THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
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,

Respondent.

INITIAL BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

Appellant Mark Rutland, as power of attorney for Mary Hoover, filed a summons and complaint against Jeremy Locklair and Orangeburg Post Acute LLC d/b/a Edisto Post Acute on or about April 20, 2021. In lieu of an answer, Defendants filed a motion to dismiss on or about May 25, 2021, arguing that (1) Appellant did not follow the requirements of the South Carolina Medical Malpractice Reform Act of 2005; (2) Orangeburg Post Acute LLC did not exist at the times alleged in the complaint. (Defs. Motion to Dismiss, May 25, 2021); and (3) Appellant's claims are barred by the statute of limitations. The lower court granted Respondents' motion on the first ground and denied the motion as to the second and third grounds. (Form 4 Order, Oct. 6, 2021).

Prior to this complaint, Appellant filed a notice of intent naming as defendants Orianna Health Systems LLC, Orangeburg Post Acute LLC d/b/a Edisto Post Acute and/or Riverside Rehabilitation and Healthcare Center LLC, Edisto Post Acue, and Riverside Rehabilitation and Healthcare Center LLC. (Notice of Intent Nov. 3, 2020). This notice, in accordance with the Medical Malpractice statute, was accompanied by an expert affidavit, identifying the breaches in the medical standard of care by the named defendants. (Aff. Luanne Trahant, Sept. 9, 2020). After filing this notice, Appellant learned he could not proceed with this case because of the bankruptcy stay governing Orianna Health Systems. (Letter Health Care Navigator, Nov. 30, 2020). After confirming with separate bankruptcy legal counsel, Appellant proceeded with the causes of action and allegations set forth in the complaint at issue before this Court, focusing on Respondents' financial and managerial irresponsibility which led to Ms. Hoover's injuries.

FACTS

Mary Hoover was a patient at Respondents' facility beginning in October of 2017 through June of 2018. She left the facility with a stage IV sacral wound to be cared for by home health and her nephew, Mark Rutland. Jeremy Locklair was the administrator of the facility throughout Ms. Hoover's stay there. Appellant's underlying complaint asserts claims in negligence against Jeremy Locklair and separate claims in negligence against the facility. Specifically, Appellant alleged Respondents were negligent in their communication to Mr. Rutland about Ms. Hoover, management of the financial resources at the facility, and management of the facility's employees, servants and/or agents. (Compl. ¶¶16, 18). Respondents' negligence led to Ms. Hoover's injuries as well as significant financial expense. (Compl. ¶19).

STANDARD OF REVIEW

South Carolina Civil Rule 12(b)(6) provides for dismissal when there is a "failure to state facts sufficient to constitute a cause of action." SCRCP Rule 12(b)(6). Generally, in considering a Rule 12(b)(6) motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the face of the Complaint. Doe v. Greenville County Sch. Dist. 375 S.C. 63, 66, 651 S.E.2d 305, 307 (2007); Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). "[U]nder our current pleading rules only ultimate facts are required to be stated in pleadings. Ultimate facts are those which the evidence upon trial will prove, and not the evidence which will be required to prove those facts." Brown v. Inv. Mgmt. & Research, Inc., 323 S.C. 395, 400 n. 3, 475 S.E.2d 754, 756 n. 3 (1996). Rule 8(e)(1) states that "each averment of a pleading shall be simple, concise and direct. No technical forms of pleadings or motions are required." SCRCP Rule 8(e)(1). And all

pleadings must be construed to do substantial justice to all parties. Unisum Ins. V. Hawkins, 342 S.C. 537, 541, 537 S.E.2d 559, 561 (Ct. App. 2000). Thus, the pleadings must be liberally construed. Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991). Dismissal under Rule 12(b)(6) is inappropriate if pleadings raise a novel question of law. Chestnut v. AVX Corp., 413 S.C. 224, 228, 776 S.E.2d 82, 84 (2015); Madison v. Am. Home Prod. Corp., 358 S.C. 449, 451, 595 S.E.2d 493, 494 (2004). Furthermore, a pleading is not made insufficient in its entirety if a statement made in the pleading is sufficient on its own. SCRCP Rule 8(e)(2) ("A party may set forth two or more statements of a cause of action or defense alternatively or hypothetically…When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements…").

ARGUMENT

The lower court incorrectly granted Respondents' Motion to Dismiss Appellant's Complaint in its entirety, failing to recognize valid allegations of negligence, separate and apart from any suggestion of medical malpractice.

I. THE LOWER COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BECAUSE JEREMY LOCKLAIR IS NOT A HEALTHCARE PROVIDER UNDER THE SOUTH CAROLINA MEDICAL MALPRACTICE ACT

Jeremy Locklair is not a healthcare provider. The South Carolina Medical Malpractice Act 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." S.C. Code Ann.

§15-79-110(6). A "healthcare institution" means an ambulatory surgical facility, a hospital, an institutional general infirmary, a nursing home, and a renal dialysis facility." Id. at (2). A "healthcare provider" means a physician, surgeon, osteopath, nurse, oral surgeon, dentist, pharmacist, chiropractor, optometrist, podiatrist, or any similar category of licensed health care provider, including a health care practice, association, partnership, or other legal entity." Id. at (3). While Orangeburg Post Acute LLC d/b/a Edisto Post Acute would be considered a healthcare institution, Jeremy Locklair does not fall under the Med-Mal Act.

Furthermore, the allegations against Jeremy Locklair do not sound in medical malpractice. "[N]ot every injury sustained by a patient in a hospital results from medical malpractice." Dawkins v. Union Hosp. Dist., 408 S.C. 171, 177, 758 S.E.2d 501, 504 (2014). South Carolina law has long recognized common knowledge as an exception to the expert testimony requirement for medical malpractice cases. *See* Green v. Lilliewood, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978) (finding no expert is required "in situations where the common knowledge and experience of layman" can evaluate conduct in question); Cox v. Lund, 286 S.C. 410, 416-17, 334 S.E.2d 116, 120 (1985) (applying Green to defendant doctor's performance of colonoscopy); *see also* Boyle v. U.S., 948 F.Supp. 2d 570 (D.S.C. 2012) (misfiled prescription); Smith v. U.S., 119 F. Supp. 2d 561 (D.S.C. 2000) (citing 40 Am. Jur. 2d Hospitals and Asylums §57 (1999) (finding examples of simple negligence claims against a hospital include "failure to prevent a patient's fall, mishandling of a canister containing bone marrow cells, and mistakenly giving one patient another's HIV test results"). "Medical malpractice" and pre-filing requirements for medical malpractice claims "do [] not impact medical providers' ordinary obligation to reasonably care for patients with respect to

nonmedical, administrative, ministerial or routine care." Dawkins at 178, 758 S.E.2d at 504; *see also* Dawkins at 178, 758 S.E.2d at 504 n. 2 (collecting cases of ordinary negligence in hospital setting including claims arising from food poisoning, slippery floors, and vulnerable patients left without assistance); Arora v. James, 689 Fed. Appx. 190 (4th Cir. May 12, 2017) (reversing denial of motion to amend complaint where amendment alleged ordinary negligence claim based on hospital's failure to keep intruders out of patient's room). The phrase "administrative, ministerial or routine care" can apply even if the medical provider's negligent act was undertaken for a medical purpose. Kastler v. Iowa Methodist Hosp., 193 N.W.2d 98, 102 (Iowa 1971) ("The character of a particular activity of a hospital – whether professional, on the one hand, or nonmedical, administrative, ministerial, or routine care, on the other – is determined by the nature of the activity itself, not by its purposes").

Appellant's complaint includes allegations against Mr. Locklair beyond medical malpractice and within the realm of common knowledge and nonmedical, administrative, ministerial, or routine care. Specifically, Appellant alleges "Defendant Locklair, as Edisto's 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…sufficiently funded facilities, continuity of care, coordinate care, and other reasonable performance of patient care as represented to the patients prior to and during their residency at Edisto." (Compl. §¶ 15). Then in paragraph 16, "Defendant Locklair departed from these duties owed to Ms. Hoover…(a) in failing to properly communicate with Plaintiff as to the care and services offered to Ms. Hoover; … (c) in failing to adequately manage the financial resources at Edisto so as to ensure adequate care of its residents… [and] (g) failing to adequately supervise, train, and discipline employees, servants,

and/or agents so as to prevent this foreseeable consequence..." These allegations sufficiently set forth not only non-medical allegations but also sufficiently set forth "ultimate facts" as required by Rule 8(e)(1). *See* SCRCP Rule 8(e)(1) and Standard of Review *supra*.

Appellant recognizes that his complaint may be a novel consideration for the court, however that is not grounds for a dismissal at the pleadings stage. If the case is allowed to proceed, Appellant submits the evidence will show that Ms. Hoover is both deaf and blind, thus requiring particular attention to informing those responsible for her of her expected care, her actual care, the ability of the facility to fully care for her, and the viability of the facility itself. Sometime during Ms. Hoover's residency at the facility, as well as its parent company and associated subsidiaries proceeded in and through bankruptcy. But for Respondents' negligent conduct in failing to communicate with Ms. Hoover and those responsible for her care regarding these issues, Ms. Hoover would not have been neglected and furthermore, Mr. Rutland would have likely removed her from the facility altogether, thus avoiding her injuries.

II. THE LOWER COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BECAUSE APPELLANT'S COMPLAINT INCLUDED CLAIMS OF NEGLIGENCE SEPARATE FROM CLAIMS OF MEDICAL MALPRACTICE

Similarly, the lower court erroneously dismissed the claims against Orangeburg Post Acute LLC d/b/a Edisto Post Acute. Although it would be considered a healthcare facility under the Medical Malpractice Act, like the allegations against Jeremy Locklair, the allegations against the facility sound in ordinary negligence, not medical malpractice. Appellant alleges "Defendant Edisto owed a duty to Ms. Hoover, an Edisto resident from 2017 to 2018, 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, coordinate care, and other reasonable performance of patient care as represented to the patients prior to and during their residency at Edisto." (Compl. ¶17). "Defendant Edisto departed from these duties (a) in failing to properly communicate with Plaintiff as to the care and services offered to Ms. Hoover…(c) in failing to adequately manage the financial resources at Edisto so as to ensure adequate care of its residents…[and] (g) failing to adequately supervise, train, and discipline employees, servants, and/or agents so as to prevent this foreseeable consequence…" (Compl. ¶18). As explained *supra*, these allegations sound not in medical malpractice but within the scope of ordinary negligence. They do not require understanding of medical standards of care and thus, do not require an expert opinion.

III. THE LOWER COURT ERRED IN DISREGARDING APPELLANT'S PRIOR PRESENTED EXPERT AFFIDAVIT

Even if this Court finds Appellant's Complaint sounds in medical malpractice, Appellant's Complaint survives the motion to dismiss because of his previously filed expert affidavit in the initial pleadings, a Notice of Intent, filed November 3, 2020. The construction of the Medical Malpractice Act and the case law interpreting it do not warrant dismissal at this stage. As noted in the *Ross* court, ""[i]t is clear that the Legislature enacted section 15-79-125 to provide an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims…[and not] a trap for plaintiffs with potentially meritorious claims." Ross v. Waccamaw Community Hospital, 404 S.C. 56, 63, 744 S.E.2d 547, 550 (2013). The *Ross* court favored the consideration of meritorious claims in declining to dismiss the plaintiff's claim for failure to comply with the pre-suit mediation

conference. Id. In the case before the court now, the issues are not as to mediation but rather the requirement of a contemporaneous expert affidavit. The *Ranucci* court answers this issue along the same principles espoused in *Ross*. The question in *Ranucci* was whether the plaintiff's malpractice claim should be dismissed because the expert affidavit was not filed contemporaneously with the notice of intent. Ranucci v. Crain, 763 S.E.2d 189 (2014). The court found "15-79-125(A) incorporates section 15-36-100 in its entirety. Thus, Ranucci could invoke section 15-36-100(C)(1), which extended the time for filing the expert witness affidavit and tolled the applicable statute of limitations." Id. at 497. The court reasoned "[b]ecause the prelitigation filtering process is not meant as an impassable boundary that denies a claimant access to the courts, we have attempted to 'avoid dismissal of cases on technical grounds and to allow adjudication on the merits.'" Ranucci at 506-507 (referencing *Ross* and quoting *Schulz v. Nienhuis*, 152 Wis. 2d 434, 448 N.W.2d 655, 658 (1989)). Here, Appellant can survive the requirements of the Medical Malpractice Act and the case law interpreting the intent and use of that act promotes accepting the previously filed expert affidavit, permitting the claims to proceed forward on their merits. To do otherwise, would bar Appellant from access to the courts, an outcome certainly not intended by the Medical Malpractice Act.

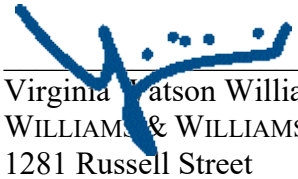
CONCLUSION

For these reasons, this Court should GRANT Appellant's appeal, remanding the matter back to the lower court, allowing discovery to begin and a determination on the facts to be made. Should this Court find that some of the allegations of Appellant's Complaint sound in medical malpractice rather than ordinary negligence and that the expert affidavit stricken, those malpractice

allegations should be stricken, and the remaining claims of ordinary negligence allowed to continue. In the alternative, this Court should find strike the allegations of Appellant's complaint that sound in medical malpractice but permit the remaining ordinary negligence claims to continue as to this novel question.

April 1, 2022

Respectfully submitted,



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