IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-434

No. COA20-670

Filed 17 August 2021

Durham County, No. 19 CVS 1462

JAYSON JACKSON, Plaintiff,

v.

DUKE UNIVERSITY HEALTH SYSTEM, INC. a/k/a DUKE UNIVERSITY HEALTH SERVICES; DUKE UNIVERSITY AFFILIATED PHYSICIANS, INC.; JOHN DOE 1; JOHN DOE 2; JOHN DOE 3; and JOHN DOE 4, 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 26 May 2021.

The Hunt Law Firm, by Anita Hunt, for plaintiff-appellant.

Young Moore and Henderson, PA, by Brian Beverly, Joseph W. Williford, and Angela Farag Craddock, for defendants-appellees.

DIETZ, Judge.

¶ 1 Plaintiff Jayson Jackson brought a medical malpractice claim concerning his treatment for a gunshot wound. Jackson's complaint included a Rule 9(j) certification that had a number of defects. Most notably, it repeatedly referenced the putative expert's review of Jackson's dental records, not his medical records. The Rule 9(j) language also failed to specifically assert that the putative expert reviewed both

Jackson's medical *care* and medical *records*, as the statutory language requires.

¶ 2 On the day of the hearing on a motion to dismiss, Jackson sought leave to amend the complaint to "replace the word dental with medical." The trial court denied the motion to amend and granted the motion to dismiss for failure to comply with Rule 9(j).

¶ 3 We affirm. The trial court should freely grant leave to amend where justice requires, but a trial court acts within its sound discretion by denying leave to amend if the amendment is futile or the plaintiff repeatedly failed to cure defects. That is the case here. Even with Jackson's proposed amendment, the complaint failed to comply with Rule 9(j). Accordingly, as explained below, the trial court did not abuse its discretion by denying the motion to amend and, as a result, properly granted the motion to dismiss.

Facts and Procedural History

¶ 4 This medical malpractice action concerns allegedly negligent treatment and rehabilitative care that Plaintiff Jayson Jackson received after sustaining a gunshot wound. Jackson brought the action against Duke University Health System and Duke University Affiliated Physicians as well as four John Doe defendants, asserting medical malpractice claims and other, related tort claims.

¶ 5 The Rule 9(j) certification accompanying the complaint had a rather obvious error. Although the claims all pertained to medical treatment and rehabilitative care

for a gunshot wound, the Rule 9(j) certification stated that "all *dental* records pertaining to the alleged negligence that are available to the Plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence."

¶ 6 The Duke Defendants moved to dismiss the medical malpractice claim for failure to comply with Rule 9(j) on 16 July 2019. They later noticed the motion for a hearing on 12 September 2019.

¶ 7 On the day of the hearing, Jackson moved to amend the complaint to "replace the word dental with medical" in the Rule 9(j) certification because "a scrivener's error was made using the word dental instead of medical" in the certification. The motion did not propose any other changes to the Rule 9(j) certification which, even with that change, was missing the required language certifying that "*the medical care* and all medical records pertaining to the alleged negligence" had been reviewed by the putative expert.

¶ 8 The trial court denied the motion to amend and granted the motion to dismiss the medical malpractice claim for failure to comply with Rule 9(j). Jackson took an interlocutory appeal of that ruling, withdrew that appeal, filed a voluntary dismissal without prejudice of "all claims against Defendants," and filed a new appeal.

Analysis

I. Duke Defendants' motion to dismiss the appeal

¶ 9 We begin our analysis with the Duke Defendants' motion to dismiss this appeal. After the trial court dismissed the medical malpractice claims with prejudice for failure to comply with Rule 9(j), Jackson appealed, withdrew the appeal, and then filed a voluntary dismissal without prejudice of "all claims against Defendants."

¶ 10 The Duke Defendants argue that by voluntarily dismissing "all claims against Defendants" Jackson "effectively terminated" the entire case, meaning all claims against all defendants. This, the Duke Defendants argue, deprived this Court of the power to review any orders entered by the trial court before the voluntary dismissal. *Hous. Auth. v. Sparks Eng'g, PLLC*, 212 N.C. App. 184, 187, 711 S.E.2d 180, 182 (2011). Although Jackson's voluntary dismissal could be interpreted as an *attempt* to dismiss the entire case (Jackson, of course, contends that it was not), Jackson had no power to voluntarily dismiss the medical malpractice claims without prejudice because the trial court already had dismissed those claims with prejudice. *Mkt. Am., Inc. v. Lee*, 257 N.C. App. 98, 106, 809 S.E.2d 32, 38 (2017). Thus, by dismissing "all claims against Defendants," Jackson's dismissal disposed only of the remaining claims not already adjudicated by the trial court, thus rendering the trial court's ruling on the motion to dismiss a final order subject to appeal. *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 367, 555 S.E.2d 634, 638 (2001). We therefore conclude

that we have jurisdiction to hear this appeal and deny the Duke Defendants' motion to dismiss.

II. Trial court's grant of motion to dismiss and denial of motion to amend

¶ 11 Jackson argues that the trial court erred by failing to grant his motion to amend the complaint to correct the "scrivener's error" in the Rule 9(j) certification that referred to Jackson's "dental records." He argues that, had the trial court allowed that motion, it would not have had a basis to grant the Duke Defendants' motion to dismiss.

¶ 12 A trial court's denial of a motion to amend the complaint, after the defendant has served a responsive pleading, is reviewed for abuse of discretion. *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 603, 821 S.E.2d 711, 727–28 (2018). Where, as here, a trial court "states no reason for its ruling on a motion to amend, this Court may examine any apparent reasons for the ruling." *Williams v. Owens*, 211 N.C. App. 393, 394, 712 S.E.2d 359, 360 (2011) (citation omitted). Reasons that justify a trial court's discretionary decision to deny the motion include undue delay, bad faith, unfair prejudice, futility of amendment, and repeated failure to cure defects. *Id.*

¶ 13 Here, the trial court was within its sound discretion to deny the motion to amend based on futility and repeated failure to cure defects. Rule 9(j) requires the complaint to specifically assert that "the medical care and all medical records

pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have 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." N.C. R. Civ. P. 9(j).

¶ 14 Jackson's complaint specifically asserted the following:

> 79. Without waiving these objections and specifically relying upon the same, all *dental* records pertaining to the alleged negligence that are available to the Plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence.
>
> 80. The person(s) referred to in the preceding paragraph(s) is/are willing to testify that the *dental* care did not comply with the applicable standard of care.
>
> 81. The Plaintiff will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence the person(s) referred to in the preceding paragraph(s) who is/are willing to testify that the *dental* care did not comply with the applicable standard of care and the motion is filed with the Complaint.

(Emphasis added).

¶ 15 On the day of the hearing on the Duke Defendants' motion to dismiss, Jackson moved to amend the complaint, explaining that it "has become apparent to the Plaintiff that a scrivener's error was made using the word dental instead of medical in paragraphs 79, 80, and 81." Jackson asked "for leave to amend the Complaint by

replacing the dental with medical."

¶ 16 But that requested change was not enough to make the complaint satisfy Rule 9(j). The rule requires that a pleading "specifically asserts that the *medical care* and all medical records" were reviewed and, even replacing the word "dental" with "medical" in these paragraphs, there would not be any assertion in the complaint that the expert reviewed Jackson's medical care as well as all medical records.

¶ 17 This is not a trivial omission. Although this Court and our Supreme Court have emphasized that litigants should be permitted to correct wording errors in a Rule 9(j) certification when justice requires, "courts have strictly enforced Rule 9(j)'s 'clear and unambiguous' language as requiring dismissal of a medical malpractice action when the plaintiff's pleading is not in compliance with the Rule's requirements." *Fairfield v. WakeMed*, 261 N.C. App. 569, 572, 821 S.E.2d 277, 280 (2018) (citation omitted). In *Fairfield*, for example, this Court affirmed the trial court's decision to dismiss a complaint stating that the expert reviewed "certain medical records and the medical care," rather than mirroring the statutory language requiring review of "the medical care and *all* medical records." *Id.* at 574–75, 821 S.E.2d at 281 (emphasis added). We reasoned that the omission of the word "all" could mean the plaintiff's expert had only "selectively" reviewed the medical records and that this "would run afoul of the General Assembly's clearly expressed mandate that the records be reviewed in their totality." *Id.*

¶ 18 Similarly, in *Alston v. Hueske*, the complaint alleged that the medical care had been reviewed by a person reasonably expected to qualify as an expert but that "the medical records were reviewed and evaluated by a duly Board Certified who opined that the care rendered to Decedent was below the applicable standard of care." 244 N.C. App. 546, 548, 781 S.E.2d 305, 307 (2016). We affirmed the trial court's dismissal under Rule 9(j) because the complaint did not "properly allege the medical records were reviewed by a person *reasonably* expected to qualify as an expert witness." *Id.* at 552, 781 S.E.2d at 310. We again explained that the omission undermined the strict requirement of Rule 9(j) because the "only information we have is that the witness is 'Board Certified.'" *Id.* at 553, 781 S.E.2d at 310. Thus, the Court "did not know whether the witness is a certified doctor or nurse, or even another health care professional" who could testify to the standard of care. *Id.* Without this key piece of information, the complaint did not satisfy the strict requirements of Rule 9(j).

¶ 19 Here, too, the failure to specifically assert that the putative expert reviewed Jackson's medical care, as the express words of Rule 9(j) require, undermines the clear and unambiguous purpose of the rule. As in *Fairfield*, omitting those statutory words could permit a litigant's expert to selectively ignore information pertaining to the patient's medical care that is not included in medical records but nonetheless indicates that the defendant satisfied the applicable duty of care. *Fairfield*, 261 N.C. App. at 574–75, 821 S.E.2d at 281. This could frustrate the underlying purpose of

Rule 9(j) and is precisely the sort of defect in the pleading that compels dismissal under our case law.

¶ 20 Thus, even if the trial court had granted Jackson's motion to amend to replace "dental" with "medical," there would still be an insurmountable defect in the Rule 9(j) language that would have compelled the trial court to grant the motion to dismiss. This, in turn, means the trial court was well within its sound discretion to deny the motion based on futility of the proposed amendment and repeated failure to cure defects in the complaint. *Williams*, 211 N.C. App. at 394, 712 S.E.2d at 360. As this Court has stressed in a number of previous cases, litigants "can avoid this result by using the statutory language." *Id.*

¶ 21 Jackson also argues that the trial court erred in granting the Duke Defendants' motion to dismiss because the motion was untimely. The Rules of Civil Procedure state that a Rule 12(b)(6) motion for failure to state a claim on which relief can be granted "shall be made *before* pleading if a further pleading is permitted" or can be made *after* a responsive pleading as a Rule 12(c) motion for judgment on the pleadings. N.C. R. Civ. P. 12(b), (c), and (h) (emphasis added). Although the rules expressly permit this type of motion to dismiss before and after the responsive pleading, they do not expressly address filing the motion *contemporaneously* with the responsive pleading. But this Court repeatedly has held that "a motion under Rule 12(b)(6) must be made prior to or contemporaneously with the filing of the responsive

pleading." *Robertson v. Boyd*, 88 N.C. App. 437, 440, 363 S.E.2d 672, 675 (1988). Thus, under controlling precedent from this Court, the Duke Defendants properly moved to dismiss under Rule 12(b)(6) at the same time that they filed their responsive pleading.

Conclusion

¶ 22 We affirm the trial court's order.

AFFIRMED.

Judges INMAN and WOOD concur.

Report per Rule 30(e).