IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-357

No. COA20-480

Filed 20 July 2021

Durham County, No. 19-CVS-2277

CANDICE BATTS, Plaintiff,

v.

IDEAL IMAGE CLINICS, PLLC D/B/A IDEAL IMAGE, DURHAM JOHN DOE 1 and JOHN DOE 2, Defendants,

Appeal by Plaintiff from order entered 8 October 2019 by Judge Josephine Kerr Davis in Durham County Superior Court. Heard in the Court of Appeals 24 March 2021.

Webb Shackleford PLLC, by Monica Webb-Shackleford and The Hunt Law Firm, by Anita Hunt, for the Plaintiff-Appellant

Lincoln Derr PLLC, by Sara R. Lincoln and Heather C. Fuller, for the Defendants-Appellees

DILLON, Judge.

I. Background

¶ 1 Plaintiff Candice Batts brought this medical malpractice action against Defendant Ideal Image Clinics, PLLC, ("Ideal") when she was allegedly injured during a laser hair removal procedure. During her procedure, she noticed a burning

smell followed by a spark and smoke.

¶ 2 Batts bases her action on four theories: (1) negligence, (2) gross negligence, (3) negligence per se, and (4) *res ipsa loquitor*. Ideal moved to dismiss pursuant to Rule 12(b)(6) of our Rules of Civil Procedure. The trial court granted the motion and dismissed the case. Batts timely appealed.

II. Argument

A. Standard of Review

¶ 3 When a claim is dismissed pursuant to Rule 12(b)(6), the appropriate standard of review is whether the allegations, treated as true, are sufficient to state a claim upon which relief may be granted. *Lynn v. Overlook Dev.,* 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991). A ruling on a motion to dismiss under Rule 12(b)(6) is reviewed *de novo*. *Sykes v. Health Network Sols., Inc.,* 372 N.C. 326, 332, 828 S.E.2d 467, 471 (2019).

B. Ordinary Negligence

¶ 4 Batts first asserts that the trial court erred by dismissing her ordinary negligence claim, when it found that her factual allegations failed to state a claim for medical malpractice. We disagree.

¶ 5 "Whether an action is treated as a medical malpractice action or as a common law negligence action is determined by our statutes[.]" *Smith v. Serro*, 185 N.C. App. 524, 529, 648 S.E.2d 566, 569 (2007). As per our General Statutes, a claim under

medical malpractice *shall be dismissed unless*:

> (1) The pleading specifically asserts that the medical care . . . ha[s] been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
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> (2) The pleading specifically asserts that the medical care . . . ha[s] been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2016). The appropriate standard of review of a trial court's analysis of a plaintiff's compliance with Rule 9(j) is *de novo*. *Phillips v. A Triangle Women's Health Clinic*, 155, N.C. App. 372, 376, 573 S.E.2d 600, 604 (2002).

¶ 6 A medical malpractice action is defined as "[a] civil action for damages for personal injury or death arising out of the furnishing or 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) (2016) (emphasis added). Under the same statute, a "health care provider" is someone who "is licensed or is otherwise registered to engage in the practice of medicine. *Id.* § 90-21.11(1)(a). And "professional

services", according to our caselaw, are acts or services "arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual." *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 628, 652 S.E.2d. 302, 305 (2007) (citation omitted).

¶ 7 Briefly stated, in medical malpractice claims the injury must stem from activities that "required clinical judgment and intellectual skill." *Gause v. New Hanover Reg'l Led. Ctr.*, 251 N.C. App. 413, 418, 795 S.E.2d 411, 415 (2016). Inversely, in ordinary negligence claims, injury stems from "acts and omissions in a medical setting that were primarily manual or physical and which did not involve a medical assessment or clinical judgment." *Id.* at 418, 795 S.E.2d at 415; *see also Goodman v. Living Centers-Southeast, Inc.*, 234 N.C. App. 330, 333, 759 S.E.2d 676, 679 (2014) (stating that medical malpractice is applicable when an injury is the result of the exercise of "specialized knowledge, labor, or skill," while ordinary negligence applies to injury during activities that are "primarily 'physical or manual.' ").

¶ 8 We hold that Batts' allegations involve medical judgment in determining the likelihood of injury resulting from the use of a laser during treatment. Therefore, Batts' complaint should have been for medical malpractice, which requires a certification as outlined in Rule 9(j). It is undisputed that Batts did not include a Rule 9(j) certification with her complaint. Accordingly, we conclude that the trial

court correctly dismissed her complaint.

C. *Res Ipsa Loquitur*

¶ 9 Batts also alleges that Defendant's negligent acts constitute *res ipsa loquitur*.

¶ 10 The doctrine of *res ipsa loquitur* applies when (1) there is no proof of the cause of injury available, (2) the instrumentality involved in the accident is under the defendant's exclusive control, and (3) the injury is of a type that does not ordinarily occur in the absence of negligence. *Howie v. Walsh*, 168 N.C. App. 694, 698, 609 S.E.2d. 249, 251 (2005). This doctrine should be restrictively used because "an average juror must be able to infer, through his common knowledge and experience and without the assistance of expert testimony, whether negligence occurred." *Hayes v. Peters*, 184 N.C. App. 285, 287, 645 S.E.2d 846, 848 (2007).

¶ 11 Here, we find issue with the first element, which requires "no proof of the cause of injury available." Batts' complaint provides that there was a "burning smell followed by a spark and smoke" while she was undergoing her treatment. Further, she explicitly states that the treatment resulted in a hole being burned into her skin.

¶ 12 This case is directly analogous to *Yorke v. Novant Health, Inc.*, where the plaintiff offered proof that the cause of injury to his arm was from a blood pressure cuff. 192 N.C. App 340, 353, 666 S.E.2d 126, 136 (2008). The Court determined that "[w]hen a plaintiff offers direct evidence of the negligence that led to his injury, the doctrine of res ipsa loquitur is inapplicable." *Id.* at 353, 666 S.E.2d at 136.

¶ 13 The doctrine also fails when considering whether an average juror would be capable of determining whether Batts' injury was the result of a negligent act on the part of defendant. Laser hair removal procedures are outside of common knowledge, experience, and sense of a layperson. Without expert testimony, a layperson would not be in an appropriate position to determine whether Batts' burn injury would normally occur in the absence of negligence.

III. Conclusion

¶ 14 We hold that the allegations set forth in Batts' complaint sound in medical malpractice. Therefore, her complaint is subject to the pleading requirements set forth in N.C. Gen. Stat. § 1A-1, Rules 9(j)(1) and (2), which she failed to satisfy. Further, we hold that the doctrine of *res ipsa loquitur* is not applicable.

AFFIRMED.

Judges ZACHARY and COLLINS concur.

Report per Rule 30(e).