IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-350

Filed: 19 November 2019

Mecklenburg County, No. 18 CVS 5560

BETTY LOU DEMARCO, Plaintiff,

v.

CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY d/b/a CAROLINAS HEALTHCARE SYSTEM, CAROLINAS PHYSICIANS NETWORK, INC. d/b/a CABARRUS FAMILY MEDICINE, P.A., and CABARRUS FAMILY MEDICINE-HARRISBURG, CAROLINAS MEDICAL CENTER-NORTHEAST d/b/a NORTHEAST WOMEN'S HEALTH & OBSTETRICS, Defendants.

Appeal by plaintiff from order entered 7 January 2019 by Judge Adam M. Conrad in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 October 2019.

Stubbs & Perdue, P.A., by Matthew W. Buckmiller and Joseph Z. Frost, for plaintiff.

Alston & Bird, LLP, by Brian D. Boone, Michael R. Hoernlein, and Rebecca L. Gauthier, for defendants.

ARROWOOD, Judge.

Betty Lou Demarco ("plaintiff") appeals from order granting motion of Charlotte-Mecklenburg Hospital Authority, Carolinas Physicians Network, Inc., and Carolinas Medical Center-Northeast ("defendants") to dismiss plaintiff's claims with prejudice pursuant to N.C.R. Civ. P. 12(b)(6) (2019). For the following reasons, we affirm in part, reverse in part, and remand.

I. Background

This case arises from an error in plaintiff's medical records. Plaintiff's complaint alleges that she is a 76-year-old woman who receives disability compensation from the U.S. Department of Labor's Office of Worker's Compensation Programs ("OWCP"). Under OWCP policy, plaintiff is required to undergo annual medical evaluations which are sent by plaintiff's doctors to OWCP. In preparation for an upcoming medical evaluation, plaintiff requested a copy of her medical record from her previous annual evaluation from Dr. Katherine Foster ("Dr. Foster"), an employee of defendants. One document in plaintiff's medical record, titled "Problem List," catalogues instances in which her attending physicians have recorded her various ailments over time, along with information concerning when the problem was last updated and whether or not it is ongoing or resolved.

Upon receipt of her medical record, plaintiff discovered erroneous entries in the Problem List. The Problem List contained two entries ("the erroneous entries") created in 2011 by Dr. Linda Bresnahan ("Dr. Bresnahan"), an employee of defendants Charlotte-Mecklenburg Hospital Authority and Carolinas Medical Center-Northeast. The erroneous entries indicated that plaintiff had been diagnosed with "gonococcal infection (acute) of lower genitourinary tract" and "gonorrhea" in 2011, which were "resolved" in January of 2016. Plaintiff has neither been diagnosed with nor treated for any sexually transmitted disease in her lifetime.

Plaintiff contacted Dr. Bresnahan to address the erroneous entries, and Dr. Bresnahan admitted that they had been "added to [her] chart erroneously in Dec[.] 2011[,]" "found no reason" why they were entered, and had no explanation for how the erroneous entries had been added to her medical record. To address this mistake, Dr. Bresnahan amended the Problem List for the erroneous entries by adding language reflecting that the diagnoses had been "canceled" and "entered in error" (hereinafter "the annotated entries").

Thereafter, plaintiff repeatedly insisted that this solution was insufficient and, per defendants' privacy policy and the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 ("HIPAA") regulations, requested an amendment of her medical record to completely erase the annotated entries from her medical record. Defendants deemed their response sufficient to address the problem and took no further action to change the Problem List in plaintiff's medical record.[1] In January of 2018, Dr. Foster conducted plaintiff's annual medical evaluation for submission to OWCP. Dr. Foster sent OWCP the medical evaluation along with the rest of plaintiff's medical record, including the annotated entries.

Defendants' refusal to comply with plaintiff's request to completely erase the annotated entries from her medical record led plaintiff to file her complaint in the

[1] Plaintiff notes that defendants did erase the annotated entries entirely after the filing of her complaint in the instant case.

instant case, asserting claims of negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, and defamation. Defendants responded by moving to dismiss the complaint with prejudice for failure to state a claim upon which relief could be granted, pursuant to N.C.R. Civ. P. 12(b)(6). A hearing on this motion was held at the 6 November 2018 civil session of Mecklenburg County Superior Court. The trial court entered an order granting defendants' motion, and this appeal followed.

II. Discussion

Plaintiff argues that the trial court erred in dismissing her claims of negligence, negligent infliction of emotional distress, and defamation pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted.[2] We address each argument in turn.

A. Standard of Review

"We review appeals from dismissals under Rule 12(b)(6) de novo." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 8 (2015) (citations omitted).

> Dismissal of an action under Rule 12(b)(6) is appropriate when the complaint fail[s] to state a claim upon which relief can be granted. [T]he well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of fact are

[2] Plaintiff has abandoned a fourth assignment of error on appeal regarding the trial court's dismissal of her claim for intentional infliction of emotional distress. *See* N.C.R. App. P. 28(a) (2019) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

> not admitted. When the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the claim, dismissal is proper.

Id. at 448, 781 S.E.2d at 7-8 (internal quotation marks and citations omitted).

B. Negligence

Plaintiff first argues that dismissal of her negligence claim was improper because her complaint adequately pleaded a legally viable claim against defendants. We agree.

> Under the common law, a person who has sustained injuries due to the negligent conduct of another may recover against the tortfeasor provided that the negligent behavior was the proximate cause of the injuries suffered. The elements of common law negligence . . . [are] as follows:
>
> 1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks[;]
>
> 2. A failure on his part to conform to the standard required[;]
>
> 3. A reasonabl[y] close causal connection between the conduct and the resulting injury[; and]
>
> 4. Actual loss or damage resulting to the interests of another[.]

Hutchens v. Hankins, 63 N.C. App. 1, 12-13, 303 S.E.2d 584, 591-92 (1983) (emphasis, alterations, and internal citations omitted). We address whether plaintiff has sufficiently pleaded each element of negligence in turn.

1. Duty

First, plaintiff's complaint asserts that defendants owed a duty to her as their patient "to exercise reasonable care, skill, and diligence to ensure that the protected health information contained in Plaintiff's medical records was accurate and correct, and did not contain any erroneous diagnoses or treatments" and to "prevent . . . dissemination of false, inaccurate, offensive, and derogatory protected health information relating to Plaintiff to third parties[.]" Plaintiff's complaint contends this duty is based upon both common law principles and HIPAA.

It is well established that hospitals and doctors in their employ owe their patients a duty to exercise the degree of care that a reasonable person would in similar circumstances to prevent an unreasonable risk of harm to their patients. *Blanton v. Moses H. Cone Mem'l Hosp., Inc.*, 319 N.C. 372, 375, 354 S.E.2d 455, 457-58 (1987) (citing *Rabon v. Rowan Mem'l Hosp., Inc.*, 269 N.C. 1, 152 S.E.2d 485 (1967) (general duty of care); *Hoke v. Glenn*, 167 N.C. 594, 83 S.E. 807 (1914) (duty of reasonable care in selecting agents); *Payne v. Garvey*, 264 N.C. 593, 142 S.E.2d 159 (1965) (duty of reasonable care in maintaining equipment)). We have not had occasion to consider whether or not this general duty of reasonable care extends to

corrections of erroneously entered medical records. Plaintiff also argues that HIPAA and defendants' own privacy policy impose upon them a duty to take reasonable measures in response to her request to correct erroneous entries in her medical records.

Although the existence of such a duty is an issue of first impression for this Court, we have previously held that HIPAA, its implementing regulations, and hospital privacy policies may be used to plead a specific standard of care sufficient to overcome dismissal under Rule 12(b)(6). *See Acosta v. Byrum*, 180 N.C. App. 562, 638 S.E.2d 246 (2006). In *Acosta*, a patient sued her treating hospital for negligence because one of its doctors provided his access code for the patient's medical records to an unauthorized party, who then viewed the records and shared information therein. *Id.* at 565, 638 S.E.2d at 249. The patient's complaint alleged that the defendant hospital owed her a duty to conform to a standard of care established by HIPAA and its own privacy policy, which it breached when its doctor gave his password to an unauthorized individual. *Id.* The complaint did not mention any specific provisions of HIPAA or the hospital's privacy policy which established this standard of care. *Id.* at 568, 638 S.E.2d at 250-51. We held that the patient was "not required in her complaint to cite the exact rule or regulation. *See* N.C. Gen. Stat. § 1A-1, Rule 8. She only must provide [defendants] notice of how she plan[ned] to establish the duty that was negligently breached." *Acosta*, 180 N.C. App. at 568, 638 S.E.2d at 251. The

patient's complaint sufficiently pleaded the element of duty for the purposes of Rule 12(b)(6) because it provided the hospital notice that she intended to use HIPAA and the hospital's own policy to establish the duty and standard of care. *Id.*

In *Acosta*, it was much more evident that the defendant's conduct violated several explicit prohibitions in HIPAA. However, we find the aforementioned principle in *Acosta* applicable here. Plaintiff's complaint likewise does not cite any specific provisions of HIPAA or defendants' privacy policy which establish their duty to respond reasonably to her request to remove the annotated entries from her medical record. As in *Acosta*, we hold that plaintiff's complaint sufficiently pleads defendants' duty to adhere to a particular standard of care because it notifies defendants that she plans to use HIPAA and defendants' own privacy policy to establish their duty to act reasonably in response to her request to remove an erroneously entered diagnosis from her medical records.[3]

2. Breach

Accordingly, we also hold that plaintiff's complaint adequately pleads breach of duty. The complaint asserts that defendants failed to meet the alleged standard of

[3] At oral argument, counsel for defendants suggested that HIPAA preempts tort claims arising from the creation and sharing of medical records. We need not address this argument because defendants did not raise it at trial. *See* N.C.R. App. P. 10(a)(1) (2019) (requiring parties to raise arguments and objections before trial court and obtain rulings thereon in order to preserve for appellate review); *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) ("[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts.") (internal quotation marks and citations omitted).

care by, among other things, adding annotations to the erroneous entries rather than erasing them entirely. *See Acosta*, 180 N.C. App. at 568, 638 S.E.2d at 251 (implicitly addressing breach in discussion of standard of care).

Defendants argue that they did not breach their duty to plaintiff as a matter of law, citing *Thornburg v. Long*, 178 N.C. 589, 101 S.E. 99 (1919). In *Thornburg*, our Supreme Court held that a doctor does not breach his common law duty of care when he makes "an honest mistake or error of judgment in making a diagnosis . . ., where there is ground for reasonable doubt as to the practice to be pursued." *Id.* at 591, 101 S.E.2d at 100. The Supreme Court held that the defendant doctor was not liable for misdiagnosing the patient plaintiff with syphilis, where the defendant had sent the plaintiff's blood sample to a laboratory for testing and returned a false indication of the disease's presence. *Id.* at 590, 101 S.E.2d at 99-100.

We find *Thornburg* distinguishable from the instant case. As plaintiff notes, "*Thornburg* was a case involving an *actual diagnosis* that turned out to be false. . . . [Here,] the False Entry appears to have been the product of negligent recordkeeping, not the negligence of a particular doctor in reaching the wrong conclusion about a patient's actual signs and symptoms." We decline to extend the rationale of *Thornburg* beyond diagnosis to cover negligence in the preparation and maintenance of a patient's medical records.

Furthermore, contrary to defendant's assertion at oral argument, such medical records do not belong to the doctor or the hospital who created them. Healthcare providers are mere custodians of their patients' medical records. Indeed, the regulatory scheme implementing HIPAA makes clear that ultimate control over a medical record lies with the patient, abridged only by enumerated exceptions. *See, e.g.,* N.C. Gen. Stat. § 8-53 (2017) (subject to enumerated exceptions, "medical records shall be furnished only on the authorization of the patient"); N.C. Gen. Stat. § 90-414.11 (2017) (recognizing patient's rights to request restriction of use and disclosure of medical records, access, inspect, and copy records, and request amendment of medical records); 45 C.F.R. § 164.524(a)(1) (2019) (subject to enumerated exceptions, "an individual has a right of access to inspect and obtain a copy of" her medical records); 45 C.F.R. § 164.502(a) (2019) (subject to enumerated exceptions, healthcare providers "may not use or disclose" patient's medical records); *see also Lowd v. Reynolds*, 205 N.C. App. 208, 212-15, 695 S.E.2d 479, 482-84 (2010) (stating that patient holds physician-patient privilege, which covers medical records; deeming plaintiff's medical records within his "possession, custody, or control" for discovery purposes under N.C.R. Civ. P. 34 (2019)); *State v. Smith*, 248 N.C. App. 804, 808, 789 S.E.2d 873, 877 (2016) (implicitly holding defendant-patient had standing to challenge admissibility of his medical records in criminal case).

3. Causation

> The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant. Questions of proximate cause and foreseeability are questions of fact to be decided by the jury. Thus, since proximate cause is a factual question, not a legal one, it is typically not appropriate to discuss in a motion to dismiss.

Acosta, 180 N.C. App. at 568-69, 638 S.E.2d at 251 (alteration, internal citations, and quotation marks omitted). Here, the complaint alleges that the harm plaintiff suffered was a "direct and proximate result of Defendants' negligence" and was "reasonably foreseeable to Defendant[s.]" Because the complaint adequately recites the element of causation, an issue of fact for the jury to decide, plaintiff has made a sufficient pleading of causation under Rule 12(b)(6).

4. Damages

An allegation of damages is sufficient under Rule 12(b)(6) "so long as it provide[s] the defendant notice of the nature and basis of plaintiff['s] claim so as to enable him to answer and prepare for trial." *Acosta*, 180 N.C. App. at 570, 638 S.E.2d at 252 (internal quotation marks omitted) (citing *McAllister v. Ha*, 347 N.C. 638, 646, 496 S.E.2d 577, 583) (1998)). Here, plaintiff's complaint claims that defendants' breach of duty caused her reputational harm, marital strife and loss of consortium, and "severe and crippling economical [sic], physical, and emotional distress, . . . pain and suffering, [and] lost opportunities[.]" This allegation is specific enough to allow

defendants to prepare a defense as to each of the listed grounds of harm. Thus, plaintiff has adequately pleaded damages.

Plaintiff's complaint adequately pleads all four elements of negligence, stating a claim upon which relief could theoretically be granted to her if proven. While we express no opinion as to whether plaintiff can survive a motion for summary judgment or prevail on the merits at trial, she has alleged sufficient facts to survive a pre-answer motion to dismiss under Rule 12(b)(6). Therefore, the trial court erred in granting defendants' motion to dismiss her claim of negligence pursuant to Rule 12(b)(6). We reverse the portion of the trial court's order dismissing plaintiff's negligence claim and remand for further proceedings on this matter.

C. Negligent Infliction of Emotional Distress

Second, plaintiff argues that the trial court erred in dismissing her claim for negligent infliction of emotional distress. Plaintiff's complaint alleges that defendants' negligence inflicted severe emotional distress upon her. Because plaintiff has pleaded a viable claim for negligence arising from the same facts, we need only consider whether her complaint adequately pleads damages in the form of "severe emotional distress."

"To state a claim for negligent infliction of emotional distress under North Carolina law, the plaintiff need only allege that: '(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause

the plaintiff severe emotional distress, and (3) the conduct did in fact cause the plaintiff severe emotional distress.' " *Sorrels v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 321-22 (1993) (alteration omitted) (quoting *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990)). As discussed *supra* section B.3, the issue of proximate causation and foreseeability of harm is inappropriate for consideration on a motion to dismiss per Rule 12(b)(6). Thus, plaintiff's complaint will pass muster under Rule 12(b)(6) if it sufficiently pleads severe emotional distress as damages.

"[T]o establish severe emotional distress . . ., the plaintiff must show an emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Sorrels*, 334 N.C. at 672, 435 S.E.2d at 322 (internal quotation marks and citation omitted). An allegation of severe emotional distress is sufficient to overcome dismissal under Rule 12(b)(6) so long as it provides the defendant with "notice of the nature and basis of plaintiff['s] claim so as to enable him to answer and prepare for trial." *Acosta*, 180 N.C. App. at 570, 638 S.E.2d at 252 (internal quotation marks and citation omitted). We have found an allegation of severe emotional distress sufficient where the plaintiff's claim that the defendant's negligence caused "severe emotional distress, humiliation, and mental anguish[,]" when considered with the plaintiff's

other factual allegations, provided the defendant adequate notice with which to prepare a defense. *Id.*

In the instant case, plaintiff's claim for negligent infliction of emotional distress alleges that defendants' negligence has caused plaintiff to suffer "severe and grievous mental and emotional suffering, fright, anguish, shock, nervousness, and anxiety" in light of her advanced age and the sordid nature of the erroneously recorded affliction. Additionally, the factual allegations of the complaint specify that the notion that defendants will continue to share the annotated entries in its communications with OWCP has caused her to "develop[ ] depression, stress, anxiety, unbridled fear, and emotional distress" which have manifested in other maladies such as loss of hair, sleeplessness, extreme exhaustion, decreased energy levels, and paranoia. Because these allegations are sufficient to provide defendants with enough notice to prepare their defense as to severe emotional distress, the trial court erred in dismissing plaintiff's claim for negligent infliction of emotional distress. We reverse the portion of the trial court's order granting defendants' motion to dismiss and remand for further proceedings on this claim for relief.

D. Defamation

Third, plaintiff contends that the trial court erred in granting defendants' Rule 12(b)(6) motion to dismiss her defamation claim. We disagree.

"In order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Craven v. Cope*, 188 N.C. App. 814, 816, 656 S.E.2d 729, 732 (2008) (internal quotation marks and citation omitted). "If a statement cannot reasonably be interpreted as stating actual facts about an individual, it cannot be the subject of a defamation suit." *Id.* at 817, 656 S.E.2d at 732 (citation omitted). "In determining whether a statement can be reasonably interpreted as stating actual facts about an individual, courts look to the circumstances in which the statement is made." *Id.* (citation omitted). The truth of an allegedly defamatory statement is a complete defense to an action for defamation. *Long v. Vertical Techs., Inc.*, 113 N.C. App. 598, 602-603, 439 S.E.2d 797, 801 (1994) (citation omitted).

In the instant case, plaintiff's complaint alleges that defendants defamed her by sending her medical records including the annotated entries to OWCP. Plaintiff contends that the initial language of diagnosis accompanied by the annotation that the diagnosis was "entered in error" "suggest[s] that Plaintiff[ ] once presented to Defendant[s] with *signs or symptoms* of a pelvic/vaginal inflammatory ailment, was diagnosed with gonorrhea, and was later determined to have some other ailment other than gonorrhea." We disagree.

The excerpt of plaintiff's medical record before us on appeal consists entirely of a Problem List in which her attending physicians have recorded her various ailments over time, along with information concerning when the problem was last updated and whether it is ongoing or resolved. The Problem List does not support plaintiff's contention because no other entries suggest that plaintiff once had some other ailment presenting symptoms similar to those of gonorrhea. Moreover, the five year span between the initial entry of diagnosis and subsequent correction does not suggest that plaintiff was subsequently diagnosed and treated for some other ailment based upon the same symptoms.

The annotated entries, viewed in the context of the Problem List in its entirety, are reasonably interpreted to state that Dr. Bresnahan entered records of diagnoses for "gonococcal infection (acute) of lower genitourinary tract" and "gonorrhea" in 2011, that were last updated in 2016 to reflect that these entries were "cancelled" because they were "entered in error." A statement which acknowledges its own falsity is true, and thus immune from liability for defamation. Because plaintiff has failed to plead that defendants communicated a false statement, we affirm the trial court's order dismissing plaintiff's defamation claim pursuant to Rule 12(b)(6).

III. Conclusion

For the foregoing reasons, we affirm that portion of the trial court's order dismissing plaintiff's defamation claim, reverse those portions dismissing plaintiff's

claims for negligence and negligent infliction of emotional distress, and remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges COLLINS and HAMPSON concur.