Anonymous Physician 1, and Indianapolis Fertility, Inc., d/b/a Reproductive Endocrinology Associa

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I N T H E COURT OF APPEALS OF INDIANA

Anonymous Physician 1, and Indianapolis Fertility, Inc., d/b/a Reproductive Endocrinology Associates, Appellants-Defendants,

v.

Elizabeth White and Matthew White, Appellees-Plaintiffs. July 29, 2020 Court of Appeals Case No. 19A-CT-1262 Appeal from the Marion Superior Court The Honorable Cynthia J. Ayers, Judge Trial Court Cause No. 49D04-1612-CT-43686

Pyle, Judge. Statement of the Case

[1] In this interlocutory appeal, Indianapolis Fertility, Inc., d/b/a Reproductive Endocrinology Associates

(collectively Appellants) appeal the trial

Indiana Trial Rule 12(B)(6) motion to dismiss

multi-count complaint. Matthew filed the

complaint after he had learned that Physician had used own sperm,

to artificially inseminate

Elizabeth White

insemination procedure, Elizabeth became pregnant and gave birth to Matthew.

Concluding that Matthew has sufficiently stated breach of contract and tort

claims for which relief can be granted, we affirm the trial court s denial of

Appellants motion to dismiss.

[2] We affirm.

Issue

Whether 12(B)(6) motion to dismiss.

Facts

[3] Because this is an appeal from a motion to dismiss, we take the undisputed facts

from the complaint. In 1981, Elizabeth sought the services of Appellants to

become pregnant. Physician told Elizabeth that he would artificially

inseminate her with donor sperm from an anonymous medical school resident and that he would use the donor sperm in no more than three successful

artificial insemination procedures in a well-defined geographic area. At no time

did Physician tell Elizabeth that he would inseminate her with his own sperm.

Elizabeth subsequently entered into a contract with Appellants for an artificial

insemination procedure. The contract specified that her procedure would use

donor sperm from an anonymous medical school resident. Following the

artificial insemination procedure, Elizabeth became pregnant and gave birth to

Matthew in 1982.

[4] In September 2016, Elizabeth and Matthew learned that Physician had

inseminated Elizabeth and other patients with his own sperm rather than with

donor sperm from anonymous medical school residents. Two months later, in

November 2016, Elizabeth and Matthew filed a proposed medical malpractice

complaint against Appellants with the Indiana Department of Insurance.

[5] In December 2016, Elizabeth and Matthew filed a joint multi-count complaint

for damages against Appellants in the Marion Superior Court. Matthew alleged

claims for breach of contract, medical malpractice, and negligent hiring and

retention. Specifically, Matthew alleged that Appellants had breached their

contract with Elizabeth when Physician artificially inseminated her with

rather than the sperm of an anonymous medical school

resident. Matthew alleged that he was a third-party beneficiary to this contract.

Matthew also alleged that Appellants had breached their duty by deviating from

the standard of care regarding fertility practices. Matthew further alleged that had suffered substantial harm

and incurred significant damages.

[6] In February 2018, Appellants filed an Indiana Trial Rule 12(B)(6) motion to

dismiss Matthew s claims, alleging that Matthew had failed to state claims for

which relief could be granted. Specifically, Appellants argued that Matthew

had not sufficiently stated a breach of contract claim because he had failed to

establish that he was a third-party beneficiary to the contract between Elizabeth

and Appellants. Appellants further argued that the allegations in Matthew complaint had failed to sufficiently state a claim for negligence because

Matthew had failed to establish that Appellants owed him a duty of care and

had failed to state a claim for compensable injuries.

[7] . 1

Matthew also filed an amended complaint in April 2018. In the amended

complaint, Matthew alleged as follows regarding his breach of contract claim:

(1) t [Matthew] the direct benefit of life and/or existence[;] (2) the contract

1 B)(6) motion to dismiss, the court is prohibited from hearing any evidence and may look only to the facts alleged in the complaint (App. Vol. 2 at 94). Appellants are correct. See K.M.K. v. A.K., 908 N.E.2d 658, 662 (Ind. Ct. App. 2009), trans. denied and at 12). and number of tangible direct benefits to [Matthew], including his conception;

intrauterin App. Vol. 2 at

68).

[8] Regarding the negligence claim, Matthew alleged that

the insemination procedure performed by

[Appellants], [Elizabeth] became pregnant with [Matthew], who was born on

November 26, 1982 App. Vol. 2 at 64-65). Matthew also alleged that

appropriate medical care to [Matthew] and had (App. Vol. 2

at 64, 65). and representations communicated to their patients,

including [Elizabeth,] specimens from a single donor were to be used in no

more than three successful insemination procedures in a well-defined

geographic area. Therefore, specimens from a single donor were not to be used

the risk of accidental incest resulting from many closely biologically related

(App. Vol. 2 at 65). Matthew also alleged that he

harm and incurred significant damages, including both emotional and physical as a result of (App. Vol. 2 at 66). Additionally,

in the amended complaint, Matthew added a count of gross negligence, which

or omissions in reckless disregard of Vol. 2 at 71).

[9] Matthew had sufficiently stated breach of contract and negligence claims.

Specifically, regarding the breach of contract claim, the trial court concluded

agreement between his mother, the doctor, and the clinic which could

(App. Vol. 2 at 16).

Regarding the negligence claim, the trial court concluded that

proof of his claims or the lack thereof, he has at least, raised an inference of a

legally action (App. Vol. 2 at 13). The trial court also specifically

Vol. 2 at 17). The trial court denied Trial Rule 12(B)(6) motion to

dismiss. Appellants now appeal that denial.

Decision

[10] Appellants argue that the trial court erroneously denied their Trial Rule

12(B)(6) motion to dismiss Matthew s claims. Specifically, Appellants contend

that Matthew failed to sufficiently state claims for which relief can be granted. [11] Our review of a trial court s denial of a motion to dismiss under Trial Rule

12(B)(6) is de novo and requires no deference to the trial court s decision. Sims v.

Beamer, 757 N.E.2d 1021, 1024 (Ind. Ct. App. 2001). A motion to dismiss

under Rule 12(B)(6) tests the legal sufficiency of a complaint: that is, whether

the allegations in the complaint establish any set of circumstances under which

a plaintiff would be entitled to relief. Trail v. Boys and Girls Clubs of Northwest

Ind., 845 N.E.2d 130, 134 (Ind. 2006) (emphasis added). Thus, while we do not test the sufficiency of the facts alleged with regards to their adequacy to provide recovery, we do test their sufficiency with regards to whether or not they have stated some factual scenario in which a legally actionable injury has occurred. Id. When reviewing a Trial Rule 12(B)(6) motion to dismiss, we accept the facts alleged in the complaint as true and view the pleadings in a light most favorable to the nonmoving party and with every reasonable inference in the nonmoving party s favor. Id.

[12] We view motions to dismiss under Trial Rule 12(B)(6) with disfavor because such motions undermine the policy of deciding causes of action on their merits. McQueen v. Fayette County Sch. Corp., 711 N.E.2d 62, 65 (Ind. Ct. App. 1999), trans. denied. A plaintiff need not set out in precise detail the facts upon which the claim is based but must still plead the operative facts necessary to set forth an actionable claim. Trail, 845 N.E.2d at 135. Indeed, under the notice pleading requirements, a plaintiff s complaint needs only contain a short and plain statement of the claim showing that the pleader is entitled to relief. Id. (quoting Indiana Trial Rule 8(A)). sufficient if they put a reasonable person on notice as to why plaintiff sues. Capitol Neon Signs, Inc. v. Indiana National Bank, 501 N.E.2d 1082, 1085 (Ind. Ct. App. 1986).

[13] Dismissals are improper under 12(B)(6) unless it appears to a certainty on the face of the complaint that the complaining party is not entitled to any relief.

Bellwether Properties, LLC v. Duke Energy Indiana, Inc., 87 N.E.3d 462, 466 (Ind. 2017) (quoting State v. American Family Voices, Inc., 898 N.E.2d 293, 296 (Ind. 2008) (emphasis added)). In addition, dismissals under T.R. 12(B)(6) are American Family Voices, 898 N.E.2d at 296.

[14] We turn Appellants argue that Matthew has failed to state a breach of contract claim because he has failed to establish that he was a third-party beneficiary to the contract between Elizabeth and Appellants.

[15] At the outset, we note that because we are reviewing the denial of a Trial Rule 12(B)(6) motion to dismiss, we need not determine whether Matthew was a third-person beneficiary to the contract. Rather, at this point, we look at the allegations in Matthew s complaint, which we accept as true, to determine whether they establish any set of circumstances under which Matthew would be entitled to relief as a third-party beneficiary and whet factual scenario in which a legally actionable injury has occurred. Trail, 845 N.E.2d at 134. [16] Generally, only those who are parties to a contract, or those in privity with a party, have the right to recover under a contract. Flaherty & Collins, Inc. v. BBR-Vision I, L.P., 990 N.E.2d 958, 971 (Ind. Ct. App. 2013), trans. denied. However, one who is not a party to a contract may enforce its provisions by demonstrating that he is a third-party beneficiary to the contract. Id.

A third-party beneficiary contract is one in which the promisor has a legal interest in performance in favor of the third party and in which the performance of the terms of the contract between two

parties must necessarily result in a direct benefit to a third party which was so intended by the parties. A third party must show that it will derive more than an incidental benefit from the performance of the promisor.

In order to enforce a contract by virtue of being a third-party beneficiary, an entity must show (1) clear intent by the actual parties to the contract to benefit the third party; (2) a duty imposed on one of the contracting parties in favor of the third party; and (3) performance of the contract terms necessary to render the third party a direct benefit intended by the parties to the contract. Among these three factors, the intent of the contracting parties to benefit the third-party is controlling.

Id. (quoting Centennial Mortgage, Inc. v. Blumenfeld, 745 N.E.2d 268, 275 (Ind. Ct.

App. 2001)).

[17] Here, Matthew alleges in his amended complaint that: (1) the contract between

of life and/or existence[;] the parties thereto in favor of [Matthew the contract necessarily rendered a number of tangible direct benefits to [Matthew], including his conception; intrauterine development; birth; and life

Vol. 2 at 68). Taking these allegations as true, as we

must do when conducting a Trial Rule 12(B)(6) review, Matthew has

established a set of circumstances under which he would be entitled to relief as

a third-party beneficiary. Matthew has therefore stated a claim for which relief

[18] We next turn tort claims. All negligence actions, including those

for medical malpractice, include the same elements that must be proven. Bader

v. Johnson, 732 N.E.2d 1212, 1216-17 (Ind. 2000). Specifically, the plaintiff

must show: (1) a duty owed to the plaintiff by the defendant; (2) a breach of

that duty by allowing conduct to fall below the applicable standard of care; and

Id. at 1217.

[19] Appellants argue that owed a duty before he was conceived. Again, given

our procedural posture of reviewing the denial of a Trial Rule 12(B)(6) motion

to dismiss, we need not determine whether Appellants owed Matthew a duty.

Rather, at this point, we look at the allegations in Matthews complaint,

accepting them as true, to determine whether they establish any set of

circumstances under which Matthew would be entitled to relief. See Trail, 845

N.E.2d at 134. [20] Walker v. Rinck, 604 N.E.2d 591 (Ind. 1992), is instructive in determining

whether Matthew has stated a negligence claim for which relief can be granted.

In the Walker case, 2

Dr. Rinck

ordered laboratory blood tests, which erroneously reported that Mrs. Walker

had Rh positive blood. As a result of the lab test, Mrs. Walker was not given a

RhoGAM injection when her child was born. In fact, Mrs. Walker was correct

that she had Rh negative blood, and her child had Rh positive blood. Mrs.

Walker was therefore exposed to the formation of potentially harmful

antibodies. Mrs. Walker subsequently gave birth to three more children, all of

whom had Rh positive blood and suffered from birth defects.

[21] All three subsequent against Dr. Rinck and the lab that had erroneously reported that Mrs. Walker

had Rh positive blood. Dr. Rinck and the lab filed summary judgment

motions, which the trial court granted. This Court affirmed the grant of

2 The Indiana Supreme Court explained as follows: When an Rh negative woman is pregnant with an Rh positive child, her blood develops antibodies which do not affect the present pregnancy, but can

cause damage to later-conceived Rh positive fetuses. An injection of RhoGAM during the first pregnancy can prevent the formation of these antibodies. However, if the injection is not given in a timely manner and reverse or destroy the antibodies. 3 p. R-84 (1986). RhoGAM is a trademark of a preparation of Rh immune globulin. It is used to prevent the formation of antibodies in Rh negative women who have received Rh positive blood. Id. at p.R.92. Walker, 604 N.E.2d at 592 n.1. summary judgment in favor of Dr. Rinck and the lab. Walker v. Rinck, 566

N.E.2d 1088, 1090 (Ind. Ct. App. 1991), trans. granted by 604 N.E.2d 591 (Ind.

1992).

[22] The Indiana Supreme Court granted transfer in Walker and stated that

[was] true that there was no direct physician-patient relationship

between Dr. Rinck and the Walker children at the time he treated their mother,

Webb v. Jarvis, [575

N.E.2d 992 (Ind. 1991)], compels us to conclude that, nevertheless, Dr. Rinck

3 Walker, 604 N.E.2d at 594. The Indiana Supreme

Court identified the following facts in support of its conclusion: (1) the Walker

children were the beneficiaries of the consensual relationship between Mrs.

Walker and Dr. Rinck, akin to a third-party beneficiary of a contract; (2) Dr.

Rinck knew that the reason for the RhoGAM was to benef

future children; (3) the injuries to the Walker children were foreseeable where

the reason to give the RhoGAM shot was to prevent the exact injuries that

occurred; (4) there was no direct conflict between Dr. 3

In Webb, 575 N.E.2d at 996, the Indiana Supreme Court set forth the following three factors to determine whether a shooting victim had stated a cognizable claim against a physician who had allegedly overprescribed anabolic steroids to a patient that had become a who was victim: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and

(3) public policy concerns. The Indiana Supreme Court, which subsequently periodically used these factors in analyzing the existence of a duty in certain cases, disapproved of the Webb v. Jarvis analysis regarding foreseeability in the context of duty in , 62 N.E.3d 384, 390 (Ind. 2016) and Rogers v. Martin, 63 N.E.3d 316, 325 (Ind. 2016). However, neither Goodwin nor Rogers overruled or disapproved of the Walker case in its entirety. Mrs. Walker and his legal duty to hypothetical future generations; and (5)

with the well-

established medical practice of giving RhoGAM to an Rh negative mother who

has given birth to an Rh positive child i

children from injury. Id. at 594-95. See also Spangler v. Bechtel, 958 N.E.2d 458,

Ransburg Indus. v. Brown, 659 N.E.2d 1081,1084 (Ind.

Ct. App. 1995) (action for a preconception tort ; Yeager v. Bloomington Obstetrics and Gynecology,

Inc., 585 N.E.2d 696, 700 (Ind. Ct. App. 1992), trans. granted and summarily

affirmed, 604 N.E.2d 598 (Ind. 1992) (stating -duty rule

disallowing all claims based upon alleged preconception torts is unnecessary,

unjust, and contrary to fundamental and traditional principles of Indiana tort

a who had failed to giv

RhoGAM shot after her first child was born with Rh positive blood).

[23] Here, in his amended complaint, Matthew alleged that Elizabeth had

September 1981, and [a]s a result of the insemination procedure

performed by [Appellants] [Elizabeth] became pregnant with [Matthew], who

4-65). Matthew also

rovide reasonable

had at 64, 65). [including [Elizabeth,] specimens from a single donor were to be used in no more than three successful insemination procedures in a well-defined

geographic area. Therefore, specimens from a single donor were not to be used

the risk of accidental incest resulting from many closely biologically related

individuals living near each other and unaware of their biological

[24] Taking these facts as true and viewing the pleadings with every reasonable

conclude that Matthew has pleaded the

operative facts necessary to establish that Appellants owed him a duty of care.

See Trail, 845 N.E.2d at 135. In other words, because it does not appear to a

certainty on the face of the complaint that Matthew is not entitled to relief, a

See Bellwether, 87

N.E.3d at 466.

[25] should have been dismissed

because Matthew failed to state a claim for compensable injuries. Appellants

life, which has been considered and rejected as a compensable injury by the We disagree with

[26] In Cowe by Cowe v. Forum Group, Inc., 575 N.E.2d 630 (Ind. 1991), the Indiana

Supreme Court gave the following e prevailing

nomenclature as follows:

applies to claims brought by the parents of a child born with birth defects alleging that due to negligent medical advice or testing they were precluded from an informed decision about whether to conceive a potentially handicapped child or, in the event of a pregnancy, to terminate it. When such action seeks damages on behalf of the child rather

Id. at 633 (internal citations omitted).

[27] Here, Matthew was neither born with birth defects nor does he allege that, due

to negligent medical advice or testing, Elizabeth was precluded from an

informed decision about whether to conceive a potentially handicapped child or

terminate her pregnancy. He also does not allege that his life is an injury.

Rather, Matthew alleges that Appellants breached their duty of care and that

breach caused him to suffer both physical and emotional damages. 4

4 of emotional distress. [28] Adhering to our Trial Rule 12(B)(6) standard of review, we need not determine

whether Matthew actually suffered physical and emotional damages. Rather, at

this point, we look at the allegations in Matthew s complaint, accepting them as

true, to determine whether they establish any set of circumstances under which

Matthew would be entitled to relief. See Trail, 845 N.E.2d at 134.

[29] The Indiana Supreme Court has explained as follows regarding damages:

It is a well-established principle that damages are awarded to fairly and adequately compensate an injured party for [his] loss, and the proper measure of damages must be flexible enough to fit the circumstances. In tort actions generally, all damages directly related to the wrong and arising without an intervening agency are recoverable. In negligence actions specifically, the injured party is entitled to damages proximately caused by the

Bader, 732 N.E.2d at 1220 (internal citations omitted).

[30] Here, Matthew has alleged that Elizab

of the insemination procedure performed by [Appellants], [Elizabeth] became

pregnant with [Matthew], who was born on November 26, 198 at 64-65 had

Vol. 2 at 66). Taking these allegations as true, Matthew has established a set of circumstances under which he would be entitled to damages proximately

[31] To the extent Appellants argue that Matthew is not entitled to damages for

emotional distress, we note that Bader, 732 N.E.2d at 1212 is instructive. In the

Bader case, and died at four months of age. When Connie became pregnant again, the

Northwest Indiana Genetic Counseling, In . Because an ultrasound revealed a fetus with a larger than expected

brain cavity and an unusual head shape, Dr. Bader requested her staff to

schedule Connie for follow-up testing. However, due to an office error, Connie

was never scheduled for testing and the ultrasound report was not forwarded to

his own ultrasound and discovered that the unborn child had hydrocephalus, it

was too late to terminate the pregnancy. The child was born with multiple birth

defects and also died four months later.

[32] The Johnsons filed a negligence action against Healthcare Providers based upon

failure to inform the Johnsons of the ultrasound results.

Healthcare Providers responded with a summary judgment motion contending

that Indiana did not recognize a claim for wrongful birth and that, even if it did, the trial court needed to determine what damages, if any, were recoverable.

The trial court denied the summary judgment motion and concluded that the

Johnsons could recover several damages, including damages for emotional

anguish. Healthcare Providers appealed, and this Court affirmed the trial court

except for the emotional distress damages. Bader v. Johnson, 675 N.E.2d 1119

(Ind. Ct. App. 1997), trans. granted.

[33] The Indiana Supreme Court granted transfer and concluded that the emotional

flowin Bader, 732 N.E.2d at

1221. Specifically, the supreme court reviewed the following modified physical

impact requirement for obtaining emotional distress damages:

When, as here, a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, . . . such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury.

Id. (quoting Shuamber v. Henderson, 579 N.E.2d 452, 456 (Ind. 1991)).

[34] The supreme court further pointed out that that the facts of a particular case are such that the alleged mental anguish was

not likely speculative, exaggerated, fictitious, or unforeseeable, then the

claimant has been allowed to proceed with an emotional distress claim for damages even though the physical impact was slight, or the evidence of

Bader, 732 N.E.2d at

1221 (and cases cited therein). In addition, the impact need only arise[] from

Bader,

732 N.E.2d at 1222 (quoting Conder v. Wood, 716 N.E.2d 432, 435 n.3 (Ind.

1999)).

[35] Applying the modified impact rule to the facts in Bader, the supreme court

ued pregnancy and the physical transformation

her body underwent as a result, satisf[ied] the direct impact requirement of our

Bader, 732 N.E.2d at 1222. The supreme court further

concluded that, provided Connie could prevail on her negligence claim, there

was no reason why Connie should not have been able to claim damages for

emotional distress. Id. However, the supreme court also concluded that

because Ronald had not suffered a direct impact as a result of Healthcare

alleged negligence, at most he was a relative bystander, a

classification of potential victims the supreme court had recently adopted in

Groves v. Taylor, 729 N.E.2d 569, 572-73 (Ind. 2000). 5 The supreme court

concluded that whether Ronald could prevail on his claim for emotional

5 proving that the plaintiff actually witnessed or came on the scene soon after the death or severe injury of a

loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or Bader, 732 N.E.2d at 1222, n.9 (quoting Groves, 729 N.E.2d at 573). distress damages depended on the evidence adduced at trial and affirmed the

[36] Here, because Matthew has stated a damages claim for which relief can be

granted and placed Appellants on notice as to why he sues, Appellants may

through the

discovery process. See Capitol Neon Signs, 501 N.E.2d at 1085. Whether

Matthew can prevail on a claim for emotional distress damages will depend on

those facts. 6

Conclusion

[37] Matthew has sufficiently stated breach of contract and tort claims for which

relief can be granted. Accordingly, the trial court did not err in denying

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6 ion against a health care provider who knowingly or intentionally

-24-5- ( ). Because Matthew did not so argue, we need not determine whether this statute is

7 In their reply brief, Appellants argue that Matthew has waived appellate review of his gross negligence claim because he failed to raise it to the trial court. We disagree. First, Appellants have waived appellate review of this issue because a party cannot raise an issue for the first time in its reply brief. See Felsher v. University of Evansville, eged facts which ma[d]e it possible for [that] claim to [38] Affirmed.

May, J., and Crone, J., concur.