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NO. COA14-567
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

ROBERT A. SARTORI,
Plaintiff-Appellant,

v.

North Carolina
Industrial Commission
I.C. No. TA-22787

N.C. DEPARTMENT OF PUBLIC SAFETY,
Defendant-Appellee.

Appeal by Plaintiff from decision and order entered by the North Carolina Industrial Commission on 17 December 2013. Heard in the Court of Appeals 17 November 2014.

Robert A. Sartori, pro-se.

Attorney General Roy Cooper, by Associate Attorney General Adrian W. Dellinger, for Defendant-Appellee.

McGEE, Chief Judge.

Robert Allen Sartori ("Plaintiff") filed a "Petition to Sue as an Indigent Person" on 15 November 2011. Plaintiff attached his proposed complaint to his petition, which included a negligence claim against the North Carolina Department of Public Safety ("Defendant"), and alleged medical malpractice based upon

the actions of a nurse employee of Defendant in the Division of Adult Correction ("DAC"). Plaintiff alleged that on 6 October 2011, while he was an inmate at the Pasquotank Correctional Institution, he suffered a "medical emergency" related to his back. Plaintiff claimed he had pre-existing "back problems," that on 6 October 2011 "he could hardly walk or stand straight-up" due to his back issues, and that instead of receiving immediate medical treatment, he was told to file a "sick call," which is a non-emergency request for an appointment with medical staff. Plaintiff stated that, at that time, he knew if he filed a "sick call," he would not be evaluated for several days.

Plaintiff filed a grievance with Defendant on 6 October 2011 concerning the treatment provided him by medical staff on 6 October 2011. The first sentence of Plaintiff's grievance statement was: "This grievance is being filed to exhaust adm. Remedies." In his grievance, Plaintiff alleged that he had "requested to file an emergency grievance because of severe back pain[.]" Plaintiff was taken to the medical center where, according to Plaintiff,

nurse Fontana . . . asked why I was here. I explained a medical emergency for a back injury. Without further questions she excused me telling me to fill out a sick [call], and at that point I feel it's a abuse of discretion negligence claim because she cannot tell if there's any internal injury or not just because she doesn't see

blood its considered not a life threatening issue which is incorrect by law and still a deliberate indifference issue. I know it was Oct. 6 Thursday a sick call was filed. I wouldn't see anybody until the following week leaving me the weekend to suffer with severe back pain that this is uncalled for when there was (2) doctors here and a full nursing staff. [T]he negligence or abuse of discretion by nurse Fontana caused me severe pain and suffering[.] That to allow a nurse to excuse an inmate's medical complaint when there are medical co-payment fees for both regular medical issues, and emergency medical issues, violates my rights to adequate medical services, and constitutes negligence, abuse of discretion, allowing nurses to dismiss an inmate's complaints without any a[ss]essment at all.

I am presently in severe pain. Sick calls aren't heard within 72 hours and the negligence, abuse of discretion by nurse Fontana has cause[d] and is continuing to cause me pain and suffering and I am exhausting my administrative remedies at this point.

In the section of Plaintiff's grievance form that asked: "What remedy would resolve your grievance?" Plaintiff answered: "Have me see a doctor without undue delay. Reprimand nurse Fontana for her unprofessionalism. Stop the abuse of discretion on medical emergencies."

Defendant responded to Plaintiff's grievance on 12 October 2011, stating that Plaintiff's grievance had been investigated, and:

According to Nurse Patterson, you were assessed according to the Department of

Corrections Health Service Policy on the definition of a medical emergency. Nurse Patterson stated that you were not at risk of loss of life or limb or bleeding profusely and was advised to submit a sick call.

Therefore, no further action is necessary.

Apparently, both Nurse Fontana and Nurse Patterson were on duty 6 October 2011. It appears, though is not certain, that Nurse Fontana was the nurse who had the most contact with Plaintiff on that day, and Nurse Patterson was in a supervisory role.

Plaintiff appealed this decision to the Secretary of the Department of Public Safety. The grievance examiner completed his review on 9 November 2011, and found that Plaintiff "was assessed and his condition did not meet the policy requirement for a medical emergency; therefore, he was advised to sign up for sick call for routine evaluation and treatment." The examiner concluded: "I am convinced that staff has adequately addressed this inmate's grievance concerns." Plaintiff's grievance was dismissed.

Plaintiff then filed his petition and proposed complaint with the North Carolina Industrial Commission ("Commission"), pursuant to the Tort Claims Act, on 15 November 2011. In his proposed complaint, Plaintiff alleged:

In this case [Plaintiff] declared an medical emergency. Nurse Fontana . . . looked at the inmate, asked him what he was here at

medical for [and Plaintiff] explained [that he was there] for an medical emergency[.] Nurse Fontana's exact words were fill out a sick call. She did not assess [Plaintiff] other than visibly, she did not asked any questions. She did not take vital signs. She simply excused [Plaintiff] stating fill out a sick call. This constitutes negligence.

Furthermore, . . . on the walls [of the medical center] it states the following[:]

A true emergency is something that happens to you that may cause death, severe injury or permanent disability if you are not seen by a health care provider.

However, A health care provider (nurse) cannot assess an inmate's complaint by simply asking what's wrong. Upon telling her, the assessment consist of "fill out a sick call," no questions about medical history no blood pressure taken, no temperature taken. When an inmate fills out a regular sick call request all the above is conducted.

[Plaintiff] contends nurse Fontana's actions constitute negligence[.] [Plaintiff] should be granted the relief requested for damage, pain and suffering.

Plaintiff claimed that the damages he suffered from the above alleged negligence consisted of "pain & suffering." However, Plaintiff included no factual allegations that any delay caused him additional pain and suffering, or what any pain and suffering consisted of. Plaintiff failed to indicate the results of his subsequent medical evaluations, and made no

allegation that his issues of 6 October 2011 were subsequently found to have been a true "medical emergency" as required by Defendant's policy before immediate medical care would be provided. Plaintiff did not challenge the legality of Defendant's policy in his complaint, nor did Plaintiff offer any specific allegations of how implementation of Defendant's medical evaluation policy resulted in any legally cognizable injury.

Defendant filed motions to dismiss Plaintiff's complaint on or after 11 January 2012.¹ Defendant provided three bases for dismissal of Plaintiff's action: (1) that the action was frivolous pursuant to N.C. Gen. Stat. § 1-110(b) and Rule T202(6) of the North Carolina Tort Claims Rules (4 NCAC 10B.0103(e)), (2) that Plaintiff failed to state a claim pursuant to Rule 12(b)(6), and (3) that Plaintiff failed to include certification pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure that an expert had reviewed Plaintiff's claim and was prepared to testify that the medical care Plaintiff received did not comply with the applicable standard of care pursuant to N.C. Gen. Stat. § 90-21.12. N.C. Gen. Stat. 1A-1, 9(j) (2013) ("Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-

¹ The copy of the motions included in the record does not bear a file stamp.

21.11(2)a. in failing to comply with the applicable standard of care under G.S. 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[.]”).

We note that Plaintiff filed his “Petition to Sue as an Indigent Person” along with his proposed complaint on 15 November 2011. Defendant served its motion to dismiss pursuant to Rule 9(j) on Plaintiff on 11 January 2012, less than sixty days after Plaintiff petitioned to sue as an indigent. According to the Tort Claims Rules, in medical malpractice cases filed by an inmate where the defendant moves to dismiss, discovery is stayed, and a hearing must be conducted to determine: “(A) whether a claim for medical malpractice has been stated; (B) whether expert testimony is necessary for the plaintiff to prevail; and (C) if expert testimony is deemed necessary, whether the plaintiff will be able to produce such testimony on the applicable standard of care.” 4 NCAC 10B.0202(a).

If defendant's Motion to Dismiss is denied, the case shall proceed as any other tort claims case. Defendant shall produce medical records to plaintiff within 45 days of the Order of the Commission denying defendant's Motion to Dismiss. *Plaintiff shall then have 120 days to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure.*

4 NCAC 10B.0202(c) (emphasis added). Therefore, Defendant filed its motion to dismiss pursuant to Rule 9(j) prematurely. In addition, it does not appear from the record that any hearing pursuant to 4 NCAC 10B.0202 was conducted. Had such a hearing been conducted, the Commission would have been required to address Defendant's motions to dismiss for failure to state a claim and frivolous action first, and only upon the denial of those motions would the 120 days allowed for Plaintiff to comply with Rule 9(j) have begun.

Defendant's motions were first heard via videoconference before a deputy commissioner of the Commission on 13 September 2012. Plaintiff argued that he had not had time to comply with the requirements of Rule 9(j). The deputy commissioner filed an order on 23 October 2012 ordering Plaintiff to "file with the [Commission] and [D]efendant a [Rule] 9(j) affidavit within 90 days from the date of this order."

Defendant's motions to dismiss were again heard on 15 January 2013. At that time, Plaintiff had still failed to

comply with the certification requirement of Rule 9(j). The deputy commissioner entered his decision and order on 22 February 2013, and "noted that [P]laintiff has previously filed a medical negligence case against [D]efendant and it was dismissed for failure to file a [Rule] 9(j) affidavit; and, [P]laintiff indicated at this hearing that he basically filed this action because he did not believe that Rule 9(j) was constitutional." The deputy commissioner dismissed Plaintiff's action for failure to comply with Rule 9(j). The deputy commissioner did not address Defendant's motions to dismiss based upon Rule 12(b)(6) or frivolous claim pursuant to N.C. Gen. Stat. § 1-110(b) and 4 NCAC 10B.0103(e).

Plaintiff appealed the decision and order of the deputy commissioner, arguing that Rule 9(j) violated the North Carolina and United States Constitutions. The Commission reviewed Plaintiff's appeal without oral arguments on 31 October 2013, and filed its decision and order on 17 December 2013, in which it dismissed Plaintiff's action for failure to comply with Rule 9(j), and did not address Defendant's additional arguments for dismissal. Plaintiff filed his notice of appeal to this Court on 13 January 2014.

Analysis

We do not reach Plaintiff's arguments because we hold that the Commission failed to make the proper determinations required by N.C. Gen. Stat. § 1-110 and 4 NCAC 10B.0103 before ruling on Plaintiff's compliance with Rule 9(j). We therefore vacate and remand for additional proceedings.

N.C. Gen. Stat. § 1-110(b) states in part:

Whenever a motion to proceed as an indigent is filed pro se by an inmate in the custody of the Division of Adult Correction of the Department of Public Safety, the motion to proceed as an indigent and the proposed complaint shall be presented to any superior court judge of the judicial district. This judge shall determine whether the complaint is frivolous.

N.C. Gen. Stat. § 1-110(b) (2013). If the trial court determines that Plaintiff's complaint is frivolous, it has discretion to dismiss the complaint. *Id.* N.C. Gen. Stat. § 1-110(b) applies equally to the Commission when considering an inmate's petition to sue as an indigent. 4 NCAC 10B.0103(e).

Plaintiff has filed numerous claims and petitions in North Carolina against a variety of defendants. One of Plaintiff's recent lawsuits was initiated by the filing of a petition on 15 April 2010 seeking approval from the Superior Court of Jackson County to file a *pro se* complaint as an indigent. *Sartori v. Cnty. of Jackson*, 213 N.C. App. 217, 714 S.E.2d 210 (2011) (unpublished opinion) ("*Sartori I*"). Plaintiff desired to bring

a medical malpractice claim against Jackson County, and Dr. Steven P. Deweese ("Dr. Deweese") and Nurse Cathy Barnes ("Nurse Barnes"), who provided medical services at the Jackson County Jail. *Id.* According to Plaintiff, DAC physicians had prescribed the painkiller Ultram four times daily for pain in Plaintiff's back, hip, hands, and left wrist. *Id.*

On 9 April 2009, Nurse Barnes dispensed the painkiller ibuprofen to plaintiff, rather than Ultram. Nurse Barnes informed plaintiff that she was acting on Dr. Deweese's orders. On 15 June 2009, Nurse Barnes dispensed Ultram to plaintiff, but only twice that day. Nurse Barnes again informed plaintiff that she was acting pursuant to Dr. Deweese's orders. On 12 October 2009, Nurse Barnes again only dispensed Ultram to plaintiff twice.

Id. In Plaintiff's proposed complaint, he "alleged that Dr. Deweese and Nurse Barnes' failure to dispense his Ultram four times per day constituted negligence and medical malpractice[.]" *Id.*

The trial court conducted a hearing as required by N.C. Gen. Stat. § 1-110 to determine whether Plaintiff could file his claim as an incarcerated and indigent *pro se* claimant. *Id.* The trial court dismissed Plaintiff's complaint pursuant to Rule 9(j), but "did not address whether [P]laintiff's claims were frivolous." *Id.* This Court vacated the trial court's order dismissing Plaintiff's complaint and remanded for a

determination pursuant to N.C. Gen. Stat. § 1-110(b) concerning whether Plaintiff's claims were frivolous, stating:

N.C. Gen. Stat. § 1-110(b) governs the treatment of motions to proceed as an indigent for inmates in the North Carolina Department of Correction. It states:

Whenever a motion to proceed as an indigent is filed pro se by an inmate in the custody of the Department of Correction, the motion to proceed as an indigent and the proposed complaint shall be presented to any superior court judge of the judicial district. *This judge shall determine whether the complaint is frivolous.* In the discretion of the court, a frivolous case may be dismissed by order. The clerk of superior court shall serve a copy of the order of dismissal upon the prison inmate. If the judge determines that the inmate may proceed as an indigent, service of process upon the defendant shall issue without further order of the court.

Id. (emphasis added). Under this statute, when the trial court is presented with a petition to sue as an indigent by an inmate, it must make a threshold determination as to whether the inmate's proposed complaint is frivolous. If the inmate's proposed complaint is frivolous, the trial court should dismiss the complaint. However, if the proposed complaint is not frivolous, then the trial court should allow the inmate to proceed as an indigent.

Id. N.C. Gen. Stat. § 1-110 also applies to tort claims against the State heard by the Commission. 4 NCAC 10B.0103(e). In the

case before us, as in *Sartori I*, Plaintiff, while an inmate, petitioned to be allowed to file his complaint *pro se*, as an indigent. A hearing was conducted resulting in the dismissal of Plaintiff's action for failure to comply with Rule 9(j) but, as was the case in *Sartori I*, there is no indication that the Commission made the threshold determination pursuant to N.C. Gen. Stat. § 1-110(b) concerning whether Plaintiff's complaint was frivolous. Because the Commission failed to follow N.C. Gen. Stat. § 1-110(b), we act as we did in *Sartori I*, vacate the Commission's order, and remand for further proceedings consistent with this opinion. *Sartori I*, 213 N.C. App. 217, 714 S.E.2d 210.

In the event the Commission conducted the appropriate review pursuant to N.C. Gen. Stat. § 1-110(b) and 4 NCAC 10B.0103(e), but Plaintiff failed to include the relevant documentation in the record, we dismiss Plaintiff's appeal for failure to submit a record allowing for full review, and the Commission need take no additional action. It is Plaintiff's duty to provide an adequate record for this Court to review. *Miller v. Miller*, 92 N.C. App. 351, 353-54, 374 S.E.2d 467, 468-69 (1988).

Vacated and remanded.

Judges HUNTER, Robert C. and BELL.

Report per Rule 30(e).