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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-393

No. COA21-649

Filed 7 June 2022

Wilkes County, No. 20CVS797

ROY JOHNSON, Plaintiff,

v.

JAMES NIELAND, DC, and FAMILY CHIROPRACTIC, PC, Defendants.

Appeal by Plaintiff from order entered 11 June 2021 by the Honorable Richard L. Doughton in Wilkes County Superior Court. Heard in the Court of Appeals 23 March 2022.

The Rawlings Law Firm, by Charles E. Rawlings, for Plaintiff-Appellant.

The Van Winkle Law Firm, by Dale A. Curriden, for Defendants-Appellees.

CARPENTER, Judge.

¶ 1 Plaintiff appeals from the trial court's grant of Defendants' motion to dismiss Plaintiff's medical malpractice complaint pursuant to N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 9(j), and from the trial court's concurrent grant of Defendants' motion for summary judgment. Because Plaintiff could not substantiate a genuine issue of

material fact for the trial court to properly consider, we affirm the decisions of the trial court.

I. Factual & Procedural Background

¶ 2 On 27 July 2020, Plaintiff-Appellant Roy Johnson ("Plaintiff") filed a complaint against Defendants-Appellees James Nieland ("Dr. Nieland") and Family Chiropractic, P.C. (collectively, "Defendants") pursuant to N.C. Gen. Stat. § 90-21.11(2)(a) (2019)[1]. The complaint involved Plaintiff's treatment during a visit to Defendants' chiropractic clinic on 8 January 2018. On 5 October 2020, Defendants served Plaintiff with interrogatories requesting proof of compliance pursuant to N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 9(j) (2019)[2] ("Rule 9(j)"). Plaintiff responded on 5 November 2020, identifying Mitchell E. Falk, DC ("Dr. Falk") as the expert who had reviewed all records pertaining to the alleged negligence and concluded Defendants were negligent.

¶ 3 During a deposition, Dr. Falk testified to the effect he had not been able to review Defendants' complete record, specifically admitting he was unable to read two pages of a three-page note written by Dr. Nieland. Relevant testimony from the deposition transpired as follows:

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[1] The text of N.C. Gen. Stat. § 90-21.11(2)(a) has not changed between the time of Plaintiff's filing and the issuance of this opinion.

[2] The text of N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 9(j) has not changed between the time of Defendants' service of interrogatories and the issuance of this opinion.

Q: And there's a type written note. I think Dr. Nieland's signature is at the end. Do you see that? This is a three-page note.
A: Yes.
Q: The visit on January 8th of – of 2018, do you see the date up there?
A: Yes.
Q: Do you recognize this as some of the records that you reviewed?
A: Yes.
Q: Does that appear to be a note by Dr. Nieland related to his visit with Mr. Johnson on January 8th of 2018?
A: It does.
. . .
Q: Does this note document a—a chief complaint of an acute left lumbar—lumbar left sacroiliac, left buttock and left posterior thigh complaint since 01/03 of 2018?
A: It does.
Q: Then there's a number of entries there documenting the character of the symptoms and—and the history. Do you see all of that?
A: No, that's one of the pages that didn't come out. Those last two pages didn't come out for me to read.
Q: Okay. So this—you didn't have a good copy of this?
A: No, I did not.
Q: All right. Would you agree that Dr. Nieland's note from the day that's in question would be a material record for you to review in order to make opinions about this case?
A: Yes.
Q: But you're saying you've not reviewed this prior to today?
A: No, I—I'm—I'm—I think I showed you the—the—the letters, they're—they're—they're scrubbed out.
. . .
Q: And I want to go back just briefly and—and again, I think I'm just about done. But go back to the records for a moment. And I think—I'd like to make not all of the records, but the three-page office note from January 8th of 2018 an exhibit. And so, I guess this will be exhibit 6.

> . . .
> Q: And—and Dr. Falk, this is the three-page record that we went over that—
> A: Yes. I'm familiar with this.
> Q: I believe you identified that you had not seen [it] before. Is that correct?
> A:Yeah. I—I—I saw it, but I couldn't read it.
> . . .
> Q: Okay. Now, Dr. Falk, were you provided all the records pertinent to the negligence in this case prior to your review?
> A: Yeah. I just couldn't read that one set because it was—it was—it was scarred. And I didn't realize it was that important, so I just went on the stuff that I knew about and—and worked with that.

¶ 4 On 28 May 2021, Defendants filed a motion to dismiss and a motion for summary judgment. In their motions, Defendants contended Dr. Falk had not reviewed "all medical records pertaining to the alleged negligence," he had failed to comply with the heightened pleading requirements of Rule 9(j) and, therefore, the case should be dismissed.

¶ 5 On 27 May 2021, Dr. Falk signed an affidavit stating, contrary to what he testified during his deposition, he did, in fact, receive a legible copy of Dr. Neiland's three-page note, which he used when forming his opinion in the case. In his affidavit, Dr. Falk explained:

> Due to the stress of the situation and the unfamiliar setting of a virtual deposition, I mistakenly stated that I could not read the three page note of January 8, 2020. However, at that time I was remembering the two chart pages that were

> illegible, the Notice of Privacy Practices and the Authorization.

¶ 6 In ruling on Defendants' motion to dismiss and motion for summary judgment, the trial court stated: "the law is very clear. You can't say something in a deposition and then contradict it by an affidavit." The trial court subsequently granted both motions in favor of Defendants. In its order dated 11 June 2021, the trial court declined to delineate findings of fact, instead writing:

> Based upon the documents in the Court's file and the materials and arguments presented by counsel for the parties, the Court is of the opinion that, with regard to Plaintiff's failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure, there are no reasonable disputes or ambiguities in the forecasted evidence and that, therefore, there are no genuine issues as to any material facts and Defendants are entitled to judgment as a matter of law.

¶ 7 Plaintiff filed notice of appeal on 15 June 2021.

II. Jurisdiction

¶ 8 The trial court's grant of Defendants' motions to dismiss and for summary judgment is a final judgment, over which this Court obtains jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Issues

¶ 9 The issues on appeal are whether the trial court erred in granting Defendants' (1) motion to dismiss, and (2) motion for summary judgment.

IV. Standard of Review

¶ 10 In medical malpractice actions, complaints must meet a higher standard than generally required to survive a motion to dismiss, in that they must also meet the requirements of Rule 9(j). *Bluitt v. Wake Forest Univ. Baptist Med. Ctr.*, 259 N.C. App. 1, 3, 814 S.E.2d 477, 479 (2018) (citing *Alston v. Hueske*, 244 N.C. App. 546, 551-52, 781 S.E.2d 305, 308 (2016) (internal quotations and citation omitted)). When ruling on a motion to dismiss pursuant to Rule 9(j), a court must consider the facts relevant to Rule 9(j) and apply the law to them. *Bluitt*, 259 N.C. App. at 3, 814 S.E.2d at 479 (citing *McGuire v. Riedle*, 190 N.C. App. 785, 787, 661 S.E.2d 754, 757 (2008) (internal quotations and citation omitted)). "A trial court's order dismissing a complaint pursuant to Rule 9(j) is reviewed *de novo* on appeal because it is a question of law." *Bluitt*, 259 N.C. App. at 3, 814 S.E.2d at 479 (citing *Alston*, 244 N.C. App. at 549, 781 S.E.2d at 308 (internal quotations and citation omitted)).

¶ 11 Similarly, "[s]ummary judgment cases are reviewed in the appellate courts under a *de novo* standard of review." *N.C. Farm Bureau Mut. Ins. Co. v. Simpson*, 198 N.C. App. 190, 191, 678 S.E.2d 753, 754, (2009) (citations omitted). "When a motion for summary judgment is granted, 'the critical questions for determination upon appeal are whether on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law.'" *Smith v. Smith*, 65 N.C. App. 139, 142, 308 S.E.2d

504, 506, (1983) (quoting *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E. 2d 399, 401 (1980)) (emphasis omitted). "[A] genuine issue is one which can be maintained by substantial evidence." *Smith*, 65 N.C. App. at 142, 308 S.E.2d at 506 (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference." *United Cmty. Bank (Ga.) v. Wolfe*, 369 N.C. 555, 558, 799 S.E.2d 269, 271 (2017) (internal quotations and citations omitted).

IV. Analysis

¶ 12 Plaintiff asserts the trial court erred in granting Defendants' motions to dismiss and for summary judgment, contending a genuine issue of material fact existed as to whether Dr. Falk met Rule 9(j) qualifications. Specifically, Plaintiff contends Dr. Falk's later-issued affidavit—claiming he did, in fact, review Dr. Nieland's three-page note—provides evidence disputing Defendants' assertions Plaintiff failed to comply with Rule 9(j). For the following reasons, we find Plaintiff's assertions pose no more than a mere "scintilla or a permissible inference" and do not amount to genuine issue of material fact, such that the trial court's grant of Defendants' motion for summary judgment should be reversed by this Court. *See id.*, at 558, 799 S.E.2d at 271. We further conclude the trial court's grant of Defendants' motion to dismiss pursuant to Rule 9(j) was proper.

¶ 13 Rule 9(j) requires in relevant part:

> Medical malpractice.--Any complaint alleging medical malpractice by a health care provider pursuant to [N.C. Gen. Stat. §] 90-21.11(2)a. in failing to comply with the applicable standard of care under [N.C. Gen. Stat. §] 90-21.12 shall be dismissed unless:
> (1) The pleading specifically asserts 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. Gen. Stat. § 1A-1, N.C. R. Civ. P. 9(j) (emphasis added).

¶ 14 The North Carolina General Assembly created Rule 9(j) of the North Carolina Rules of Civil Procedure to require medical malpractice complaints to include an assertion that the "medical care" was reviewed by a qualified professional willing to testify that the acts or omissions fell below the standard of care. Rule 9(j) required Plaintiff to provide Dr. Falk with, and for Dr. Falk to review, "all medical records pertaining to the alleged negligence." N.C. R. Civ. P. 9(j)(1); *see also Leonard v. Bell*, 272 N.C. App. 610, 626, 847 S.E.2d 58, 68 (2020). Defendants' assertion Dr. Falk failed to review "all medical records pertaining to the alleged negligence" is supported by Dr. Falk's own testimony during his deposition.

¶ 15 As to Plaintiff's assertion Dr. Falk's affidavit provides evidence disputing Defendants' dismissal arguments, it is "well established that a party opposing a motion for summary judgment cannot create an issue of fact by filing an affidavit

contradicting his prior sworn testimony." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 225, 768 S.E.2d 582, 596 (2015) (citations omitted). Our Court has held, "where an affidavit contains additions and changes that are 'conclusory statements or recharacterizations more favorable to plaintiffs [that] materially alter the deposition testimony in order to address gaps in the evidence necessary to survive summary judgment[,]' the trial court should properly exclude these portions of the affidavits." *Id.* at 225, 768 S.E.2d at 596, (quoting *Marion Partners, LLC v. Weatherspoon & Voltz*, LLP, 215 N.C. App. 357, 362, 716 S.E.2d 29, 33 (2011)). In *Marion Partners*, we reasoned: if "a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Marion Partners, LLC*, 215 N.C. App. at 362, 716 S.E.2d at 33.

¶ 16 Because Dr. Falk's affidavit testimony directly contradicts his otherwise clear deposition testimony, Plaintiff cannot use the "scintilla" of evidence in support of his contention presented by Dr. Falk's affidavit testimony to create an issue of fact in order to survive summary judgment. *See United Cmty. Bank*, 369 N.C. at 558, 799 S.E.2d at 271. The trial court properly refused to consider the relevant portion of Dr. Falk's affidavit. *See Supplee* 239 N.C. App. at 225, 768 S.E.2d at 596.

¶ 17 Plaintiff further contends the trial court erred in failing to include findings of fact in its order. In *Moore v. Galloway*, we reasoned: "[t]here is no necessity for findings of fact where facts are not at issue . . . ." 35 N.C. App. 394, 397, 241 S.E.2d 386, 387 (1978). Therefore, where there are no genuine issues of material fact, the trial court is necessarily relieved of any obligation to make findings of fact. In its order granting Defendants' motions, the trial court found: "there are no reasonable disputes or ambiguities in the forecasted evidence," and "therefore, there are no genuine issues as to any material facts . . . ." Because a later-issued affidavit contradicting prior testimony cannot serve to create a genuine issue of material fact, we agree with the reasoning of the trial court, and will not remand the present case to the trial court for the formal entry of findings of fact. *See Supplee*, 239 N.C. App. at 225, 768 S.E.2d at 596.

V. Conclusion

¶ 18 An expert witness' later filed affidavit testimony, which directly contradicts the witness' otherwise clear deposition testimony, cannot serve to create a genuine issue of fact in order to survive a motion to dismiss pursuant to Rule 9(j). This Court concludes the grant of Defendants' motions to dismiss and for summary judgment were proper, and the lack of the trial court's entry of findings of fact do not substantiate Plaintiff's claim for reversal of the order.

AFFIRMED.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).