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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-492

Filed: 31 December 2020

Vance County, No. 15-CVS-1071

NANCY ANN FULLER, Plaintiff,

v.

RAFAEL E. NEGRON-MEDINA, M.D., in His Individual and Official Capacity,
Defendant.

Appeal by Plaintiff from order entered 25 July 2018 by Judge Michael L. Robinson in Superior Court, Vance County. Heard in the Court of Appeals 7 January 2020.

The Law Office of Colon & Associates, PLLC, by Arlene L. Velasquez-Colon and Kendra R. Alleyne, for Plaintiff-Appellant.

Batten Lee, PLLC, by Michael C. Allen and Matthew D. Mariani, for Defendant-Appellee.

McGEE, Chief Judge.

Nancy Ann Fuller (“Ms. Fuller” or “Plaintiff”) appeals from an order granting partial summary judgment in favor of orthopedic surgeon Rafael E. Negron-Medina, M.D. (“Defendant”). On appeal, Plaintiff argues that the trial court erred by dismissing her *res ipsa loquitur* claim. We affirm.

I. Factual and Procedural Background

Plaintiff filed a complaint on 30 October 2015 against Defendant alleging claims of gross negligence, medical malpractice, and “medical malpractice under the existing doctrine of *res ipsa loquitur*” as a “pleading in the alternative.” The complaint alleged that Defendant performed a left hip replacement surgery on Ms. Fuller, using an anterolateral approach, on 23 October 2013 at Duke LifePoint Maria Parham Medical Center, LLC, in Henderson. Immediately following the surgery, Ms. Fuller complained of “excruciating pain, numbness, loss of sensation and mobility in her lower left extremity, predominately below the left knee, and left foot.” Ms. Fuller’s postoperative symptoms did not improve in the months following the surgery. As a result, Ms. Fuller sought a second opinion in December of 2013 from an orthopedic surgeon who diagnosed her with a nerve injury.

Plaintiff also alleged in her complaint that she underwent a nerve exploration in January 2014 at Duke Raleigh Hospital. After discovering “that a chunk of [Ms. Fuller’s] sciatic nerve was severed and missing, which left a two (2) to two and one-half (2½) centimeter (approximately one inch) gap between the severed ends of the nerve[,]” the surgeon performing the nerve exploration attempted to repair the injury. Following the procedure, Ms. Fuller “noticed an immediate difference in the mobility and feeling of her left leg[;]” however, the “improved result receded over time.” Plaintiff alleged in the complaint that she was “unable to ambulate without the

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assistance of crutches, a walker, or other ambulatory aid” and “will likely be crippled and injured for the remainder of her life as a result of [Defendant’s] botched medical treatment.”

Defendant filed an answer and moved to dismiss Plaintiff’s *res ipsa loquitur* claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on 29 December 2015. A hearing on Defendant’s motion to dismiss was held on 7 January 2016 before Judge Robert H. Hobgood. The trial court denied Defendant’s motion to dismiss by order entered 26 January 2016.

Following discovery, Plaintiff moved for partial summary judgment on 21 June 2017 as to the issue of liability. Defendant moved for summary judgment as to all of Plaintiff’s claims on 26 June 2017. A hearing on the motions was held on 23 July 2018 before Judge Michael L. Robinson. The trial court denied Plaintiff’s motion and granted Defendant’s motion in part by order entered 25 July 2018. Specifically, Defendant’s motion for summary judgment was granted as to Plaintiff’s claims for *res ipsa loquitur*, gross negligence, and medical malpractice to the extent it was based on Defendant’s failure to investigate and follow up on Ms. Fuller’s post-surgical complaints.¹ Plaintiff’s claim for medical malpractice relating to Defendant’s negligent performance of the surgery was the only claim that survived summary

¹ Plaintiff’s medical malpractice claim contained allegations that Defendant both negligently performed her surgery *and* negligently failed to investigate and follow-up on her post-surgical complaints.

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judgment. Plaintiff appeals the order granting in part Defendant's motion for summary judgment.

II. Analysis

Plaintiff argues the trial court erred by granting partial summary judgment in Defendant's favor. Plaintiff's substantive challenge to the trial court's grant of summary judgment is based solely on her *res ipsa loquitur* claim. As an initial matter, however, we must address this Court's jurisdiction.

A. *Jurisdiction*

Plaintiff acknowledges the partial summary judgment order is interlocutory because all her claims have not been resolved; however, she contends that she is entitled to immediate appellate review because a substantial right is affected. *See* N.C. Gen. Stat. §§ 1-277, 7A-27(b)(3)(a) (2019) (providing for immediate appeal of a judicial order or determination that affects a substantial right). Specifically, Plaintiff contends that if she "goes to trial only on the issue of medical malpractice negligence, then she will be subjected to the possibility of separate trials involving the same issues creating the possibility she will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issues."

"The right to avoid one trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal, while the right to avoid the possibility of two trials on the same issues can be such a substantial right." *Green*

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v. Duke Power Co., 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982) (citation omitted).

This Court has explained that

when common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn creates the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.

Davidson v. Knauff Ins. Agency, Inc., 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (1989) (quotation marks, citation, and brackets omitted). To demonstrate this substantial right, an appellant must show that “(1) the same factual issues would be present in both trials *and* (2) the possibility of inconsistent verdicts on those issues exists.” *N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995) (emphasis added) (citation omitted). “Issues are the ‘same’ if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts.” *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011) (citation omitted).

In the present case, Plaintiff’s medical malpractice claim included an alternative claim under the doctrine of *res ipsa loquitur*. Thus, the facts relevant to Plaintiff’s medical malpractice claim tend to overlap with her *res ipsa loquitur* claim. If the alternative negligence theories are not heard together, Defendant could face separate trials on the same factual issues, potentially resulting in inconsistent

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verdicts. As a result, we hold a substantial right is affected and this matter is properly before this Court.

B. Summary Judgment

Plaintiff argues that the trial court erred by granting summary judgment in Defendant's favor on her claim for *res ipsa loquitur*. Additionally, Plaintiff contends that the partial summary judgment order overruled a prior order entered by a different superior court judge.

Summary judgment is properly granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). “An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action.” *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). The burden is on the movant to establish “the lack of a triable issue of fact.” *Sykes v. Keiltex Indus., Inc.*, 123 N.C. App. 482, 484–85, 473 S.E.2d 341, 343 (1996). “If the movant meets its burden, the nonmovant is then required to produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial.” *Thompson v. First Citizens Bank & Trust Co.*, 151 N.C. App. 704, 706, 567 S.E.2d

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184, 187 (2002) (quotation marks, citations, and brackets omitted). “When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party[.]” *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001), and “[a]ll inferences of fact must be drawn against the movant and in favor of the nonmovant,” *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).

“*Res ipsa loquitur* applies when (1) direct proof of the cause of an injury is unavailable, (2) defendant controlled the instrumentality involved in the accident, and (3) ‘the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission.’” *Bluitt v. Wake Forest Univ. Baptist Med. Ctr.*, 259 N.C. App. 1, 4, 814 S.E.2d 477, 480 (2018) (quoting *Grigg v. Lester*, 102 N.C. App. 332, 333, 401 S.E.2d 657, 657–58 (1991)). Our courts apply the *res ipsa loquitur* doctrine in a “somewhat restrictive” manner because

the majority of medical treatment involves inherent risks which even adherence to the appropriate standard of care cannot eliminate. *This, coupled with the scientific and technical nature of medical treatment, renders the average juror unfit to determine whether [a] plaintiff’s injury would rarely occur in the absence of negligence.* Unless the jury is able to make such a determination[, a] plaintiff clearly is not entitled to the inference of negligence *res ipsa [loquitur] affords.*

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Robinson v. Duke Univ. Health Sys., Inc., 229 N.C. App. 215, 225–26, 747 S.E.2d 321, 329–30 (2013) (emphasis added) (quoting *Schaffner v. Cumberland Cnty. Hosp. System*, 77 N.C. App. 689, 692, 336 S.E.2d 116, 118 (1985)).

Accordingly, “because *res ipsa loquitur* is based upon common knowledge and experience,” *Grigg*, 102 N.C. App. at 335, 401 S.E.2d at 659, “this Court has long held the position that in order for *res ipsa loquitur* to apply, the negligence complained of must be of the nature that a jury—through common knowledge and experience—could infer[.]” *Diehl v. Koffer*, 140 N.C. App. 375, 378–79, 536 S.E.2d 359, 362 (2000) (citation omitted). As a result, “[t]his Court has consistently reaffirmed that *res ipsa loquitur* is inappropriate in the usual medical malpractice case, where the question of injury and the facts in evidence are peculiarly in the province of expert opinion.” *Bowlin v. Duke Univ.*, 108 N.C. App. 145, 149–50, 423 S.E.2d 320, 323 (1992) (citation omitted). “In accordance with this principle, our Court will affirm the dismissal of medical negligence complaints based on the *res ipsa loquitur* doctrine where both the standard of care and its breach must be established by expert testimony.” *Bluitt*, 259 N.C. App. at 6, 814 S.E.2d at 481.

In the present case, in an affidavit, Plaintiff’s expert witness Dr. Clifford R. Wheelless expressed his opinion that “Ms. Fuller sustained a very serious nerve injury known as neurotmesis to the tibial branch of her sciatic nerve from some type of blunt force trauma from some type of surgical instrument during this surgery[.]”

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Defendant's expert witness, Dr. Richard D. Bey, testified that in his opinion, Ms. Fuller's injury resulted from stretch injuries, namely neuropraxia and axonotmesis.² Dr. Thomas K. Fehring, another expert witness for Defendant, testified that in his opinion, Ms. Fuller's injury resulted from a retractor.

Moreover, in the opinion of Dr. Wheelless, the injuries Ms. Fuller sustained to her sciatic nerve are "extremely rare, and almost unheard of" and are not a known complication within the standard of care inherent with that type of surgery. Dr. Fehring refused to attribute Ms. Fuller's injury to negligence or recklessness on behalf of Defendant; instead, Dr. Fehring testified that Ms. Fuller's injury was "unfortunate." In the opinion of Dr. Sonny B. Bal, another one of Plaintiff's expert witnesses, Ms. Fuller's injury "is not merely an extremely rare complication but literally unheard of, completely avoidable, and there is absolutely no reason Ms. Fuller should have sustained such an injury given it is outside the anatomical field of surgery, absent negligence." Dr. Shawn Hocker, Defendant's expert witness, testified that every surgeon deviates from the anatomical field of surgery to "redirect" and "reposition retractors to optimize your exposure."

² Dr. Bey explained that there are three degrees of nerve injuries. The first, neuropraxia, is a "stretch injury" that most patients recover from within days or weeks. The second form, axonotmesis, results when "long tracts of axons are disrupted so they have to regenerate and grow back down those tubes that are still intact." The third and "worst injury is one called neurotmesis," resulting when the nerve is actually cut and the nerve "can't find its way to grow down those columns of fascicles because it's disrupted."

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Because even medical experts could not agree upon the cause of Ms. Fuller's injury, the average juror would not be able to infer that an injury to the sciatic nerve during a total hip replacement using an anterolateral approach was the result of a negligent act. *See Bowlin*, 108 N.C. App. at 149, 423 S.E.2d at 323 ("It is our opinion that injury to the sciatic nerve during a bone marrow harvest procedure is peculiarly the subject of expert opinion, and a layman would have no basis for concluding that defendant was negligent in extracting the marrow."). Indeed, Dr. Albert R. Harris, the surgeon who conducted Ms. Fuller's nerve exploration, testified that it would be "inappropriate" for him to testify regarding Defendant's compliance or lack of compliance with the standard of care because he has "no familiarity with the procedure that [Defendant] performed, [he's] not an orthopedic surgeon, [he doesn't] know anything about hip replacements" and he "would not be able to say with any medical certainty whether this was a known complication of the procedure or not." Thus, in this case, "expert testimony was not only proper but necessary." *Diehl*, 140 N.C. App. at 380, 536 S.E.2d at 363. "As such, because there was conflicting expert testimony as to [D]efendant's negligence, we cannot therefore hold that 'the injury is one that would not ordinarily occur in the absence of some negligent act or omission' by [D]efendant." *Id.* (citing *Grigg*, 102 N.C. App. at 333, 401 S.E.2d at 658) (brackets omitted).

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As a result, we hold the trial court did not err in granting summary judgment in Defendant's favor as to Plaintiff's *res ipsa loquitur* claim. And since Plaintiff cannot pursue a *res ipsa loquitur* claim, it is immaterial whether, as Plaintiff asserts, the trial court's grant of summary judgment was seemingly inconsistent with a prior superior court judge's denial of Defendant's motion to dismiss.

III. Conclusion

For the reasons discussed above, we affirm the trial court.

AFFIRMED.

Judges DIETZ and YOUNG concur.

Report per Rule 30(e).