NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

KATHLEEN CARELLI Appellant v. ST. CLAIR MEMORIAL HOSPITAL AND/OR DR. ANTHONY SCALDIONE Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 467 WDA 2013

Appeal from the Order February 11, 2013
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): G.D.-99-6509

BEFORE: BENDER, P.J.E., LAZARUS, J., and MUNDY, J.

MEMORANDUM BY MUNDY, J.: FILED: January 24, 2014

Appellant, Kathleen Carelli, appeals from the February 11, 2013 order granting the motion for judgment on the pleadings filed by Appellees, St. Clair Memorial Hospital and/or Dr. Anthony Scaldione, and dismissing Appellant's second amended complaint with prejudice. After careful review, we affirm.

This case involved a medical professional liability action arising out of care and treatment of Appellant by Dr. Scaldione at St. Clair Memorial Hospital, on May 7, 1982. Appellant claims to have suffered multiple injuries as a result of Appellees' alleged mistreatment of her "massive postpartum hemorrhage." ***See*** Second Amended Complaint, 6/4/04, at ¶¶ 1-5, 14-25.

The trial court summarized the pertinent procedural history of this case as follows.

> A Writ of Summons was initially filed on April 30, 1999, thus commencing this matter. A Complaint was filed some four (4) years later, on December 30, 2003. Preliminary Objections were filed and ultimately disposed of on August 23, 2004. The majority of Preliminary Objections were overruled and [Appellees] filed their Answer on September 1, 2004. [Appellant] filed an answer to New Matter on September 9, 2004. The case remained dormant from September of 2004 until [Appellees] filed a Motion for Summary Judgment on the Pleadings [o]n November[19,] 2012.

Trial Court Opinion, 5/1/13, at 2-3.

Following a hearing, the trial court entered an order on February 11, 2013, granting Appellees' motion for judgment on the pleadings and dismissing Appellant's second amended complaint with prejudice. This timely appeal followed on March 13, 2013. Thereafter, on March 14, 2013, the trial court ordered Appellant to file a concise statement of errors complained of on appeal, in accordance with Pa.R.A.P. 1925(b), within 21 days. On April 4, 2013, Appellant filed a timely Rule 1925(b) statement, asserting no less than 26 intertwined claims of error. The trial court subsequently filed its Rule 1925(a) opinion on May 1, 2013.[1]

On appeal, Appellant raises the following issues for our review.

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[1] On July 31, 2013, Appellant filed a motion to strike Appellees' brief for various purported defects, which was ultimately denied by this Court on December 12, 2013.

> I. Did [the trial court] commit reversible error by ruling that [Appellant's] breach of contract claim which was timely filed within the limits of 42 Pa.C.S.A. [§ 5525(3)(4)] against [Appellee] Hospital must be filed as a medical negligence tort claim which was too late within a two year tort limitations which he does not identify[?]
>
> II. Did [the trial court] commit reversible error when [it] ruled the present claims are the same as those presented in 1987 at G.D. 87-216973[?]

Appellant's Brief at 2.

Preliminarily, we note that Appellant's brief to this Court fails to comply with the Pennsylvania Rules of Appellate Procedure in numerous respects. Generally, parties to an appeal are required to submit briefs in conformity, in all material respects, with the requirements of the Rules of Appellate Procedure, as nearly as the circumstances of the particular case will admit. ***See*** Pa.R.A.P. 2101. Included in these Rules is the requirement that an appellant's "statement of the case shall not contain any argument." Pa.R.A.P. 2117(b). Instantly, Appellant's "Statement of the Case" is peppered with argument. ***See*** Appellant's Brief at 3-9.

Moreover, the Rules of Appellate Procedure require that "[t]he argument shall be divided into as many parts as there are questions … followed by such discussion and citation of authorities as are deemed pertinent." Pa.R.A.P. 2119(a). Herein, our review of the claims raised by Appellant in her "Statement of Questions Involved" reveals that they fail to correspond with those raised in the "Argument" section of her appellate

brief. Specifically, Appellants' argument is divided into four distinct headings. ***See*** Appellant's Brief at 11, 22, 24, and 26. The "Statement of Questions Involved" section in Appellant's brief, however, presents the two aforementioned issues for our review. ***Id.*** at 2.

"This Court may quash or dismiss an appeal if the appellant fails to conform to the requirements set forth in the Pennsylvania Rules of Appellate Procedure." ***In re Ullman***, 995 A.2d 1207, 1211 (Pa. Super. 2010) (citation omitted), *appeal denied*, 20 A.3d 489 (Pa. 2011). Additionally, we "will not act as counsel and will not develop arguments on behalf of an appellant." ***In re R.D.***, 44 A.3d 657, 674 (Pa. Super. 2012) (citation omitted), *appeal denied*, 56 A.3d 398 (Pa. 2012). Nevertheless, to the extent that we are able to discern Appellant's claims, and our appellate review is not impeded, we shall proceed to address them on the merits. ***See Rabutino v. Freedom State Realty Co., Inc.***, 809 A.2d 933, 937 n.3 (Pa. Super. 2002).

We being by noting that "[a]ppellate review of an order granting a motion for judgment on the pleadings is plenary." ***Wachovia Bank, N.A. v. Ferretti***, 935 A.2d 565, 570 (Pa. Super. 2007) (citations omitted). This Court has recognized that our review is limited to the following.

> [D]etermining whether the trial court committed an error of law or whether there were facts presented which warrant a jury trial. In conducting this review, we look only to the pleadings and any documents properly attached thereto. Judgment on the pleadings is proper only where the pleadings

> evidence that there are no material facts in dispute such that a trial by jury would be unnecessary.

Bowman v. Sunoco, Inc., 986 A.2d 883, 886 (Pa. Super. 2009) (citation omitted), *affirmed*, 65 A.3d 901 (Pa. 2013).

Appellant first argues the trial court erred in granting Appellees' motion for judgment on the pleadings on the basis that her causes of action for breach of express and implied contract were time-barred by the then-applicable two-year statute of limitations for medical malpractice claims.[2] Appellant's Brief at 11. Appellant maintains that her relationship with Appellees was "contractual in nature[,]" the breach of contract claims raised in her second amended complaint were timely filed under 42 Pa.C.S.A. § 5525(3) and (4), and the trial court committed reversible error in

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[2] The then-applicable statute of limitations for medical malpractice actions was set forth in 42 Pa.C.S.A. § 5524 and provided, in relevant part, as follows.

> **§ 5524. Two year limitation**
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> The following actions and proceedings must be commenced within two years:
>
> …
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

42 Pa.C.S.A. § 5524(2).

characterizing said causes of action as medical negligence claims. ***Id.*** at 11-12, 18, 20-21. For the following reasons, we disagree.

In the instant matter, the trial court stated the following in support of its decision to grant Appellees' motion for judgment on the pleadings, and dismiss Appellant's second amended complaint with prejudice.

> The pleadings reveal [Appellant] was treated at St. Clair Hospital on May 7, 1982. [Appellant] claims that she did not know of the professional negligence purportedly committed there against her until 1996. It is clear, however, that the instant lawsuit was not commenced until April 30, 1999. [Appellant]'s claim thus falls outside of the two (2) year Statute of Limitations for medical malpractice lawsuits.
>
> [Appellant]'s Second Amended Complaint advances a single count claiming in "Assumpsit Against St. Clair Hospital." This count purports to allege breaches of express and implied contract, fraud, negligence and violations of EMTALA, 42 U.S.C. § 1395. As noted above, any negligence claim is barred by the applicable Statute of Limitations.
>
> The law is clear that [Appellant] cannot assert a medical negligence claim in the form of a breach of contract claim. There is nothing pled to support the existence of an express written contract between [Appellant] and either [Appellee].

Trial Court Opinion, 5/1/13, at 3 (citations to case law omitted).

Upon careful review, we discern no error on the part of the trial court in reaching these conclusions. The distinction between a claim of medical negligence and that sounding in breach of contract is well settled. A medical malpractice claim based in negligence asserts "a negligent or unskillful

performance by a physician of the duties which are devolved and incumbent upon him on account of his relations with his patients, or of a want of proper care and skill in the performance of a professional act." ***Vazquez v. CHS Professional Practice, P.C.***, 39 A.3d 395, 397 (Pa. Super. 2012) (citation omitted).

> Because medical malpractice is a form of negligence, to state a *prima facie* cause of action, a plaintiff must demonstrate the elements of negligence: a duty owed by the physician to the patient, a breach of that duty by the physician, that the breach was the proximate cause of the harm suffered, and the damages suffered were a direct result of harm.

Quinby v. Plumsteadville Family Practice, Inc., 907 A.2d 1061, 1070 (Pa. 2006) (citations and quotation marks omitted).

Conversely, a claim sounding in breach of contract requires "(1) the existence of a contract, (2) a breach of a duty imposed by the contract, and (3) damages. While every element must be pled specifically, it is axiomatic that a contract may be manifest orally, in writing, or as an inference from the acts and conduct of the parties." ***Sullivan v. Chartwell Inv. Partners, LP***, 873 A.2d 710, 716 (Pa. Super. 2005) (citation and internal quotation marks omitted).

This Court has long recognized "where a complaint is predicated upon facts constituting medical treatment, that is, when it involves diagnosis, care and treatment by licensed professionals," as is the case herein, "**the action must be characterized as a professional negligence action**." ***Yee v.***

Roberts, 878 A.2d 906, 912 (Pa. Super. 2005) (citations and internal quotation marks omitted; emphasis added), *appeal denied*, 901 A.2d 499 (Pa. 2006). Furthermore, as the trial court properly recognized, an appellant may not sustain a cause of action for breach of contract relating to negligent medical care absent an express written contract. ***See Mason v. Western Pennsylvania Hospital***, 428 A.2d 1366, 1368 (Pa. Super 1981), *vacated on other grounds*, 453 A.2d 974 (Pa. 1982) (allowing for an assumpsit action where a physician or healthcare provider binds itself by an express contract to obtain specific results by treatment or an operation, provided this guaranty is supported by separate consideration). Nonetheless, "in absence of a special contract, a physician neither warrants a cure nor guarantees the result of treatment." ***Jistarri v. Nappi***, 549 A.2d 210, 215 (Pa. Super. 1988), *citing* ***Collins v. Hand***, 246 A.2d 398, 401 (Pa. 1968).

Based on the foregoing, we discern no error on the part of the trial court in concluding that Appellant failed to set forth a cognizable claim for breach of express or implied contract under the circumstances of this case. Thus, the trial court properly concluded that said claims were time-barred by the then-applicable two-year statute of limitations for medical malpractice claims.

We now turn to Appellant's claim that the trial court erred in noting, albeit parenthetically, "that Appellant's claims here are the same as those

subject to the Grant of Non-Suit at G.D. 1987-21697 by the Honorable Alan Penkower many years ago." ***See*** Appellant's Brief at 22, *quoting* Trial Court Opinion, 5/1/13, at 3. For the following reasons, we disagree.

Under the doctrine of *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that [same cause of] action…." ***In re Stevenson***, 40 A.3d 1212, 1222 (Pa. 2012) (citation omitted). The purpose of the doctrine is "to conserve limited judicial resources, establish certainty and respect for court judgments, and protect the party relying upon the judgment from vexatious judgment." ***Radakovich v. Radakovich***, 846 A.2d 709, 715 (Pa. Super. 2004) (citation omitted). The doctrine of *res judicata* applies when two actions possess the "(1) identity of the thing sued upon; (2) identity of the cause of action; (3) identity of the parties; (4) identity of the capacity of the parties." ***Branham v. Rohm and Haas Co.***, 19 A.3d 1094, 1108-1109 (Pa. Super. 2011) (citation omitted), *appeal denied*, 42 A.3d 289 (Pa. 2012). "In determining whether *res judicata* should apply, a court may consider whether the factual allegations of both actions are the same, whether the same evidence is necessary to prove each action and whether both actions seek compensation for the same damages." ***Kelly v. Kelly***, 887 A.2d 788, 792 (Pa. Super. 2005) (citation omitted), *appeal denied*, 905 A.2d 500 (Pa. 2006). Lastly, we note that, "the doctrine

must be liberally construed and applied without technical restriction." ***Radakovich***, ***supra*** (citation omitted).

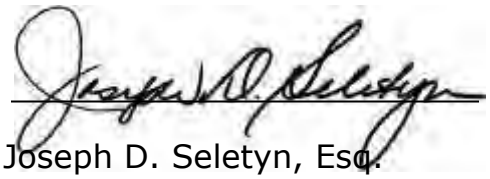
Instantly, our review of the evidentiary record reveals that the claims alleged in Appellant's instant complaint refer to the same conduct and damages that underpinned the prior action at docket number G.D. 87-21697. ***See*** Appellee's Motion for Judgment on the Pleadings, 11/19/12, Exhibit B – Civil Complaint, No. G.D. 87-21697. Hence, we agree with the trial court that Appellant's actions possess the four common elements required by the doctrine of *res judicata*. ***See Branham***, ***supra***. Notably, Appellant's current action against Appellees arises from the same set of facts and circumstances as her prior action at G.D. 87-21697. Similarly, Appellant identifies the same damages and injuries that she identified at G.D. 87-21697. Although Appellant couches her causes of action in the instant case using different terminology, the averments contained within her complaint reveal her intention to re-litigate issues that were, or could have been, raised in the prior action. We note, "[a]lthough [] two lawsuits embody differently entitled causes of action [], we cannot and will not elevate form over substance." ***Chada v. Chada***, 756 A.2d 39, 43 (Pa. Super. 2000) (citation and internal quotation marks omitted). "[B]y varying the form of action or adopting a different method of presenting [her] case," this Court has long recognized that an appellant "cannot … escape the operation of the principle that one and the same cause of action shall not be twice litigated."

Kelly, ***supra*** (citation and emphasis omitted). Accordingly, Appellant's claim of trial court error in this regard must fail.

For all the foregoing reasons, we affirm the trial court's February 11, 2013 order granting Appellees' motion for judgment on the pleadings, and dismissing Appellant's second amended complaint with prejudice.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/24/2014