to determine whether this claim was supported by the evidence presented at trial.” 177 N.C. App. at 334, 628 S.E.2d at 828. However, as noted *supra*, the parties included only limited portions of the trial transcript and none of the admitted exhibits in the Record. Further, from the limited Record before us, it appears Plaintiff first raised the issue of a survival claim during the charge conference—as the trial court’s initial proposed issues to submit to the jury only related to the wrongful death claim—when Plaintiff’s counsel stated, “Your Honor, I did think of an issue that is not on the

verdict sheet, and I don't know if this is an option, to have the verdict sheet read in such a way that the jury could consider personal injuries and -- in addition to wrongful death." After hearing arguments from counsel for both parties and after reviewing the Complaint and *Alston*, the trial court made the following finding:

Further, the Court notes the case has been tried as a wrongful death case. The Court[has] heard the evidence in the matter and, again, finds it to be distinguishable and is going to deny the request for additional instructions or issues being submitted on the verdict sheet, with regard to negligent injury separate and apart from the wrongful death claims.

Here, we are reminded the trial court had the benefit of hearing the totality of the evidence presented by the parties and the arguments of counsel over the course of the trial. Given the lack of a complete trial record and our deferential standard of review, we cannot say the trial court abused its discretion by submitting only the wrongful death claim to the jury. *See id.* (citations omitted); *Murrow*, 321 N.C. at 499, 364 S.E.2d at 396 ("[T]he trial court has *wide discretion* in presenting the issues to the jury[.]" (emphasis added) (citation omitted)). Therefore, we affirm the trial court's Judgment.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's 28 March 2018 Judgment.

AFFIRMED.

Judge DILLON concurs.

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Judge MURPHY concurs in the result only in a separate opinion.

Report per Rule 30(e).

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MURPHY, Judge, concurring in the result.

I do not join with the Majority in having to assume *arguendo* that the Complaint and prayer for relief sufficiently allege a survival action seeking damages for Decedent’s injuries prior to death. The Plaintiff’s Complaint meets the requirements of *Alston* and fully complies with Rules 8(a)(1) and (2) of our Rules of Civil Procedure. Even if there was ambiguity, which there is not, Rule 8(f) would require a construction “as to do substantial justice.” N.C.G.S. § 1A-1, Rule 8(f) (2017). However, I join the Majority in finding no abuse of discretion, and I respectfully concur in the result only.