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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-318

No. COA20-339

Filed 6 July 2021

Durham County, No. 19 CVS 002099

CRISTIAN FERRERA, as Executor and Administrator of the Estate of YESENIA FUNEZ, Plaintiff,

v.

BRIAN V. ROBBINS, M.D., Individually, Defendant.

Appeal by Plaintiff from order entered 15 November 2019 by Judge Beecher S. Gray in Durham County Superior Court. Heard in the Court of Appeals 9 February 2021.

Knott & Boyle, PLLC, by Ben Van Steinburg, for the Plaintiff-Appellant

Yates, McLamb & Weyher, L.L.P., by Barry S. Cobb, for the Defendant-Appellant

DILLON, Judge.

¶ 1 The estate of a woman who was killed by her son commenced this wrongful death action against a doctor who was treating her son for his mental disorders.

I. Background

¶ 2 In January 2017, Oliver Funez was involuntarily committed to a public hospital in Chapel Hill for six weeks where he was treated by Defendant Brian

Robbins and other medical staff. Prior to his admission to the hospital, Oliver had displayed violent and aggressive behavior, manifested signs of psychosis, and refused to take his medication.

¶ 3 On 28 February 2017, Dr. Robbins made the decision to release Oliver, giving Oliver a supply of medication. Shortly after his release, Oliver stopped taking his medication. A week after his release, on 6 March 2017, Oliver fatally stabbed his mother, Yesenia Funez. Oliver later stated that voices in his head told him that God commanded him to kill, and that in doing so, he would become an angel.

¶ 4 Plaintiff is the representative of Ms. Funez' estate. He filed this wrongful death action against Dr. Robbins, asserting two claims: (1) ordinary negligence and (2) gross negligence. The trial court granted Dr. Robbins' motion to dismiss both claims. Plaintiff timely appealed.

II. Argument

A. Dismissal of the Ordinary Negligence Claim

¶ 5 Plaintiff asserts that the trial court erred by dismissing the ordinary negligence claim, contending that the complaint did not establish as a matter of law that Dr. Robbins was entitled to statutory qualified immunity, the basis of the trial court's ruling. We agree.

¶ 6 "A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting the question whether, as a matter of law, the allegations of

the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some recognized legal theory." *Cage v. Colonial Bldg. Co.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994) (citation and internal marks omitted). But a "Rule 12(b)(6) motion . . . should not be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Id.*

¶ 7 Here, the trial court concluded that Dr. Robbins has qualified immunity under the Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985, codified at N.C. Gen. Stat. § 122C-210.1 (2017), which provides physicians working at State hospitals with statutory immunity against certain claims of ordinary negligence. The version of this statute that was in place when this present action was commenced offers this immunity only "so long as the requisite procedures were followed [by the physician-defendant] and the decision [by the physician-defendant to release the patient] was an exercise of professional judgment[.]" N.C. Gen. Stat. § 122C-210.1 (This statute has been amended for actions commenced on or after 1 October 2019 to offer the immunity to any physician not engaged in "gross negligence.").

¶ 8 Qualified immunity is an affirmative defense. *Summey v. Barker*, 357 N.C. 492, 494, 586 S.E.2d 247, 248 (2003); *Dobson v. Harris*, 352 N.C. 77, 86, 530 S.E.2d 829, 837 (2000).

¶ 9 Our Court has stated that the burden is on the defendant doctor to establish that he is entitled to qualified immunity under Section 122C-210.1, stating that this statutory "immunity does not attach *until a defendant* shows that he or she followed the requisite procedures [and that] the decision [as to how to treat the patient] was an exercise of professional judgment." *Boryla-Lett v. Psychiatric Solutions of N.C., Inc.*, 200 N.C. App. 529, 534, 685 S.E.2d 14, 19 (2009) (emphasis added) (citation and internal marks omitted).

¶ 10 However, though the burden to establish qualified immunity rests with the defendant, a defendant's Rule 12(b)(6) motion to dismiss may be granted based on qualified immunity where the allegations in the plaintiff's complaint conclusively establishes that defendant is entitled qualified immunity. *Toomer v. Garrett*, 155 N.C. App. 462, 474-75, 574 S.E.2d 76, 86 (2002). For instance, in *Toomer*, our Court overruled a trial court's determination that it lacked the authority to grant a motion to dismiss based on qualified immunity prior to the defendant pleading immunity as an affirmative defense. *Id.* at 473, 574 S.E.2d at 86 ("[W]hile qualified immunity certainly must be pleaded in a defendant's answer, it may also be raised in a motion to dismiss under Rule 12(b) made prior to any responsive pleading."). Our holding in *Toomer* is consistent with jurisprudence from our Supreme Court which recognizes that a complaint is subject to a Rule 12(b)(6) dismissal where the complaint "discloses an unconditional affirmative defense which defeats [an otherwise validly-asserted]

claim." *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 270, 333 S.E.2d 236, 238 (1985).

¶ 11 Here, Plaintiff essentially alleges in his complaint that Dr. Robbins was negligent in discharging Oliver. Plaintiff, however, makes no allegations—one way or the other—regarding whether Dr. Robbins was following "requisite procedures" when he discharged Oliver. Therefore, it cannot be said that "it appears to a certainty that Plaintiff is entitled to no relief under any state of facts which could be proved" by Plaintiff. *Cage*, 337 N.C. at 683, 448 S.E.2d at 116.

¶ 12 For instance, Plaintiff alleges that Dr. Robbins discharged Oliver "while [Oliver] was still experiencing hallucinations." If true, Dr. Robbins would be entitled to qualified immunity if such action was merely a negligent exercise of his professional judgment. And even if there was a procedure required for the doctor to ascertain whether a patient that he is about to release is experiencing hallucinations, Dr. Robbins would be entitled to qualified immunity if he followed the procedure negligently, for instance, if he determined (incorrectly) that Oliver was not experiencing hallucinations at the time of his release. However, Dr. Robbins would not be entitled to qualified immunity if it required that a doctor determine whether a patient is experiencing hallucinations before deciding to release the patient but that, Dr. Robbins failed to follow this procedure by failing even to consider whether Oliver was experiencing hallucinations.

¶ 13 In sum, Dr. Robbins is entitled to qualified immunity for acts of ordinary

negligence (1) in the exercise of his professional judgment and (2) where he was otherwise following the requisite procedures. It seems evident that Plaintiff alleges that the negligent acts of Dr. Robbins all arose from the exercise of his professional judgment. However, the complaint simply does not allege—one way or the other—whether Dr. Robbins was following required procedures when he committed his negligent acts. And the burden is with Dr. Robbins to show that he falls within the class of doctors entitled to qualified immunity. Dr. Robbins may well be able to establish, as a matter of law, *at the summary judgment stage* that he followed all requisite procedures (though maybe some negligently) in his decision to discharge Oliver. However, the complaint itself does not conclusively establish that Dr. Robbins did so. Accordingly, we must conclude that Dr. Robbins was not entitled to dismissal of the ordinary negligence claims against him at the Rule 12(b)(6) stage based on qualified immunity.

B. Dismissal of the Gross Negligence Claim

¶ 14 Plaintiff argues that the court erred by dismissing the claim for gross negligence because the pleadings were sufficient to state a claim for which relief may be granted. We agree.

¶ 15 Our Court has held that claims of gross negligence, unlike claims of ordinary negligence, fall outside of the qualified immunity protections of N.C. Gen. Stat. § 122C-201.1. *Pangburn v. Saad*, 73 N.C. App. 336, 347, 326 S.E.2d 365, 372 (1985)

("[I]f plaintiff has stated a claim against [a treating physician] for his grossly negligent or intentional acts, it will withstand dismissal, since it will fall outside the statutory protection[.]"). That is, even if the negligent acts of a physician-defendant were in the exercise of his professional judgment and he otherwise followed requisite procedures, a physician-defendant is not immune where his acts rise to the level of gross negligence.

¶ 16 Our Supreme Court has defined gross negligence as "wanton conduct done with conscious or *reckless disregard* for the rights and safety of others." *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988) (emphasis added).

¶ 17 In reviewing this issue, we are reminded that Plaintiff's complaint "must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000).

¶ 18 We conclude that it could be inferred from Plaintiff's allegations, if true, that Dr. Robbins' actions rose to the level of gross negligence. For example, Plaintiff alleges that Dr. Robbins acted recklessly in making certain decisions. Further, Plaintiff alleges that Dr. Robbins discharged Oliver "when it was apparent" that Oliver was not mentally stable. It could be inferred from this allegation that Dr. Robbins released Oliver even though he was aware that Oliver was not mentally

stable. Also, a reasonable inference from the complaint suggests that Dr. Robbins recklessly disregarded Oliver's medical records when he made the decision to discharge him without reviewing the records that had been entered during the previous few days when Dr. Robbins was not on duty.

¶ 19 Accordingly, we reverse the trial court's dismissal of Plaintiff's claim based on gross negligence. Of course, if discovery does not bear out Plaintiff's allegations of gross negligence, Dr. Robbins would be entitled to summary judgment. However, at this stage, Plaintiff is entitled to proceed on his gross negligence claim.

III. Conclusion

¶ 20 We reverse the trial court's dismissal of Plaintiff's ordinary negligence and gross negligence claims and remand for further proceedings.

REVERSED AND REMANDED.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).