THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2011-CP-44-00074

Sarah Dawkins, ... Appellant,

v.

Union Hospital District
(aka) Wallace Thomson Hospital, ... Respondent.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

South Carolina

Other States

STATUTES

RULES

MISCELLANEOUS

STATEMENT OF THE ISSUE ON APPEAL

Did the Circuit Court err in dismissing Plaintiff's complaint for failing to comply with the pre-suit Notice of Intent To Sue procedures under the South Carolina Code for medical malpractice cases where the matter as pled does not does not constitute a claim for medical negligence within the meaning of the Act?

STATEMENT OF THE CASE

Sarah Dawkins (Plaintiff) filed an amended complaint on May 9, 2011, against Wallace Thomson Hospital (aka) Union Hospital District ("Hospital") for negligence, recklessness, willfulness and wantonness. The complaint asserted that on February 22, 2009, the Hospital failed to follow its own policies in leaving Plaintiff unattended in the emergency room and she fell while attempting to use the restroom. Plaintiff alleged she suffered serious injuries in the fall. She sought actual damages for her injuries.

On April 18, 2011, the Hospital filed a motion to dismiss, asserting the case was a "medical malpractice" case and the complaint should be dismissed because Plaintiff failed to comply with Sections 15-79-110, *et seq.* and 15-36-100 of the South Carolina Code. Specifically, the Hospital asserted Plaintiff was required to file a Notice of Intent to File Suit and an affidavit of an expert witness prior to filing a complaint (the NOI procedure).

The circuit court heard the motion to dismiss on January 17, 2012, and on February 2, 2012, entered an order granting the motion to dismiss. Plaintiff timely moved for reconsideration and on April 4, 2012, the court entered an order denying Plaintiff's motion but correcting clerical errors. Plaintiff received written notice of the entry of the order on April 6, 2012.

Plaintiff served a Notice of Appeal on May 2, 2012.

FACTS

On February 18, 2011, Plaintiff filed a complaint against the Hospital for recovery for injuries she received when she fell while a patient in the Hospital's facility. She filed an amended complaint on May 9, 2011, which asserts:

* * *

3. That on or about February 22, 2009, the Plaintiff checked into the Defendant's Hospital for the expressed purpose of receiving medical attention for headaches and the inability to maintain balance or walk. Ms. Dawkins arrived at the hospital via ambulance as her daughter-in-law thought she could have been having a stroke. She was placed in the emergency room and her family was told they could not accompany her into that area.

4. Upon her son Tim arriving at the hospital, he was requested to enter the room and was informed that his mother had [fallen] while left unattended in the restroom, and suffered a hair-line fracture in her right foot.

5. At the time of admission, the Plaintiff asserts that the intake nurses were informed of the conditions surrounding her admittance. In response to the noted ailments, the Plaintiff should not have been left unattended and unmonitored until proper tests could be performed or at the very least until the appropriate fall Hospital procedures were put in place.

6. In addition, her daughter-in-law had also disclosed to the staff that Ms. Dawkins was experiencing instability and possible symptoms of stroke.

7. The Plaintiff asserts that on the morning of February 22, 2009 while attempting to use the restroom she fell. The Plaintiff states that she suffered severe pain and was unable to pull herself up or reach the call button for assistance.

8. The Plaintiff remained on the floor until staff assisted her. She was in excruciating pain and could not believe that any staff members had not come in to check on her condition.

9. The Plaintiff asserts that she was only rendered assistance after someone heard her repeated pleas for help.

10. It is Plaintiff's belief that had the Defendant's staff performed their duties in compliance with the Hospital Policies, she would not have suffered the injuries that exasperated her original reason for being in the hospital.

11. The Defendant's staff was fully aware of the Plaintiff's complaints, as well as the medications that were to be administered to Plaintiff. In addition, the Defendant had every obligation to the Plaintiff to ensure her safety with regard to her original complaints, as well as the side effects of the medications that were being administered by Defendant.

12. The Plaintiff contends at the time and place mentioned above, the Defendant was grossly negligent, reckless, willful and wanton, in one or more of the following particulars, to wit:

    a. In failing to adhere to the Defendant's policies and procedures and assuring that the Plaintiff was monitored;

    b. In failing to keep a watchful eye on a person who had originally complained of dizziness, headaches and instability, which were the precursors of her admittance; and

    c. In failing to take any precautionary actions, by any means, to insure the Plaintiff's safety.

(R. pp. 12-14, ¶¶ 3-12).

Prior to filing an answer, the Hospital moved to dismiss on several grounds. The Hospital first asserted that Plaintiff was required to comply with the NOI requirements found in Section 15-79-125(A) of the Code and the expert witness affidavit as requirement found in Section 15-36-100(B) of the Code. (R. p. 19).

The Hospital also asserted the action should be dismissed pursuant to Rule 12(b)(1), SCRCP, for lack of subject matter jurisdiction. The basis was an assertion that

failure to abide by the NOI procedures deprived the circuit court of jurisdiction. (R. pp. 21-22).

Lastly, the Hospital sought dismissal pursuant to Rule 12(b)(6), SCRCP, contending that under the NOI procedure, a plaintiff may not file a complaint until after complying with the procedure. (R. p. 22).

Plaintiff countered that the NOI procedure had nothing to do with the circuit court's subject matter jurisdiction. (R. p. 26). Plaintiff also asserted that under Rule 8, SCRCP, the Complaint was sufficient to withstand a Rule 12(b)(6) challenge. (R. p. 27). Lastly, Plaintiff asserted that there was no allegation of diagnostic or other medical treatment that the Hospital staff failed to properly administer. That is, her injuries were not caused by professional negligence but, rather, from the failure to supervise Plaintiff "and keep a watchful eye on Plaintiff," so that the NOI statute was not applicable. (R. pp. 28-29).

Plaintiff also contended there was no requirement for an expert affidavit under Section 15-36-100(B) because the specifications of negligence were within the ambit of common knowledge. (R pp. 6-7).

Following a hearing, the trial court granted the Hospital's motion. The court focused on Paragraphs 3, 5 and 11 of the Complaint and concluded these assertions fell within the definition of "medical malpractice" found in Section 15-79-100(6) of the Code. Thus, the circuit court held the NOI procedures were triggered by the Complaint and that the Plaintiff's failure to comply rendered the complaint subject to dismissal under Rule 12(b)(6). (R. pp. 4-5).

Plaintiff moved for reconsideration. (R. p. 32). The circuit court denied the motion, stating:

> The premise of Plaintiff's allegations is based on an event that happened in a medical facility due to a medical condition. Any duty in this case arose from the fact that the Plaintiff was seeking medical treatment at a medical facility. Had the events alleged to have occurred at the hospital taken place at a restaurant, grocery store, or any other place of business, none would be liable based on the allegations in the amended complaint. Therefore, this is not a premises liability case, as there is no allegation that any dangerous conditions at the hospital caused Plaintiff to fall.

(R. p. 10). The court held the claims "accordingly... fell within the statutory definition of medical malpractice, thereby triggering the NOI and Expert Affidavit requirements of § 15-79-125 and § 15-36-100(C)(1)." (R. p. 10).

This appeal follows.

ARGUMENTS

In reviewing a motion to dismiss, the appellate court applies the same standard of review as the trial court. *Carolina Park Associates, LLC v. Marino*, 400 S.C. 1, 732 S.E.2d 876 (2012). A ruling dismissing a complaint for failure to state facts sufficient to constitute a cause of action must be based solely on allegations set forth in the complaint. *Id.* If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal is improper. *Id.* Lastly, questions of law may be decided with no particular deference to the trial court. *Id.*

PLAINTIFF DID NOT HAVE TO COMPLY WITH THE PRE-SUIT PROCEDURES BEFORE BRINGING HER CLAIM ARISING OUT OF HER FALL IN HOSPITAL'S FACILITY

The sole ground under which the trial court dismissed this matter was its ruling that Plaintiff's claims outlined in the Amended Complaint fell within the statutory definition of "medical malpractice" so that the NOI and Expert Affidavit statutory requirements were triggered as a matter of law. The claims, however, were in the nature of ordinary negligence in leaving Plaintiff unattended and unmonitored which resulted in her fall when she attempted to use the restroom. That is, there is no claim of mis-diagnosis or mistake in medical treatment for the medical condition for which she was seeking treatment. The claims are in the nature of a breach of a duty of care once the Hospital assumed physical custody of Plaintiff.

Plaintiff asserts these claims do not arise to "medical negligence" as a matter of law under the statute. Alternatively, Plaintiff contends that the nature of any breach of the standard of medical care that may arise under her allegations would fall within the common knowledge exception to the expert witness requirement.

The Complaint Does Not Allege "Medical Malpractice"

Section 15-79-110(6) provides

> "Medical malpractice" means 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.

S.C. Code Ann. § 15-79-110 (2012). This definition is ambiguous. There is no direction about what is meant by the phrase "doing *that* which" in reference to the actions that give rise to medical malpractice. This legislation was designed to provide pre-complaint procedures for tort claims arising out of professional services involving a matter of medical science. This is reflected in the provision of the statutory scheme relieving a plaintiff from the NOI requirements where the underlying tort involves matters of common knowledge. *See* S.C. Code Ann. § 15-36-100 (C)(2) (2012) ("The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.").

In addition, any application of the statute in this instance must be limited. The Court should accord the statute a strict construction because it is in derogation of

Plaintiff's common law right to bring an action for her injuries. As the Supreme Court recently stated with reference to the NOI statutes:

> [S]tatutes in derogation of the common law are to be strictly construed. *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). Under this rule, a statute restricting the common law will "not be extended beyond the clear intent of the legislature." *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000). Statutes subject to this rule include those which "limit a claimant's right to bring suit." 82 C.J.S. *Statutes* § 535.

Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). The Court added that "section 15–36–100 restricts a plaintiff's common law right to bring a malpractice claim by imposing this requirement. Consequently, the language in the statute is to be strictly construed, and *section 15–36–100 cannot extend any further than what the General Assembly clearly intended.*" *Id.*, 397 S.C. at 538, 725 S.E.2d at 697 (emphasis added).

At common law, the analysis in a medical malpractice action tracks the familiar duty-breach-causation-damages analysis employed in a typical tort action. *Willis v. Wu*, 362 S.C. 146, 607 S.E.2d 63 (2004). That is, in a negligence action against a physician or other health care provider in which medical malpractice is alleged, plaintiff generally must demonstrate a duty is owed because a physician-patient relationship existed, that the physician failed to exercise the degree of care and skill which ordinarily is employed by the profession under similar conditions and like circumstances, that the physician's failure proximately caused harm or injury to plaintiff, and that the plaintiff suffered damages as a result of the harm or injury. *Id.*

Under the common law, medical negligence is defined as "the failure by a

physician to exercise that degree of care and skill which is ordinarily employed by the profession generally, under similar conditions and in like surrounding circumstances." *Welch v. Whitaker*, 282 S.C. 251, 317 S.E.2d 758 (Ct. App. 1984); 18 S.C. Jur. *Negligence* § 59 (Thomson Reuters 2012). *See also Melton v. Medtronic, Inc.*, 389 S.C. 641, 698 S.E.2d 886 (Ct. App. 2010) (a physician commits "medical malpractice" by not exercising that degree of skill and learning that is ordinarily possessed and exercised by members of the profession in good standing acting in the same or similar circumstances). "Medical malpractice" involves more than acts of ordinary negligence; it focuses on the specialized skills and learning of medical professionals and on deviations from the required standard of medical care. *See Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004) (the standard of care in a medical malpractice action concerns both the physician's skill and the physician's professional learning). *Accord Botehlo v. Bycura*, 282 S.C. 578, 583, 320 S.E.2d 59, 62 (Ct. App. 1984) ("In a medical malpractice action the plaintiff must establish by expert testimony both the required standard of care and the defendant's failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge or experience, so that no special learning is needed to evaluate the defendant's conduct. The reason for requiring expert testimony is that matters of proper diagnosis and treatment ordinarily involve technical knowledge beyond the ken of laymen.") (citations omitted).

The Supreme Court of Connecticut addressed this issue recently, stating:

> The classification of a negligence claim as either medical malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred. Professional

> negligence or malpractice is defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services. Furthermore, malpractice presupposes some improper conduct in the treatment or operative skill or the failure to exercise requisite medical skill. From those definitions, we conclude that the relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship; and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment. To prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury. Generally, expert testimony is required to establish both the standard of care to which the defendant is held and the breach of that standard.

Gold v. Greenwich Hosp. Ass'n, 811 A.2d 1266, 1270 (Conn. 2002) (citations omitted). *See also Howard v. Ozark Guidance Center*, 930 S.W.2d 341 (Ark. 1996) (in order to be a "medical injury" the injury must be the result of a "professional service", "a doctor's treatment or order," or "a matter of medical science"). As the Supreme Court of Arkansas noted, "[t]he distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons." *Id.* at 342.

This distinction between medical negligence and ordinary negligence under a pre-suit procedure is not new. Florida's courts have drawn this distinction repeatedly. *See, e.g.*, *Lake Shore Hospital, Inc. v. Clarke*, 768 So.2d 1251, 1251–52 (Fla. 1st DCA 2000) (plaintiff's negligence action for injuries suffered from falling while walking from her hospital bed to the bathroom was not an action for medical negligence because plaintiff

did not allege a breach of a professional standard of care); *Lakeland Regional Medical Center, Inc. v. Allen*, 944 So.2d 541, 543 (Fla. App. 2 Dist. 2006) (if the cause of an injury is effected by negligent medical care then, by definition, the complaint sounds in malpractice and Chapter 766 pre-suit notice is required because the breach of a certain medical standard of care allegedly occurred; conversely, if the cause of the injury is effected by a factor other than a failure of proper medical care, no pre-suit notice is required). Florida's pre-suit procedure defines a "medical negligence" claim as "arising out of the rendering of, or the failure to render, medical care of services," section 766.106 (1)(a), Fla. Stat. Ann. (2011), which distinguishes Florida's statute from South Carolina's statute. This, however, is a distinction without a difference. Although South Carolina's statutory scheme does not contain a similar definition, South Carolina's statute has an identical intent; it is aimed specifically at claims involving rendition of medical services, not tort actions in general.

For instance, had Plaintiff been struck by a ceiling tile that became dislodged, or assaulted by a hospital employee, those claims would not fall within the intended reach of the pre-suit procedure for medical negligence. As the Florida District Court of Appeal stated:

> It is undoubtedly true that some injuries suffered in a medical facility or inflicted by medical personnel do not arise out of the rendering or failure to render medical care or services. A clear example is offered by *St. Mary's Hosp. v. Bell*, 785 So.2d 1261 (Fla. 4th DCA 2001), where a patient's foot was injured by an employee as a result of simple negligence. *See also Lake Shore Hosp., Inc. v. Clarke*, 768 So. 2d 1251 (Fla. 1st DCA 2000).

Blom v. Adventist Health System/Sunbelt, Inc., 911 So.2d 211, 214 (2005).

Although not controlling, these cases from other jurisdiction are persuasive. While the General Assembly intended to make it more difficult for a plaintiff to vindicate rights against a medical mistake that causes harm, the General Assembly never intended to create a system where *every* tort claim is covered by the pre-suit NOI procedure simply because the injury occurs in a hospital.

Plaintiff's complaint essentially asserts that the Hospital assumed a duty of due care once it undertook custody and care of Plaintiff, and its failure to follow its own procedures resulted in a breach of that duty of due care. Under the law of South Carolina, even where there is no duty to act but an act is voluntarily undertaken, the actor assumes the duty to use due care. *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991). The Supreme Court in *Russell* referenced The Restatement of Torts 2d, Section 323, states in part:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if
>
> (a) his failure to exercise such care increased the risk of such harm ...

Russell, 305 S.C. at 89-90, 406 S.E.2d at 340, citing *Restatement (Second) of Torts* § 323 (1965) (Negligent Performance of Undertaking to Render Services). The Court added:

> A slight modification appears in Section 324, which states as follows:
>
> > One who being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by

> (a) the failure of the other to exercise reasonable care to secure the safety of the other while within the act as charged, or
>
> (b) the actors discontinuing his aid or protection if by doing so he leaves the other in a worse position than when the actor took charge of him.

Russell, 305 S.C. at 89-90, 406 S.E.2d at 340, citing *Restatement (Second) of Torts* § 324 (1965) (Duty of One Who Takes Charge of Another Who is Helpless). *See also Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006) (applying the rules from both § 323 and 324 of the Restatement in finding center liable for injury to child with special needs whom the center voluntarily undertook to supervise and provide care).

This is not a case in which Plaintiff contends the medical staff misdiagnosed her condition or provided inappropriate treatment for her medical condition. Instead, this case involves an assertion that the Hospital failed to exercise due care once it took charge of her by failing to secure her safety. Furthermore, the allegations contend the Hospital left her worse-off by its failure to follow its procedures and by leaving her unattended.

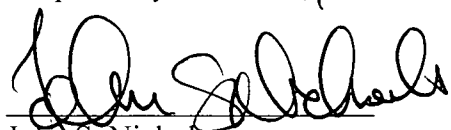
The rules of civil procedure provide that they are to "be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. Construing Rule 8 in this manner, Plaintiff has sufficiently pled a claim against the Hospital that is not in professional negligence but involves violation of an ordinary duty of care.

Accordingly, this Court should reverse the circuit court's decision and remand the matter so that the Hospital can file an answer to the amended complaint, the parties may engage in discovery, and the case can proceed.

CONCLUSION

For the reasons stated this Court should reverse the trial court's dismissal of this matter and should remand for further proceedings consistent with this Court's ruling.

Respectfully submitted,



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July 23, 2013

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CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,

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July 29, 2013

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Final Brief of Appellant* and *Reply Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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