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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-106

No. COA20-512

Filed 6 April 2021

Wake County, No. 19 CVS 11906

JENNIFER F. ALBA, Administratrix of the Estate of JOSEPH A. HOCKETT, II,  
Deceased, Plaintiff,

v.

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, Defendant.

Appeal by plaintiff from order entered 19 February 2020 by Judge Mary Ann  
Tally in Wake County Superior Court. Heard in the Court of Appeals 10 March 2021.

*Essex Richards, P.A., by Caitlin H. Walton and Norris A. Adams, II, and  
Kantor and Kantor, LLP, by Lisa S. Kantor, pro hac vice, for plaintiff-  
appellant.*

*Kilpatrick Townsend & Stockton LLP, by Richard J. Keshian and Philip A.  
Harris, Jr., for defendant-appellee.*

ZACHARY, Judge.

¶ 1

Plaintiff Jennifer F. Alba, as administratrix of the estate of Joseph A. Hockett, II, deceased, appeals from the trial court's order granting Defendant Blue Cross and Blue Shield of North Carolina's motion to dismiss. After careful review, we affirm the trial court's order.

***Background***

¶ 2

On 2 September 2017, Hockett died as a result of a drug overdose. Plaintiff is Hockett's mother and the administratrix of his estate. At his death, Hockett was 29 years old and lived in Apex, North Carolina. During the period of time relevant to this case, Hockett was a covered participant in a "BlueLocal" individual health benefit plan administered by Defendant Blue Cross and Blue Shield of North Carolina ("BCBS"). This appeal arises from Plaintiff's allegation that BCBS improperly sent checks directly to Hockett reimbursing him for his out-of-network care in the months preceding his death.

¶ 3

On 28 January 2017, Hockett was assaulted in Wilmington, resulting in injuries to his jaw and teeth that required emergency treatment. Hockett was treated at New Hanover Regional Medical Center, a hospital outside of his BlueLocal insurance network. Over the next few months, BCBS provided Hockett with multiple Explanations of Benefits ("EOB"), each of which contained the following language pertinent to Hockett's receipt of out-of-network care: "BCBSNC makes payment directly to you for services rendered by non-participating providers. You are responsible for paying the non-participating provider's bills. Non-participating providers may bill you for the difference in what BCBSNC allows and their actual charge." Accompanying the EOBs were checks from BCBS made payable to Hockett totaling more than \$38,000, as reimbursement for the allowed portion of the cost of his out-of-network care.

¶ 4 On 11 March 2017, Hockett overdosed in a hotel room in Wilmington. Hockett again received out-of-network emergency treatment at New Hanover Regional Medical Center, and BCBS subsequently sent Hockett additional EOBs containing the same quoted language as above, as well as checks made payable to Hockett totaling more than \$7,000. After returning home, Hockett was admitted to an in-network psychiatric and addiction treatment facility located in Raleigh. One of the EOBs that BCBS sent Hockett for this in-network treatment contained a billing code indicating that Hockett “was provided alcohol or drug detoxification services in an inpatient hospital.”

¶ 5 Hockett was subsequently transferred to an out-of-network drug and alcohol rehabilitation program in Wilmington. Throughout the spring and summer, Hockett received periodic out-of-network treatment in Wilmington, for which he received EOBs from BCBS. By the end of August 2017, BCBS had sent Hockett checks for nearly \$70,000 made payable to him, in reimbursement for the cost of the allowed portion of his out-of-network care.

¶ 6 On 28 August 2017, Hockett opened a bank account, in which he deposited a check from BCBS for \$33,399.76. Over the next four days, he made three large cash withdrawals from the account. On 2 September 2017, the day after his last cash withdrawal, Hockett was found unresponsive and declared dead. He had overdosed on cocaine and heroin.

¶ 7

On 28 August 2019, Plaintiff, acting in her capacity as administratrix of Hockett’s estate, filed a complaint against BCBS for negligence, gross negligence, wrongful death, survivorship, and unfair and deceptive trade practices. On 4 November 2019, BCBS moved to dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 5 February 2020, BCBS’s motion to dismiss came on for hearing in Wake County Superior Court before the Honorable Mary Ann Tally. On 19 February 2020, the trial court entered an order granting BCBS’s motion to dismiss. Plaintiff filed notice of appeal on 10 March 2020.

### ***Discussion***

¶ 8

On appeal, Plaintiff argues that the trial court committed reversible error by granting BCBS’s motion to dismiss the claims of negligence, gross negligence, wrongful death, and survivorship.<sup>1</sup> We disagree.

#### ***A. Standard of Review***

¶ 9

A party may move for the dismissal of a claim or claims based on the complaint’s “[f]ailure to state a claim upon which relief can be granted[.]” N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2019). “The motion to dismiss under N.C. R. Civ. P.

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<sup>1</sup> Plaintiff does not argue the unfair and deceptive trade practices claim on appeal, and thus, this issue will not be addressed. “The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party’s brief are deemed abandoned.” N.C.R. App. P. 28(a).

12(b)(6) tests the legal sufficiency of the complaint.” *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979). On a motion to dismiss pursuant to Rule 12(b)(6), our standard of review is “whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.” *Blow v. DSM Pharm., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009) (citation omitted), *disc. review denied*, 363 N.C. 853, 693 S.E.2d 917 (2010).

¶ 10 Dismissal pursuant to Rule 12(b)(6) is proper “when (1) the complaint, on its face, reveals that no law supports the plaintiff’s claim; (2) the complaint, on its face, reveals an absence of facts sufficient to make a good claim; or (3) some fact disclosed in the complaint necessarily defeats the plaintiff’s claim.” *Id.* “[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.” *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (citation omitted).

### ***B. Applicable Legal Principles***

¶ 11 Each of the four claims at issue on appeal are founded upon the same legal principles of negligence. “Negligence is the failure to exercise proper care in the performance of a legal duty owed by a defendant to a plaintiff under the circumstances.” *Blackmon v. Tri-Arc Food Sys., Inc.*, 246 N.C. App. 38, 43, 782 S.E.2d 741, 745 (2016) (citation omitted). “To state a claim for common law negligence, a

plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach.” *Id.* at 42, 782 S.E.2d at 744 (citation omitted).

¶ 12 “Gross negligence has been defined as wanton conduct done with conscious or reckless disregard for the rights and safety of others.” *Toomer v. Garrett*, 155 N.C. App. 462, 482, 574 S.E.2d 76, 92 (2002) (citation and internal quotation marks omitted), *disc. review denied*, 357 N.C. 66, 579 S.E.2d 576 (2003). “Aside from allegations of wanton conduct, a claim for gross negligence requires that [the] plaintiff plead facts on each of the elements of negligence[.]” *Id.*

¶ 13 Wrongful death and survivorship are statutory causes of action. *See State Auto Ins. Co. v. Blind*, 185 N.C. App. 707, 710–11, 650 S.E.2d 25, 27 (2007). This Court has held that “wrongful death and survivorship claims may be brought as alternative claims for the same negligent acts” when “the defendant’s negligence or wrongful act may have caused either or both the decedent’s pre-death injuries and wrongful death.” *Alston v. Britthaven, Inc.*, 177 N.C. App. 330, 339, 628 S.E.2d 824, 831 (2006), *disc. review denied*, 361 N.C. 218, 642 S.E.2d 242 (2007); *but cf. Blind*, 185 N.C. App. at 713, 650 S.E.2d at 29 (“[W]hen a single negligent act of the defendant causes a decedent’s injuries and those injuries unquestionably result in the decedent’s death, the plaintiff’s remedy for the decedent’s pain and suffering and medical expenses lies only in a wrongful death claim.”).

¶ 14 Our survivorship statute provides that, “[u]pon the death of any person, all

demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person,” with certain exceptions, “shall survive to and against the personal representative or collector of the person’s estate.”

N.C. Gen. Stat. § 28A-18-1(a). Our wrongful-death statute provides, in pertinent part:

When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled the injured person to an action for damages therefor, the person or corporation that would have been so liable, and the personal representatives or collectors of the person or corporation that would have been so liable, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent . . . .

*Id.* § 28A-18-2(a).

¶ 15 “A wrongful death negligence claim must be based on actionable negligence under the general rules of tort liability.” *Mabrey v. Smith*, 144 N.C. App. 119, 122, 548 S.E.2d 183, 186, *disc. review denied*, 354 N.C. 219, 554 S.E.2d 340 (2001).

In an action for recovery of damages for wrongful death, resulting from alleged actionable negligence, the plaintiff must show: First, that there has been a failure on the part of [the] defendant to exercise proper care in the performance of some legal duty which the defendant owed [the] plaintiff’s intestate under the circumstances in which they were placed; and second, that such negligent breach of duty was the proximate cause of the injury which produced the death—a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed.

*Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003) (quoting *Harris v. Wright*, 268 N.C. 654, 658, 151 S.E.2d 563, 566 (1966)), *aff'd per curiam*, 358 N.C. 137, 591 S.E.2d 520 (2004).

¶ 16 As each of the claims at issue in this appeal arises from the basic legal principles of negligence, dismissal is proper if, as a matter of law, the allegations of the complaint—treated as true—are insufficient to state a negligence claim upon which relief may be granted under any legal theory. *See Blow*, 197 N.C. App. at 588, 678 S.E.2d at 248.

### ***C. Duty and Breach***

¶ 17 It is well established that “[t]he parties to a contract impose upon themselves the obligation to perform it[,]” and that “the law imposes upon each of them the obligation to perform it with ordinary care[.]” *Toone v. Adams*, 262 N.C. 403, 407, 137 S.E.2d 132, 135 (1964). Accordingly, in the insurance context, “[t]he law imposes on the insurer the duty of carrying out in good faith its contract of insurance.” *Alford v. Textile Ins. Co.*, 248 N.C. 224, 229, 103 S.E.2d 8, 12 (1958).

¶ 18 On appeal, Plaintiff does not argue that BCBS breached its contractual obligations to Hockett. Rather, Plaintiff argues that there are two bases in tort from which BCBS’s legal duty to Hockett arose:

[T]he duty [BCBS] owed to [Hockett] is based upon both [BCBS]’s relationship with [Hockett] as his insurer and under common law negligence principles by virtue of



[BCBS]’s undertaking of an active course of conduct to send substantial monetary payments directly to its insured, who it knew had significant mental health and substance abuse problems, rather than to the treating providers, simply because they were not “in network.”

¶ 19 With regard to Plaintiff’s first assertion—that BCBS breached a legal duty it owed to Hockett as his insurer—Plaintiff acknowledges that this is an issue of first impression in North Carolina. Plaintiff calls our attention to *Payton v. Aetna/US Healthcare*, No. 100440/99, 2000 N.Y. Misc. LEXIS 91 (Sup. Ct. Mar. 22, 2000) (unpublished), an unpublished opinion from a New York state trial court, in which the court determined that an insurer could be liable for a breach of its duty to execute its contractual obligations with due care when the plaintiff-administratrix of her son’s estate alleged a “significant [and] apparently unwarranted delay and confusion in the processing of [the] decedent’s requests for coverage” prior to the decedent’s passing, *id.* at \*7–8.

¶ 20 Not only is *Payton* not binding on this Court, but it is also inapt. As BCBS observes in its appellate brief, *Payton* concerned tort allegations arising from “failure of coverage, not *provision* of coverage in compliance with the governing insurance policy[.]” We decline Plaintiff’s invitation to create a new legal duty for insurers based on the cited authorities and the facts of the case before us.

¶ 21 As for the second of Plaintiff’s asserted sources for BCBS’s duty to Hockett—that BCBS assumed a duty to exercise ordinary care to protect Hockett from harm

when BCBS undertook an active course of conduct—it is well established that

although the duty owed by a defendant to a plaintiff may have sprung from a contractual promise made to another, the duty sued on in a negligence action is not the contractual promise but the duty to use reasonable care in affirmatively performing that promise. The duty exists independent of the contract.

*White v. Collins Bldg., Inc.*, 209 N.C. App. 48, 51, 704 S.E.2d 307, 309 (2011) (citation and internal quotation marks omitted).

¶ 22 Assuming that Plaintiff successfully pleaded the existence of a common-law duty of due care owed to Hockett by BCBS, Plaintiff has not shown that BCBS breached that duty by complying with its contractual obligation to send Hockett reimbursement checks for his out-of-network care. Plaintiff argues that BCBS “knew or should have known that [Hockett] was suffering from serious mental health and substance abuse problems when it provided him with outrageous sums of money[,]” and that BCBS “failed to exercise reasonable care when it sent substantial monetary payments directly to [Hockett], rather than directly to the treating provider, simply because they were not ‘in network.’ ”

¶ 23 In sum, Plaintiff essentially contends that BCBS violated its duty of due care to Hockett by failing to send payments directly to his out-of-network providers. However, Plaintiff’s recommended course of action would constitute a breach of the express provisions of BCBS’s contract with Hockett. Although compliance with a

contractual obligation does not preclude a breach of a concomitant duty of due care, our courts nevertheless have a longstanding “duty to construe and enforce insurance policies as written, without rewriting the contract or disregarding the express language used.” *Fid. Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986).

¶ 24 In the case at bar, Plaintiff does not allege that BCBS negligently performed its obligations under the terms of the health-insurance contract. Indeed, as Plaintiff candidly admits, BCBS did exactly what Hockett contracted with BCBS to do: it paid all covered claims for out-of-network care directly to Hockett, rather than directly to his out-of-network provider. This does not amount to a failure by BCBS to exercise reasonable care in the execution of its contractual obligations.

¶ 25 Plaintiff makes what are, at heart, policy arguments to support her claims regarding such health-insurance contract provisions. However, “[t]his Court is an error-correcting court, not a law-making court.” *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 127, 723 S.E.2d 352, 358 (2012). In short, our Court is unable to provide the relief she seeks on appeal.

### ***Conclusion***

¶ 26 For the foregoing reasons, the trial court did not err in granting BCBS’s motion to dismiss. Accordingly, the trial court’s order is affirmed.

AFFIRMED.

ALBA V. BLUE CROSS & BLUE SHIELD OF N.C.

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*Opinion of the Court*

Judges CARPENTER and WOOD concur.

Report per Rule 30(e).