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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-138

No. COA21-66

Filed 1 March 2022

Buncombe County, No. 20 CVS 471

RASHUNDA HARRISON, Plaintiff,

v.

RICHARD F. MORRIS, DMD, Defendant.

Appeal by plaintiff from orders entered 5 October 2020 by Judge Marvin L. Pope, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 19 October 2021.

George W. Moore for plaintiff-appellant.

Roberts & Stevens, PA, by David C. Hawisher and Phillip T. Jackson, for defendant-appellee.

GORE, Judge.

¶ 1 This is a medical malpractice claim. Rashunda Harrison filed this action following a 120-day extension of the applicable statute of limitations for filing a medical malpractice action in North Carolina. Rule 9(j) of the North Carolina Rules of Civil Procedure establishes a heightened pleading requirement for medical malpractice actions and affords a plaintiff the opportunity to extend the statute of

limitations to provide additional time to comply with the Rule. Ms. Harrison appeals from the trial court's Order Denying Ms. Harrison's Motion for Relief from Judgment and Order Granting Dr. Morris's Motion to Dismiss. We affirm the trial court's orders.

I. Background

¶ 2 Ms. Harrison was a patient at Fox Dental Associates. At an appointment at Fox Dental Associates on 6 October 2016, Ms. Harrison was informed she needed to have a wisdom tooth extracted. Ms. Harrison consented to the procedure in writing. The extraction was performed on 9 November 2016 by Dr. Morris. Dr. Morris had difficulty during the procedure and required assistance from Dr. Kevin T. Fox to complete the procedure. Substantial pressure was placed on Ms. Harrison's jaw during the procedure. Following the procedure, Dr. Morris informed Ms. Harrison that a small piece of bone in her jaw had broken during the procedure. Dr. Morris and Dr. Fox's clinical notes, taken following the procedure, state that a "[l]arge portion of [the] left maxillary tuberosity fractured off with [the] tooth during extraction . . . ."

¶ 3 Following the procedure, Ms. Harrison experienced intense pain throughout her face and jaw. She was unable to open her mouth without pain and had difficulty eating. Ms. Harrison contacted Fox Dental Associates with these concerns on 10 November 2016. On 17 November 2016, Ms. Harrison had a follow-up visit with Dr. Morris. At this visit, Dr. Morris advised Ms. Harrison that her pain "is referred pain" and could be due to "over extending her jaw muscles throughout the long procedure."

¶ 4 Ms. Harrison returned to see Dr. Morris for continued pain in her jaw on 2 December 2016. At this visit, Dr. Morris referred Ms. Harrison to an oral surgeon for further evaluation. Ms. Harrison's condition did not improve and she returned to see Dr. Morris on 30 January 2017. At that visit Dr. Morris referred Ms. Harrison to a physical therapist.

¶ 5 Ms. Harrison did not visit Dr. Morris again after 30 January 2017. However, Dr. Morris did receive treatment updates from Ms. Harrison's physical therapist on 25 April 2017 and her oral surgeon on 5 and 10 May 2017.

¶ 6 On 31 January 2020, before filing her complaint, Ms. Harrison filed a Motion to Extend the Statute of Limitations pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. That same day, Buncombe County Resident Superior Court Judge Alan Z. Thornburg entered an Order Extending the Statute of Limitations to 29 April 2020.

¶ 7 Ms. Harrison filed her Complaint against Dr. Morris on 29 April 2020 alleging medical malpractice. On 6 July 2020, Dr. Morris filed a Motion to Dismiss and Answer. In his Motion to Dismiss, Dr. Morris alleged *inter alia* that Ms. Harrison's Complaint is time-barred by the applicable statute of limitations. On 3 August 2020, Buncombe County Superior Court Judge Marvin P. Pope, Jr. entered an Order Granting Dr. Morris's Motion to Dismiss. Judge Pope concluded that for the purposes of the continuing course of treatment doctrine, Dr. Morris's treatment of Ms. Harrison

ended on 30 January 2017 and Ms. Harrison's Complaint is barred by the statute of limitations.

¶ 8 On 23 September 2020, Ms. Harrison filed a Motion for Relief from Order pursuant to Rule 60. Ms. Harrison argued that Judge Pope's Order should be vacated because Judge Pope did not have the authority to overrule the Order Extending the Statute of Limitations entered by Judge Thornburg. Judge Pope entered an Order Denying Ms. Harrison's Motion for Relief from Judgment on 5 October 2020, concluding that the Order Granting Dr. Morris's Motion to Dismiss is not void. However, Judge Pope did modify the Order Granting Dr. Morris's Motion to Dismiss by adding findings of fact and conclusions of law to facilitate appellate review. Ms. Harrison filed a written Notice of Appeal on 6 October 2020.

II. Analysis

¶ 9 Ms. Harrison argues the trial court erred in granting Dr. Morris's Motion to Dismiss. Ms. Harrison argues her claim is not barred by the statute of limitations because under the continuing course of treatment doctrine the complaint alleges a continuous relationship with defendant into May 2017. Plaintiff also argues the trial court erroneously overruled the Order entered by Judge Thornburg, citing the North Carolina rule that "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court

judge previously made in the same action." *Callaway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972).

¶ 10 "A defense under a statute of limitations . . . may be raised via a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (citations omitted).

¶ 11 The applicable statute of limitation for medical malpractice claims is contained within N.C. Gen. Stat. § 1-15(c) (2020). This statute provides in pertinent part:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person . . . which originates under circumstances making the injury . . . not readily apparent to the claimant at the time of its origin, and the injury . . . is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years.

N.C. Gen. Stat. § 1-15(c). However, Rule 9(j) of the North Carolina Rules of Civil Procedure allows for the statute of limitation to be extended for up to 120 days, to allow the plaintiff to comply with Rule 9(j)'s heightened pleading requirement. Rule 9(j) provides in pertinent part:

> Upon motion by the complainant prior to the expiration of

> the applicable statute of limitations, a resident judge of the superior court . . . may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

N.C. R. Civ. P. 9(j) (2020). Ms. Harrison argues that under the continuing course of treatment doctrine the statute of limitation did not accrue until May 2017. Dr. Morris argues that the statute of limitation began to run no later than 30 January 2017, thus Ms. Harrison's claim was already barred when Ms. Harrison filed her Motion to Extend the Statute of Limitation.

¶ 12 The continuing course of treatment doctrine "rests on the theory that so long as the relationship of surgeon and patient is continued, the surgeon was guilty of malpractice during that entire relationship for not repairing the damage he had done." *Horton v. Carolina Medicorp*, 344 N.C. 133, 137, 472 S.E.2d 778, 780 (1996) (internal quotations and citation omitted). "[T]he doctrine tolls the running of the statute for the period between the original negligent act and the ensuing discovery and correction of its consequences; the claim still accrues at the time of the original negligent act or omission." *Id.* at 137, 472 S.E.2d at 781. Thus, the statute of limitations begins to run when defendant's treatment of plaintiff ended or the time at which the plaintiff knew or should have known of his injury, whichever comes first. *Ballenger v. Crowell*, 38 N.C. App. 50, 58, 247 S.E.2d 287, 293 (1978).

¶ 13 To benefit from this doctrine, a plaintiff must show (1) a continuous relationship with a physician and (2) subsequent treatment from that physician. *Id.* This subsequent treatment must be for the "same injury." *Stallings v. Gunter*, 99 N.C. App. 710, 715, 394 S.E.2d 212, 216, *disc. rev. denied*, 327 N.C. 638, 399 S.E.2d 125 (1990) (citation omitted). This Court has determined that letters written by a surgeon to a patient encouraging the patient to seek follow-up treatment with the surgeon did not constitute treatment. *Hensell v. Winslow*, 106 N.C. App. 285, 290, 416 S.E.2d 426, 430, *disc. rev. denied*, 332 N.C. 344, 421 S.E.2d 148 (1992).

¶ 14 In the case *sub judice*, Ms. Harrison's last follow-up visit with Dr. Morris for her jaw pain occurred on 30 January 2017. Following this Court's logic and analysis in *Hensell*, the correspondence containing treatment updates between Dr. Morris and Ms. Harrison's physical therapist and oral surgeon do not constitute "treatment" for purposes of the continuing course of treatment doctrine. Thus, assuming Ms. Harrison did not discover her injury earlier, the latest the statute of limitation began to run in this case was 30 January 2017; and the statute of limitation would subsequently expire on 30 January 2020. Ms. Harrison filed her Motion to Extend the Statute of Limitation on 31 January 2020, one day after the latest the statute of limitation could have expired. As a result, Ms. Harrison's claim is barred by the statute of limitation.

¶ 15 Nonetheless, Ms. Harrison argues Judge Pope erred by granting Dr. Morris's Motion to Dismiss, because to do so Judge Pope had to overrule Judge Thornburg's prior order, and one Superior Court Judge cannot overrule another Superior Court Judge. *See Callaway*, 281 N.C. at 501, 189 S.E.2d at 488 ("[N]o appeal lies from one Superior Court judge to another; [] one Superior Court judge may not correct another's errors of law; and [] ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.").

¶ 16 However, *Callaway* goes on to state that "the rule is [] a judge has the power to modify an interlocutory order made by another whenever there is a showing of changed conditions which warrant such action." *Id.* at 502, 189 S.E.2d at 488. Interlocutory orders are subject to change "at any time to meet the justice and equity of the case upon sufficient grounds shown for the same." *Miller v. Justice*, 86 N.C. 26, 30 (1882). A material change in conditions exists when there is an intervention of new facts which would bear upon the propriety of a previous order. *Callaway*, 281 N.C. at 505, 189 S.E.2d at 490.

¶ 17 Judge Thornburg's order is interlocutory because it "does not finally determine or complete the suit." *Id.* at 501, 189 S.E.2d at 488. We conclude that there was a change of circumstances in the case *sub judice.* In her Motion to Extend the Statute of Limitation, Ms. Harrison alleged her final follow-up visit with Dr. Morris occurred

on 3 February 2017 while Ms. Harrison's complaint alleged the final follow-up visit was 30 January 2017. If Ms. Harrison had alleged the same facts in her Motion to Extend the Statute of Limitation as she did in her complaint, Judge Thornburg's ruling likely would have been different. Thus, Judge Pope properly overruled to the extent necessary the Order entered by Judge Thornburg to meet the justice and equity of the case.

III. Conclusion

¶ 18 For the foregoing reasons we affirm the trial court's Order Granting Dr. Morris's Motion to Dismiss and Order Denying Ms. Harrison's Motion for Relief from Judgment.

AFFIRMED.

Chief Judge STROUD and Judge INMAN concur.

Report per Rule 30(e).