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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA COURT OF COMMON PLEAS FOR ORANGEBURG COUNTY
G.D. Morgan, Jr., Circuit Court Judge

Appellate Case No. 2022-000088

Mark Rutland, as Power of Attorney for Mary Hoover, — Appellant,

v.

Jeremy Locklair and Orangeburg Post Acute LLC d/b/a Edisto Post Acute, — Respondents.

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. In granting Respondents' Motion to Dismiss and denying Appellant's Motion to Reconsider, did the trial court correctly dismiss the case because of Appellant's failure to comply with the requirements of the South Carolina Medical Malpractice Reform Act of 2005 after ruling that Appellant's claim against Respondent Jeremy Locklair sounded in medical negligence based on the face of the Complaint?

STATEMENT OF THE CASE

This appeal arises out of allegations that Mary Hoover ("Hoover") received negligent care as a result of acts or omissions of Respondents-Defendants Jeremy Locklair ("Locklair") and Orangeburg Post Acute LLC ("OPC") (collectively, "Respondents") while Hoover was a resident of a nursing home located at 575 Stonewall Jackson Street in Orangeburg, South Carolina, between October 4, 2017, and June 15, 2018. (R. pp. 31, 32–33; Summons & Compl. ¶¶ 3–4, 7, 11).

Appellant-Plaintiff Mark Rutland, as Power of Attorney for Mary Hoover, ("Appellant") filed a Notice of Intent to File Suit (the "NOI") on November 3, 2020, in the South Carolina Court of Common Pleas for Orangeburg County, naming "Orianna Health Systems, LLC, Orangeburg Post Acute LLC d/b/a Edisto Post Acute and/or Riverside Rehabilitation and Healthcare Center LLC, Edisto Post Acute, and Riverside Rehabilitation and Healthcare Center LLC" as defendants. (R. pp. 27–30; Notice of Intent). Locklair was not included as a party to the NOI and Appellant did not attempt to amend the NOI to add Locklair as a defendant. The NOI remains pending.

Instead, on April 20, 2021, Appellant filed a Summons and Complaint against Respondents in the South Carolina Court of Common Pleas for Orangeburg County. (R. pp. 31–37; Summons & Compl.). The Complaint included allegations regarding Hoover's multiple admissions to the hospital and readmissions to the subject skilled nursing facility spanning October 4, 2017, to June 15, 2018: (1) after an admission to a hospital, Hoover was admitted to the subject nursing home on October 4, 2017, until November 3, 2017, when she was admitted to a hospital for abdominal pain and was subsequently discharged on the same day to the nursing home; (2) on November 6, 2017, Hoover was admitted to a hospital for urine retention and constipation and was subsequently discharged on the same day to the nursing home; (3) on November 27, 2017, Hoover was admitted to a hospital for an acute UTI and was discharged back to the nursing home on December 4, 2017,

with two open areas to her sacrum; (4) on April 13, 2018, Hoover was admitted to a hospital after developing a Stage IV wound with moderate foul drainage and tunneling until she was discharged to the nursing home on April 20, 2018; and (5) on June 15, 2018, Hoover was discharged from the nursing home when her sacral wound remained a Stage IV. (R. p. 33; Compl. ¶¶ 7–11). The Complaint alleges that Locklair was the administrator of the nursing home facility while Hoover was a patient and, "as the administrator, had the responsibility to supervise, plan, develop, monitor, and maintain appropriate standards of care throughout all departments at [the nursing home], ensuring the safe and reasonable care of the residents." (R. pp. 33–34; Compl. ¶ 13).

According to affidavits of service, Locklair and OPC were served with process on April 27, 2021. (R. pp. 15–16; Affs. of Service). On May 25, 2021, Respondents timely responded to the allegations in the Complaint by filing a Motion to Dismiss, requesting the Court dismiss all claims against Respondents because (1) Appellant failed to follow the requirements of the South Carolina Medical Malpractice Reform Act of 2005, S.C. Code § 15-79-110 et seq. (the "Medical Malpractice Act"), which mandates satisfying certain statutory requirements before commencing a civil action; (2) OPC did not exist during Hoover's residency and did not file its Articles of Organization until five months after Hoover's discharge; and (3) Appellant's claims alleging negligence prior to April 20, 2018, are barred by the three-year statute of limitations under S.C. Code § 15-3-530. (R. pp. 18–21; Mot. to Dismiss).

On September 28, 2021, the trial court held a hearing on Respondents' Motion to Dismiss, where the trial court heard oral argument from all parties. (R. pp. 38–52; Tr. of Sept. 28, 2021 Hr'g on Mot. to Dismiss). During the hearing, Appellant asserted:

> The key crux . . . of our Complaint is that there was a failure to administer a facility adequately, failure to adequately address financial resources, but most importantly, . . . failure to timely communicate the notice of bankruptcy to the family or to Ms. Rutland directly so that we could preserve a claim as to the facilities that went

> through bankruptcy. And so for that reason[], . . . we would respectfully request the Motion to Dismiss be denied.

(R. p. 45, line 22–p. 46, line 7; Tr. of Sept. 28, 2021 Hr'g on Mot. to Dismiss pp. 8:22–9:7). The trial court questioned the allegations before the trial court:

> Are the allegations and I'm look at them right now, the allegations against the administrator, Mr. Locklair, are you alleging that his conduct is the proximate cause of the injuries that [Hoover] sustained mainly Stage IV ulcers. Is that the argument you're making that the administrator is a result of his actions proximately caused the Stage IV ulcer?

(R. p. 46, lines 10–17; Tr. of Sept. 28, 2021 Hr'g on Mot. to Dismiss p. 9:10–17). Appellant responded:

> No, sir. No. Because it obviously would be the provision of actual medical care. . . . What we are talking about is the issues with the bankruptcy and then the failure to preserve assets to avoid them going into bankruptcy, that's the things that have damaged Ms. Rutland because she's been unfortunately barred from bringing a claim against these other facilities because it's already been discharged from bankruptcy without any notice to our client.

(R. p. 46, line 18–p. 47, line 8; Tr. of Sept. 28, 2021 Hr'g on Mot. to Dismiss pp. 9:18–10:8). In response, Respondents pointed out how the Complaint is devoid of any such allegation:

> Just my plain reading of the Complaint does not seem to show anything related to an allegation of a failure to communicate about a bankruptcy or that that's an issue. I think the plain reading of the Complaint is related to any allegations from Mr. Locklair specifically failing to establish proper standards of care to the exercise at [the nursing home], failing to implement a system with safeguards to prevent the demise of her health condition. Again, it relates all back to the Complaint as it is pled relates all back to the health care and services that were provided to Ms. Hoover. And so it squarely falls under the Notice of Intent statute.
>
> Furthermore, Mr. Locklair [i]s a licensed nursing home administrator, . . . his only job is the purview of a nursing home and a nursing home is clearly under the Notice of Intent statute. [Locklair] is reportable as an individual if any action is made against him to a national health practitioner, that databank.
>
> So for all those reasons, [Locklair] has a right to have a Notice of Intent served against him. He has the right to appear in it. And he has the right be able to mediate a case before it goes to a formal complaint and, unfortunately, [Appellant] denied him that right.

(R. p. 47, line 11–p. 48, line 12; Tr. of Sept. 28, 2021 Hr'g on Mot. to Dismiss pp. 10:11–11:12). The trial court took the Motion to Dismiss under advisement. (R. p. 51, lines 22–24; Tr. of Sept. 28, 2021 Hr'g on Mot. to Dismiss p. 14:22–24). Subsequently, the trial court issued two orders rejecting Appellant's arguments and granting Respondents' Motion to Dismiss.

First, on October 6, 2021, the trial court issued a Form 4 Order, granting Respondents' Motion to Dismiss for Appellant's failure to comply with the Medical Malpractice Act, but denying it as to the other grounds raised by Respondents. (R. pp. 2–4; Oct. 6, 2021 Form 4 Order).

Second, on December 6, 2021, the trial court issued an Order Granting Respondents' Motion to Dismiss, rejecting Appellant's arguments "that the allegations in the Complaint as to [Locklair] were related to alleged failures in communication from him in his capacity as the Administrator of the nursing home, to Hoover's family and his role in administration of the nursing home's resources" and finding that the Complaint "does not support this argument" and, instead, "makes reference to the skilled nursing services and care provided to Hoover at the nursing home by its employees and alleges that these employees failed to establish and meet the standard of care, thereby causing Hoover to suffer injuries." (R. pp. 8–11; Dec. 6, 2021 Order pp. 2–3). The trial court correctly explained that the "Complaint expressly alleges that [Locklair] has a 'responsibility to . . . maintain appropriate standards of care . . . ensuring the safe and reasonable care of the residents'" and that "[a]ny matter involving care provided at a nursing home falls squarely within the Medical Malpractice Act." (R. p. 10; Dec. 6, 2021 Order p. 3). Appellant acknowledged to the trial court "that a Notice of Intent to File Suit and expert affidavit were not filed prior to filing the instant Complaint." (R. p. 10; Dec. 6, 2021 Order p. 3). Accordingly, the trial court correctly found "that based on the allegations of the Complaint, this matter is subject to the requirements of

The Medical Malpractice Act, and, therefore, the Complaint was improperly filed" and dismissed the case. (R. p. 10; Dec. 6, 2021 Order p. 3).

On December 16, 2021, Appellant filed a Motion to Reconsider Order to Dismiss under Rule 59(e) of the South Carolina Rules of Civil Procedure, asserting the same arguments the trial court already rejected. (R. pp. 22–24; Mot. to Recons.). In his Motion to Reconsider, Appellant conceded that OPC "would be considered a healthcare institution" but contested dismissal of Appellant's claim against Locklair, asserting that Appellant "has alleged numerous allegations separate and apart from any healthcare provided against . . . Locklair and thus, those claims must proceed beyond a motion to dismiss." (R. p. 23; Mot. to Recons. p. 2).

On January 3, 3022, the trial court issued a Form 4 Order, denying Appellant's Motion to Reconsider, correctly rejecting Appellant's argument and explaining:

> [Appellant] argues their failure to comply with the South Carolina Medical Malpractice Act is not fatal because, although Defendant Edisto Post Acute is a healthcare institution, [Locklair] is not a healthcare provider, thus, the act does not apply. The Court disagrees. Additionally, [Appellant] argued at the hearing and now in this motion, that [Locklair]'s failure to communicate the bankruptcy of Defendant Edisto Post Acute to Plaintiff is actionable. Notably, and of great importance in a motion to dismiss under Rule 12(b)(6), SCRCP, there are no allegations in the Complaint concerning bankruptcy and alleged failure to communicate it.

(R. p. 6; Jan. 3, 2022 Form 4 Order p. 2). Accordingly, the trial court denied Appellant's Motion to Reconsider. (R. p. 6; Jan. 3, 2022 Form 4 Order p. 2).

On January 27, 2022, Appellant filed a Notice of Appeal, appealing "the order granting [Respondents'] Motion to Dismiss (December 6, 2021) and order denying [Appellant's] Motion to Reconsider the Order (January 3, 2022)." (R. pp. 25–26; Notice of Appeal).

STANDARD OF REVIEW

On appeal of an order dismissing an action under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the Court of Appeals applies the same standard of review that was implemented by the trial court: "whether the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court." Dawkins v. Union Hosp. Dist., 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014) (citing Grimsley v. S.C. Law Enf't Div., 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012); Flateau v. Harrelson, 355 S.C. 197, 201–03, 584 S.E.2d 413, 415–16 (Ct. App. 2003)). The Court views the allegations in the complaint "in the light most favorable to the plaintiff" and determines if "the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief under any theory of the case." Id. (citing Grimsley, 396 S.C. at 291, 721 S.E.2d at 426).

Whether the failure to comply with the Medical Malpractice Act's pre-suit requirements warrants dismissal of a civil action is within the trial court's discretion and, thus, is reviewed only for an abuse of discretion. See Ross v. Waccamaw Cmty. Hosp., 404 S.C. 56, 64, 744 S.E.2d 547, 551 (2013) ("[T]he failure to comply with the 120-day time period could result in dismissal . . . as a function of the court's discretion based on the facts and circumstances, and not as a mandated one-size-fits-all result."); see also Stanton v. Town of Pawley's Island, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) (citing Coleman v. Dunlap, 306 S.C. 491, 413 S.E.2d 15 (1992)) ("A matter within the sound discretion of the trial judge will not be disturbed on appeal absent an abuse of discretion."). "An abuse of discretion occurs where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." Id. (citation omitted).

ARGUMENT

This Court should affirm the trial court's dismissal of this case because, based on a plain reading of the Complaint, Appellant's claims against Locklair sound in medical negligence and Appellant failed to follow the requirements of the Medical Malpractice Act.

"The differentiation of ordinary negligence and medical malpractice is 'subtle' and 'depends heavily on the facts of each individual case.'" Delaney v. United States, 260 F. Supp. 3d 505, 510 (D.S.C. 2017) (quoting Dawkins, 758 S.E.2d at 504).

Importantly, where a claim sounds in medical negligence, the Medical Malpractice Act mandates certain pre-suit procedures before a civil action may be filed. See S.C. Code § 15-79-125 (requiring, inter alia, a notice of intent to file suit naming all adverse parties as defendants and containing a short and plain statement of the facts showing that the party filing the notice is entitled to relief as a prerequisite to filing a civil action); S.C. Code § 15-36-100 (requiring an accompanying expert affidavit). In particular, the Medical Malpractice Act requires the parties to participate in a pre-suit mediation conference "within 90 days and no later than one hundred and twenty days from the service of the Notice of Intent to File Suit" before a civil action may be instituted. S.C. Code § 15-79-125. Only "[i]f the matter cannot be resolved through mediation" may a plaintiff "initiate the civil action[.]" S.C. Code § 15-79-125. The Medical Malpractice Act is clear that these requirements "shall" be met prior to initiating a formal summons and complaint.

When these requirements are not met, the improvidently filed civil action is subject to dismissal. See, e.g., Duckett v. SCP 2006-C23-202, LLC, 225 F. Supp. 3d 432, 437 (D.S.C. 2015) (court "would grant" motion to dismiss where plaintiff "failed to adhere to the substantive statutory requirements"); Garrick v. Khoury, Appellate Case No. 2018-001842, 2021 WL 1906281, at *1 (S.C. Ct. App. May 12, 2021) (per curiam) (affirming trial court's dismissal of malpractice action

for plaintiff's failure to comply with S.C. Code § 15-17-125 and § 15-36-100); Brown v. Carolinas Hosp. Sys., Appellate Case No. 2006-000784, 2018 WL 774831, at *1–2 (S.C. Ct. App. Feb. 7, 2018) (per curiam) (affirming trial court's dismissal of notice of intent and complaint where plaintiff did not comply with statutory requirements); Washington v. Trident Med. Ctr., Appellate Case No. 2016-000495, 2018 WL 491034, at *1 (S.C. Ct. App. Jan. 10, 2018) (per curiam) (affirming trial court's dismissal of action for failure to comply with pre-suit requirements in Medical Malpractice Act). Even where a complaint alleges a mix of medical and non-medical malpractice claims, a complaint is still subject to dismissal for failure to adhere to the Medical Malpractice Act's requirements. Fisher v. Pelstring, 817 F. Supp. 2d 791, 807 n.8 (D.S.C. 2011) (citing S.C. Code § 15-79-125). Further, the Medical Malpractice Act requires that all potential adverse parties be included in the notice of intent regardless of what allegations are asserted. The notice of intent "must name all adverse parties as defendants [and] must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief." S.C. Code §15-79-125.

"The South Carolina Code of Laws defines medical malpractice as 'doing that which the reasonably prudent health care provider or health care institution would not do or not doing that which the reasonably prudent health care provider or health care institution would do in the same or similar circumstances.'" Williams v. Quest Diagnostics, Inc., 353 F. Supp. 3d 432, 440 (D.S.C. 2018) (quoting S.C. Code Ann. § 15-79-110(6)). The statute's definition of "Health care institution" includes "a nursing home." S.C. Code § 15-79-110(2). The statute further defines "Nursing home" as:

> [A] licensed facility with an organized nursing staff to maintain and operate organized facilities and services to accommodate two or more unrelated persons exceeding twenty-four hours which is operated either in connection with a hospital

> or as a freestanding facility for the express or implied purpose of providing skilled nursing services for persons who are not in need of hospital care.

S.C. Code § 15-79-110(7).

Here, Appellant does not dispute that OPC falls within the ambit of the Medical Malpractice Act. Indeed, Appellant admits OPC is "nursing home" and a "health care institution," and alleges OPC was negligent by failing to do "that which a reasonably prudent . . . health care institution would do in the same or similar circumstances." Rather, Appellant asserts that his claims against Locklair sound in ordinary negligence and do not require compliance with the Medical Malpractice Act's requirements for commencing a civil action against Locklair.

The trial court considered and rejected Appellant's assertion, correctly interpreting the plain language of the allegations in the Complaint as asserting a medical negligence claim against Locklair. Indeed, the allegations in the Complaint indicate that Appellant's claim styled as "Negligence, Gross Negligence, and Negligence per se" is properly construed as a medical negligence claim. The Complaint alleges "Locklair, as [the nursing home] administrator, owed a duty to Ms. Hoover . . . to create and manage a health-care environment that would provide and promote standard of care services to its residents with competent healthcare providers, sufficiently funded facilities, continuity of care, coordinated care, and other reasonable performance of patient care[.]" (R. p. 34; Compl. ¶ 15 (emphases added)). As the nursing home administrator, Locklair is a licensed professional and an employee of the nursing home. The Complaint further alleges specific duties of care and that "Locklair departed from these duties . . . owed by a [nursing home] administrator" by: (1) "failing to properly communicate with [Appellant] as to the care and services offered to Ms. Hoover"; (2) "failing to implement a system with adequate safeguards so as to prevent the demise of Ms. Hoover's health condition"; (3) "failing to adequately manage the financial resources at [the nursing home] so as to ensure adequate care of its residents"; (4) "failing

to establish the proper standards of care to be exercised at [the nursing home]"; (5) "failing to direct and oversee the providers and employees at [the nursing home] to ensure standard of care services were being offered and provided to its residents"; (6) "failing to identify that Ms. Hoover was receiving below the standard medical care and services"; and (7) "failing to adequately supervise, train, and discipline employees, servants, and/or agents so as to prevent this foreseeable consequence[.]" (R. p. 34; Compl. ¶ 16 (emphases added)).

The allegations against Respondents here are not akin to cases where South Carolina courts have held there was no medical negligence claim but only ordinary negligence claims. This case is not like Dawkins where the plaintiff alleged an injury that occurred "when she attempted to use the restroom [in a hospital] unsupervised, prior to receiving medical care," and the "complaint ma[de] clear that" the alleged negligence occurred before the plaintiff "had . . . begun receiving medical care at the time of her injury[,]" and the complaint "d[id] not allege the Hospital's employees negligently administered medical care." Dawkins, 408 S.C. at 178–79, 758 S.E.2d at 504–05; see also Smith v. United States, 119 F. Supp. 2d 561, 572 (D.S.C. 2000) (citing 40A Am. Jur. 2d Hospitals & Asylums § 57 (1999)) ("American Jurisprudence gives us examples of simple negligence claims against a hospital; such as failure to prevent a patient's fall, mishandling a cannister containing bone marrow cells, and mistakenly giving one patient another's HIV test results. On the other hand, it gives examples of malpractice claims against a hospital to include negligent selection and retention of physician, liability for the negligence of its professionals through the doctrine of respondeat superior, and negligent release of a patient resulting in another's wrongful death.").

Courts have rejected plaintiffs' attempts to sidestep the Medical Malpractice Act by guising a medical malpractice claim with language in the complaint asserting their claim sounds in

ordinary negligence, even though the substance of the claim is one for medical malpractice. See, e.g., Heaton v. Stirling, Civil Action No. 2:19-0540-RMG, 2020 WL 1933775, at *1 n.1 (D.S.C. Apr. 22, 2020) ("As to the healthcare provider defendants, the claim for gross negligence is appropriately construed as a claim for medical malpractice. . . . The facts of this case indicate that the claim styled as 'gross negligence' is properly construed as a medical malpractice claim."); Duckett, 225 F. Supp. 3d at 437 (rejecting plaintiff's argument that its negligence claim for failure to warn that drug was not FDA approved for plaintiff's use and failure to warn of side effects fell outside scope of Medical Malpractice Act; holding plaintiff's claims "fall squarely within [the Medical Malpractice Act]").

Thus, as the trial court correctly held, Appellant's claims against Respondents sound in medical negligence and are subject to the Medical Malpractice Act's requirements for commencing a civil action, which Appellant failed to follow. Because of this failure, the trial court properly dismissed the action.

CONCLUSION

For the foregoing reasons, the Court should **AFFIRM** the trial court's October 6, 2021 Form 4 Order and December 6, 2021 Order Granting Respondents' Motion to Dismiss and the trial court's January 3, 2022 Form 4 Order denying Appellant's Motion to Reconsider, and **DISMISS** Appellant's appeal.

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Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

October 13, 2022

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PROOF OF SERVICE

I certify that I have served the Respondents' Final Brief electronically to Ms. Virginia W. Williams via email to her email address, ginny@williamsattys.com on or about October 13, 2022.

October 13, 2022

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