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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

MAITE MURPHY, CIRCUIT COURT JUDGE

CASE NO. 2022-NI-38-00006

MICHELLE FRAZIER, APPELLANT,

V.

HALCYON REHAB, LLCRESPONDENT.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR AS A MATTER OF LAW IN DISMISSING RESPONDENT HALYCON FINDING APPELLANT'S CLAIM TRIGGERED THE EXPERT AFFIDAVIT REQUIREMENTS FOUND IN SECTION S.C. CODE ANN. § 15-79-125?

STATEMENT OF CASE

Barbara Frazier, at age 47, became a resident at Riverside Rehab and Health Center, LLC (Riverside), a skilled nursing facility located in Orangeburg County South Carolina. Ms. Frazier's residency began in April 2015 and ended around July 2018 when she was discharged to Regional Medical Center. Ms. Frazier died on July 28, 2018.

Throughout Ms. Frazier's admission, the facility underwent multiple different licensees. At the time Ms. Frazier sustained multiple injuries, Riverside was the licensee operating the facility. In March of 2018 and unbeknownst to Ms. Frazier and her family, Riverside filed for bankruptcy in Federal Court in Texas. Accordingly, no claim was filed by Ms. Frazier or on behalf of her estate during the bankruptcy proceedings. Ms. Frazier remained a resident of Riverside for four (4) months after Riverside filed for bankruptcy.

On May 29, 2020, Plaintiff was duly appointed as Personal Representative of Ms. Frazier's estate. Plaintiff filed a Notice of Intent with a Summons and Complaint attached on July 27, 2021. The Notice named Defendant Orangeburg Post-Acute, LLC as successor entity of Riverside. No appearance was made by Defendant Orangeburg Post-Acute, LLC during the pre-suit period. Plaintiff filed a Summons and Complaint on December 14, 2021. Defendant Orangeburg Post-Acute, LLC filed a Motion to Dismiss, on January 13, 2022, alleging they were not a successor entity but a subsequent new facility with no corporate involvement with the former Riverside.

Prior to the hearing for Defendant Orangeburg Post-Acute, LLC's Motion to Dismiss, Plaintiff subsequently filed a Motion to Amend Complaint to Add Defendants on February 9, 2022. Plaintiff alleged the bankruptcy proceedings did not include other affiliates, servants, employees, agents, and/or alter-egos that derived substantial revenue and used its financial

position to affect and control management, operations, finances, staffing, and policies and procedures at Riverside, all of which directly affected patient/resident care such as that of Barbara Frazier.

The hearing for Defendant Orangeburg Post-Acute's Motion to Dismiss was held on March 23, 2022. The matter was taken under advisement. The court granted Defendant Orangeburg Post-Acute's motion to dismiss on the ground they were not a successor entity. Plaintiff timely filed a second Notice of Intent on March 17, 2022, naming six (6) new corporate defendants, namely Respondent Halycon Rehab, LLC. The second Notice of Intent gave rise to this Appeal.

In the second Notice of Intent, Appellant made claims against the corporate Defendants for underfunding, understaffing, and undertraining at the facility wherein the corporate Defendants took money from the facility which should have been used and directed for patient/resident care. Appellant further alleged the corporate Defendants controlled the finances and thereby controlled the funding and staffing at the facility.

Respondent Halycon Rehab, LLC filed a Motion to Dismiss Appellant's second Notice of Intent. A hearing was held on September 22, 2022. The trial court issued an Order granting Respondent's Motion Dismiss finding Appellant did not provide an expert affidavit alleging at least one act of negligence by Respondent pursuant to S.C. Code Ann. § 15-79-125.

STATEMENT OF FACTS

Barbara Frazier, at age 47, became a resident at Riverside Rehab and Health Center, LLC (Riverside), a skilled nursing facility located in Orangeburg County South Carolina. Ms. Frazier's residency began in April 2015 and ended around July 2018 when she was discharged to Regional Medical Center. Ms. Frazier died on July 28, 2018.

During her admission to Riverside, Ms. Frazier was dependent on the staff at the facility for most of her daily needs, including but not limited to, turning and repositioning, pressure relief, toileting, transfers, mobility, hygiene and grooming, and other activities of daily living. Appellant as Personal Representative of Ms. Frazier's estate, alleged Ms. Frazier suffered multiple injuries at the facility including, but not limited to a) dehydration; b) sepsis; c) acute kidney failure; d) pressure sores; e) insults to her dignity; f) violation of her rights; g) physical suffering; h) urinary tract infection; and i) mental anguish. Appellant also made claims against the corporate Defendants, namely the Respondent, for underfunding, understaffing, and undertraining at the facility wherein the corporate Defendants took money from the facility which should have been used and directed for patient/resident care.

A. FACILITY BACKGROUND

During Ms. Frazier's residency, the facility had multiple entities appear on the facility's admission paperwork and in the patient's records. For example, when Ms. Frazier was originally admitted on April 14, 2015, the facility's admission paperwork included the name of Covenant Dove Healthcare of Orangeburg, LLC. Also, in April of 2015, Ms. Frazier's physical therapy log reflected the name Laurel Baye Healthcare of Orangeburg. In April of 2016, Ms. Frazier's treatment records reflected the name Orangeburg Rehabilitation and Healthcare Center. And finally, in May of 2016, Ms. Frazier's physical therapy card had the name Riverside Rehabilitation Center on it.

Given the numerous corporate entities that appeared in the facility's records, Appellant not only alleged nursing home negligence and neglect but has also made claims against the corporate Defendants for underfunding, understaffing, and undertraining at the facility wherein the corporate Defendants took money from the facility which should have been used and directed

for patient/resident care. Appellant further alleged the corporate Defendants (Respondent) also controlled the finances and thereby controlled the funding and staffing at the facility.

STANDARD OF REVIEW

A trial court's decision to grant a motion to dismiss is subject to a de novo review. *Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996).

MOTION TO DISMISS STANDARD

In deciding a motion to dismiss, the appellate tribunal applies the same standard of review that was implemented by the trial court. *Williams v. Condon*, 347 S.C. 227 (2001). The grant of a motion to dismiss will not be sustained if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the Appellant to relief on any theory of the case. *Stiles v. Onorato*, 318 S.C. 297 (1995). Accordingly, the appellate court may consider the complaint, as well as documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. It may also refer to matters of public record.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT GRANTED HALYCON'S MOTION TO DISMISS.

A. South Carolina Law has recognized direct liability of corporate parents.

Claims for direct corporate negligence have been specifically recognized by the South Carolina Supreme Court in nursing home cases in *Morrow v. Fundamental Long Term Care Holdings, LLC*, 412 S.C. 534 773 S.E. 2d 144 (2015). Plaintiff, here, argues the corporate Defendants including Respondent Halycon have control and authority over decisions regarding staffing, funding, policies, and procedures, etc. Plaintiff further alleged the corporate Defendants

(Respondent) took profits from the facility which should have been directed for patient/resident care. The well-pled Complaint further alleged Respondent acted as each other's alter-egos, acted as each other's agents, and acted in a joint enterprise with an amalgamation of interest.

The Court, in *Morrow*, held "...direct corporate liability attaches due to a breach of duty which runs directly between a parent company and a subsidiary, arising from negligence in actions such as leaving a hospital underfunded, understaffed or undertrained so as to provide substandard care." See *Morrow*. Further, the corporate form may be disregarded when equity requires the action to assist a third party. *Woodside v Woodside*, 290 S.C. 366 (Ct. App. 1986). Thus, a corporate parent that actively participated in and exercised control over the operations of a subsidiary's facility may be directly liable as operator of the facility. *U.S. v. Best Foods*, 524 U.S. 5 (1998).

South Carolina law also provided that "when two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, expressed or implied, to act for all in respect to the control of the means and agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to the others. *Funderburk v. Powell*, 181 S.C. 412, 432 (1936). Further, South Carolina courts have held that evidence such as shared officers, shareholders, location, management, etc. can give rise to corporate liability under amalgamation of interest. *Kincaid v. Landing Development Corporation*, 289 S.C. 89, 96 (Ct. App. 1986).

B. Respondent Halycon participated in, and exercised control over the operations of its subsidiary's facility and is therefore liable under the theories of alter-go, piercing the corporate veil and amalgamation of interest.

Respondent Halycon is an entity related to and engaged in the operation and management of Riverside, either directly or through their subsidiaries and agents. Appellant's Complaint

identifies Respondent's relationship and how its conduct related to the negligent care given to Ms. Frazier. Additionally, the Medicaid Cost Reports for the facility identified Respondent Halcyon Rehab, LLC and HMS Purchasing, LLC, as related parties with common control. Halcyon Rehab also received in excess of \$636,246.00 in payment in 2017-2018. *See Medicaid Cost Report for Riverside.*

Appellant's Complaint properly alleged Respondent engaged in conduct as a corporate related entity in a joint enterprise, acting as the facility's agent and alter ego, with an amalgamation of interest. Respondent Halcyon 1) received payments from the facility; 2) contracted with the facility; 3) identified as a related companies to the facility; and 4) made representations regarding the care and operation of the facility to the government. Accordingly, Appellant should have been allowed to determine through discovery whether the Respondent and other corporate Defendants shared the same officers with the facility; filed tax returns for the facility; owned the facility's property; provided consulting services and direction to the facility; and/or took huge sums of money from the facility. Such additional evidence would have been weighed by the trial court on a dispositive motion in the future.

C. Appellant's corporate claims against Respondent did not require compliance with the statutory requirements for filing medical malpractice, specifically the expert affidavit requirement.

Not every injury sustained by a patient in a hospital requires expert testimony to establish the claim. *Dawkins v. Union Hospital District*, 408 S.C. 171 (2014). Here, Appellant alleged Respondent actively participated in and exercise control over the operation of the subsidiary's facility. Allegations from the well-pled Complaint included corporate negligence grounded in the following conduct:

- Operational, budgetary, and administrative decisions that were determined more by the financial needs and goals of the Defendants than by the custodial, medical, and nursing needs of residents and patients of their facility, including Ms. Frazier;
- Creating, implementing, and enforcing dangerous operational budgets, practices, and policies at their facility which deprived residents and patients, including Ms. Frazier, of safe, adequate, and essential care and resources to meet their needs, including, but not limited to, appropriate plans of care, assessment and continued monitoring;
- Inadequate and inappropriate staffing of the subsidiary facility, even though the needs of the resident population, including the needs of Ms. Frazier, exceeded the capacity of the staff;
- Insufficient allocation of financial and operational resources to their facility, thereby causing harm to residents and patients, including Ms. Frazier; and
- Deceptive practices and fraudulent misrepresentations that concealed the subsidiary facility's inability to care for patients, including Ms. Frazier.

None of these allegations constitute the practice of medicine requiring expert medical testimony to establish the duty owed to Ms. Frazier. Corporate negligence can be readily understood by jurors exercising their common knowledge. *Id.* Moreover, the allegations made against Respondent are nonmedical, administrative, and ministerial in nature. South Carolina law is well established that expert testimony establishing the standard of care is not required for derivative claims sounded in ordinary negligence. *Id.*

CONCLUSION

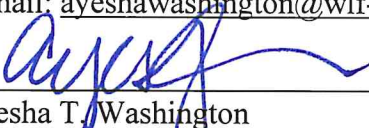
South Carolina Supreme Court has specifically recognized direct corporate negligence against parent companies in this very type of case. See *Morrow*. In addition to the corporate negligence, there is sufficient allegation regarding Respondent's liability based upon agency, amalgamation of interest, alter ego, and joint enterprise. South Carolina law provides that "when two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of

the means and the agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to the others.” See *Funderburk*. The Medicaid Cost Report substantiated Respondent’s role in the operation, management, and control of the facility by virtue of their control of the finances, staffing, and administration which gives rise to direct liability. The alleged conduct of the Respondent is nonmedical and not subject to the statutory requirements associated with medical malpractice. Therefore, this court should reverse the trial court’s order granting Respondent’s Motion to Dismiss.

Respectfully submitted,

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