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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1096

Filed: 18 June 2019

Hertford County, No. 16 CVS 155

BRENDA FENNELL, Administratrix of the Estate of CLAUDE MCKINLEY FENNELL, Plaintiff,

v.

EAST CAROLINA HEALTH d/b/a VIDANT ROANOKE-CHOWAN HOSPITAL, DARLA K. LILES, M.D., and VIDANT MEDICAL CENTER, Defendants.

Appeal by plaintiff from orders entered 13 March 2018 and an order and judgment entered 3 April 2018 by Judge Beecher R. Gray in Hertford County Superior Court. Heard in the Court of Appeals 7 May 2019.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

Harris, Creech, Ward & Blackerby, PA, by Jay C. Salsman, C. David Creech and Christina J. Banfield, for defendant-appellee East Carolina Health, d/b/a Vidant Roanoke-Chowan Hospital.

Batten Lee, PLLC, by Kari R. Johnson, Randolph L. Lee and Gloria T. Becker, for defendant-appellee Darla K. Liles.

TYSON, Judge.

Brenda Fennell ("Plaintiff"), as administratrix of the estate of Claude McKinley Fennell ("Mr. Fennell"), appeals from directed verdict orders and judgment entered upon a jury's verdict finding the death of Mr. Fennell was not caused by the negligence of Defendant Darla K. Liles, M.D. ("Dr. Liles"). We affirm the trial court's directed verdict orders. In the absence of arguments brought forth on appeal to challenge the jury's verdict, we also find no error in the jury's verdict or in the judgment entered thereon

I. Background

Mr. Fennell, age 54, went to Vidant Roanoke-Chowan Hospital ("Vidant") on 28 February 2014, complaining of shortness of breath, nausea, chills, and fever. He was diagnosed with anemia, hypoxia, and pneumonia and admitted to the hospital. He received a blood transfusion, which reduced his complaints, and was discharged the next day. His symptoms returned, along with a feeling of fatigue, and he was readmitted to Vidant about two weeks later on 10 March 2014. He received another blood transfusion, which again alleviated his symptoms. He was discharged on 14 March 2014 and was prescribed medication for suspected pneumonia.

Mr. Fennell presented to and was examined by Dr. Liles on 26 March 2014. Dr. Liles met with hematology and oncology patients once a week at Vidant's outreach clinic. Dr. Liles reviewed Mr. Fennell's previous hospitalization records and ordered

blood work. Mr. Fennell's blood work indicated improvement since his hospitalization, though some of his values tested abnormal.

Dr. Liles indicated Mr. Fennell's blood work was consistent with someone who was recovering from a severe illness. In her medical report, Dr. Liles indicated her desire for Mr. Fennell to return for additional blood work in a few weeks to "make sure he continue[d] to respond and normalize," and would conduct further testing depending on the results.

Dr. Liles consulted with Dr. Ballance, the director of the laboratory at Vidant, concerning Mr. Fennell's blood smear. Dr. Ballance indicated Dr. Liles may consider ordering a bone marrow test for Mr. Fennell, if she "felt clinically it was indicated." Based upon Mr. Fennell's ongoing recovery from a severe illness, and his apparent improvement without a transfusion, Dr. Liles testified she did not think it was clinically appropriate to have Mr. Fennell drive out to Greenville for an emergency bone marrow test. Dr. Ballance also testified that Mr. Fennell's blood smear was insufficient to diagnose leukemia.

In early May 2014, Mr. Fennell was again complaining of his previous symptoms, as well as a pain in his side. Mr. Fennell presented to Vidant Medical Center ("VMC") in Greenville, where he was admitted on 7 May 2014. A bone marrow biopsy was performed on 8 May 2014. As a result, Mr. Fennell was diagnosed with Acute Myeloid Leukemia ("AML").

Mr. Fennell was treated with chemotherapy following his diagnosis. A bone marrow test performed on 21 May 2014 revealed no sign of leukemia in his blood. In the days prior to his death, Mr. Fennell was being treated for infection and internal bleeding. On 24 May 2014, Mr. Fennell experienced a severe hemorrhage and cardiac arrest and died. The recorded cause of death was acute hemorrhage.

Plaintiff filed this action on 20 September 2016, as administratrix of Mr. Fennell's estate. Plaintiff alleged claims of fraudulent concealment and medical malpractice/wrongful death against Defendants: Vidant, Dr. Liles and VMC. Plaintiff asserted the pathologist at Vidant had informed Dr. Liles the 26 March 2014 blood smear indicated Mr. Fennell had leukemia, and Dr. Liles had concealed the information, knowing the condition was potentially life-threatening. Plaintiff also asserted the negligence of Dr. Liles was imputed to the corporate Defendants under apparent agency and was the direct and proximate cause of Mr. Fennell's death.

The case was called for trial by jury on 26 February 2018. At the close of Plaintiff's evidence, Defendants moved for directed verdict. The trial court granted the motion for directed verdict regarding Plaintiff's claim for fraudulent concealment on 13 March 2018. At the close of all evidence, Defendants renewed their motion for directed verdict on the remaining issues. The trial court granted their motion as to Plaintiff's claim for punitive damages and gross negligence.

The medical malpractice/wrongful death claim was submitted to the jury. The jury's verdict sheet presented three issues:

> Issue One: Was the death of the decedent, Claude McKinley Fennell, caused by the negligence of the Defendant, Darla K. Liles, M.D.?
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> . . .
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> Issue Two: Did Claude McKinley Fennell, by his own negligence, contribute to his death?
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> . . .
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> Issue Three: Was Darla K. Liles, M.D. an apparent agent of East Carolina Health d/b/a Vidant Roanoke-Chowan Hospital at the time that medical services were rendered to the decedent, Claude McKinley Fennell, on March 26, 2014?

The jury answered "No" to the first issue, which negated the need for any answer for the following two issues. An order and judgment in favor of Defendants, dismissing Plaintiff's complaint with prejudice, was filed on 3 April 2018. Plaintiff appealed the orders for directed verdict and the order and judgment entered following the jury's verdict.

II. Jurisdiction

An appeal of right lies to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017).

III. Issues

Plaintiff argues the trial court erred by: (1) applying the wrong standard in granting Defendants' motions for directed verdict "in the exercise of [its] discretion;" and, (2) granting Defendants' motions when sufficient evidence of fraud was presented to submit the issue to the jury. Plaintiff also argues that if this Court reverses the trial court's grant of Defendants' motions for directed verdict, the claim for punitive damages must also be reinstated. Plaintiff also asserts Vidant is liable for fraudulent concealment based upon apparent agency.

IV. Standard of Review

Although Plaintiff's notice of appeal includes the order and judgment entered following the jury's verdict, the only issues argued before this Court relate to the trial court's grant of Defendants' motions for directed verdict. Plaintiff's failure to bring forth arguments to challenge the judgment entered upon the jury's verdict waives and abandons any preservation of error. N.C. R. App. P. 28.

A movant asserting a motion for directed verdict tests whether the evidence is sufficient to submit an issue to the jury. N.C. Gen. Stat. § 1A-1, Rule 50 (2017); *Clark v. Perry*, 114 N.C. App. 297, 304, 442 S.E.2d 57, 61 (1994) ("In considering a motion for directed verdict, the task of the trial court is to determine whether the evidence, viewed in the light most favorable to the non-movant, is sufficient to submit the case to the jury.").

On appeal, this Court reviews the trial court's ruling on a motion for directed verdict *de novo*. *Denson v. Richmond Cty.*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003).

V. Analysis

Plaintiff asserts the trial court applied the incorrect standard in granting the Defendants' motions for directed verdict because the trial judge included the phrase "in the exercise of my discretion" in each order. Viewing the evidence in the light most favorable to Plaintiff, the trial court did not err in granting Defendants' motions for directed verdict. *See Perry*, 114 N.C. App. at 304, 442 S.E.2d at 61.

A. Fraudulent Concealment

A claim for fraudulent concealment can be based on actual or constructive fraud. *Watts v. Cumberland Cty. Hosp. Sys., Inc.*, 317 N.C. 110, 115, 343 S.E.2d 879, 883 (1986). "Actual fraud is the more common type, arising from arm's length transactions." *Terry v. Terry*, 302 N.C. 77, 82, 273 S.E.2d 674, 677 (1981). There are five essential elements to support a claim for actual fraud: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Id.* at 83, 273 S.E.2d at 677.

In comparison, "[c]onstructive fraud arises where a confidential or fiduciary relationship exists, and its proof is less 'exacting' than that required for actual fraud."

Watts, 317 N.C. at 115-16, 343 S.E.2d at 884 (citation omitted). A fiduciary relationship exists between a doctor and a patient. *Id.* at 116, 343 S.E.2d at 884.

In a claim for constructive fraud:

> It is necessary for plaintiff to allege the facts and circumstances (1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.

Rhodes v. Jones, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950). Plaintiff has asserted claims for both actual and constructive fraud. Viewing the evidence in the light most favorable to Plaintiff, her claim fails as a matter of law under either theory of fraud.

1. Actual Fraud

A claim of actual fraud requires fraudulent intent. The claim fails where a diagnosis or other information is unknown to a doctor. *Watts v. Cumberland Cty. Hosp. Sys., Inc.*, 74 N.C. App. 769, 775, 330 S.E.2d 256, 261 (1985), *rev'd in part on other grounds*, 317 N.C. 110, 343 S.E.2d 879 (1986).

The plaintiff in *Watts* was injured in an automobile accident. *Watts*, 317 N.C. at 111, 343 S.E.2d at 881. The plaintiff was treated for back pain for six years by multiple doctors. *Id.* at 111-15, 343 S.E.2d at 881-83. A CT-scan performed five years after the accident revealed fractures in two of the plaintiff's vertebra. *Id.* at 113, 343 S.E.2d at 882. The plaintiff brought a complaint for fraudulent concealment, which alleged multiple doctors had "made false representations that were intended to

prevent plaintiff from discovering that the fracture had been overlooked at the initial examination, and which ultimately concealed from plaintiff the true nature and extent of her injuries." *Watts*, 74 N.C. App. at 773, 330 S.E.2d at 260. The plaintiff asserted X-rays taken shortly after the accident revealed multiple fractures.

This Court affirmed the trial court's grant of summary judgment for five of the plaintiff's treating physicians:

> The allegations and proof as to [these five doctors] show only that at a point after they had completed treating the plaintiff, another doctor rendered an opinion different from theirs. There is no allegation or indication that these five doctors ever reviewed the original x-rays or consulted with one another. The evidence is uncontroverted that at the time [these five doctors] were involved with the care of plaintiff, no doctor had rendered an opinion or diagnosis that plaintiff had sustained fractures of her neck and/or spine in 1974. *We fail to see how these doctors could have fraudulently concealed information from the plaintiff that was unknown to them*. The forecast of evidence leads inevitably to the conclusion that the plaintiff continues to rest her case as to these five doctors exclusively on *wholly unsupported conclusory allegations of fraudulent concealment*. We conclude that no triable issue of fact exists on plaintiff's claim of fraud, and as to [these five doctors], the summary judgment must be affirmed.

Id. at 774-75, 330 S.E.2d at 261 (emphasis supplied).

This Court reversed the trial court's grant of summary judgment as to two other doctors, after concluding issues of material fact existed concerning whether they "knew of [the] plaintiff's true condition." *Id.* at 775, 330 S.E.2d at 261. The Supreme Court reversed, and distinguished between a breach of duty and fraud:

"Merely to allege that those physicians breached a duty to examine the X rays and to discover the breaks (if any) is insufficient to withstand a motion for summary judgment on charges of fraud." *Watts*, 317 N.C. at 117, 343 S.E.2d at 885.

In addition, even though the plaintiff's doctors "concluded that plaintiff's pain had at least some psychological underpinnings, such conclusions, while arguably offensive to the patient, appear to have been legitimate medical opinions." *Id.* at 118, 343 S.E.2d at 885. Legitimate medical opinions "cannot sustain the indispensable element of intentional deceit to a claim of relief sounding in fraud." *Id.*

Like the physicians in *Watts*, no evidence was presented to establish Dr. Liles knew Mr. Fennell had AML, let alone knowingly concealed material information from him. In her complaint, Plaintiff alleges the pathologist at Vidant communicated with Dr. Liles that Mr. Fennell's blood smear showed he had AML. This allegation is not born out by the evidence.

Dr. Ballance, the director of the laboratory at Vidant, testified he did not see any evidence of AML, nor did he communicate such an opinion to Dr. Liles. Dr. Ballance suggested Dr. Liles to consider ordering a bone marrow biopsy only if she felt it was clinically indicated. Dr. Liles testified: "on this day, there was [*sic*] no indicators that Mr. Fennell had acute leukemia. In fact I will attest that he did not have acute leukemia." Plaintiff's medical experts also testified it is not certain Mr. Fennell had AML on 26 March 2014. Like the doctors in *Watts*, it was impossible for

Dr. Liles to conceal information she did not have. *See Watts*, 74 N.C. App. at 774-75, 330 S.E.2d at 261.

On appeal, Plaintiff now argues Dr. Liles fraudulently concealed Mr. Fennell's lab test results. Presuming, *arguendo*, this theory is preserved on appeal, Plaintiff's claim still fails. Dr. Liles' medical opinion concerning Mr. Fennell's blood smear on 26 March 2014 concluded his abnormal blood work was consistent with Mr. Fennell recovering from a severe illness from pneumonia and other maladies. Dr. Liles requested follow-up testing for continued monitoring. The evidence presented is insufficient to meet the element of intentional deceit. *See Watts*, 317 N.C. at 118, 343 S.E.2d at 885. Plaintiff's arguments are overruled.

2. Constructive Fraud

Intent to deceive is not an element of a claim of constructive fraud. *Forbis v. Neal*, 361 N.C. 519, 529, 649 S.E.2d 382, 388 (2007). Rather, where a "superior party obtains a possible benefit through the alleged abuse of the confidential or fiduciary relationship, the aggrieved party is entitled to a presumption that constructive fraud occurred." *Id.* Plaintiff asserts Dr. Liles abused her relationship with Mr. Fennell by failing to disclose his blood smear results. As discussed above, the evidence presented at trial indicated Dr. Liles did not determine Mr. Fennell had AML from the blood smear she performed. In the exercise of her professional judgment, and after review of Mr. Fennell's medical history and blood tests, Dr. Liles ordered a follow-up

appointment to continue monitoring Mr. Fennell's condition. None of Dr. Liles' actions amounts to an abuse of her fiduciary relationship with Mr. Fennell. Any arguments related to Dr. Liles' alleged negligence or medical malpractice were resolved in her favor by the jury's verdict.

Plaintiff presented no evidence of an abuse of the relationship between Mr. Fennell and Dr. Liles, nor of any possible benefit Dr. Liles obtained by withholding the test results from Mr. Fennell. Plaintiff's arguments are overruled.

B. Other Claims on Appeal

Plaintiff argues that if this Court reverses the trial court's grant of directed verdicts in favor of Defendants, it must reinstate the claims of punitive damages. Based upon our resolution and conclusion on the above issue, it is unnecessary to reach this argument. For the same reason, we do not reach Plaintiff's argument related to the purported liability of Vidant under a theory of apparent agency.

VI. Conclusion

Viewing the evidence in the light most favorable to Plaintiff, Plaintiff's claim for fraudulent concealment fails as a matter of law. Plaintiff presented insufficient evidence of either actual or constructive fraud to submit these issues to the jury. We affirm the trial court's orders for directed verdict in favor of Defendants. Based on our conclusion, Plaintiff's other arguments also fail.

In the absence of arguments brought forth on appeal to challenge the jury's verdict, we also find no error in the jury's verdict in favor of Defendants or in the judgment entered thereon. *It is so ordered.*

AFFIRMED IN PART; NO ERROR IN PART.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).