

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 21, 2015 Session

ESTATE OF PHYLLIS THIBODEAU ET AL. V. ST. THOMAS HOSPITAL

**Appeal from the Circuit Court for Davidson County
No. 12C4289 Joseph P. Binkley, Jr., Judge**

No. M2014-02030-COA-R3-CV – Filed October 29, 2015

Plaintiffs, a husband and wife, filed suit against St. Thomas Hospital alleging claims for ordinary negligence and a derivative loss of consortium. The complaint alleged that St. Thomas was liable for injuries Plaintiffs sustained as a result of the hospital's employees' failure to properly support the wife as they attempted to transfer her from a bariatric stretcher to her automobile. St. Thomas moved to dismiss the claim on the grounds Plaintiffs failed to comply with the pre-suit notice and good faith certificate filing requirements of the health care liability statute set forth in Tenn. Code Ann. §§ 29-26-121 and -122. Plaintiffs responded that the complaint was not subject to the filing requirements because it sounded in ordinary negligence, not health care liability. The trial court held that Plaintiffs' action is a health care liability action subject to the filing provisions of the health care liability statute and dismissed Plaintiffs' claim with prejudice, finding it undisputed that Plaintiffs failed to comply with Tenn. Code Ann. §§ 29-26-121 and -122. Plaintiffs appeal. Having applied the clear language of the health care liability statute to Plaintiffs' complaint, we conclude that the allegations contained therein meet the definition of a health care liability action as defined in Tenn. Code Ann. § 29-26-101(a)(1) and that Plaintiffs were required to comply with Tenn. Code Ann. §§ 29-26-121 and -122. Therefore, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which RICHARD R. DINKINS and W. NEAL MCBRAYER, JJ., joined.

M. Ben Moore and Colin B. Calhoun, Nashville, Tennessee, for the appellants, Estate of Phyllis Thibodeau and Robert Thibodeau.

C. Bennett Harrison, Jr., and Brian W. Holmes, Nashville, Tennessee, for the appellee, St. Thomas Hospital.

OPINION

Phyllis Thibodeau and Robert Thibodeau (collectively “Plaintiffs”), residents of Massachusetts, embarked upon a multi-city road trip in September 2011.¹ Mrs. Thibodeau suffered from arthritic knee pain for many years, and, during the trip, she experienced a great deal of pain in her right knee. By the time Plaintiffs arrived in Nashville, Tennessee, on October 24, 2011, her pain worsened to such a degree that Plaintiffs contacted an ambulance to transport her to St. Thomas Hospital (“St. Thomas”). Mrs. Thibodeau’s pain was so severe that she could not walk and the Emergency Medical Technicians transported her by bariatric stretcher from the bed in Plaintiffs’ hotel room to the ambulance.

After arriving at St. Thomas, registered nurse Kyle Cole was assigned to care for Mrs. Thibodeau. Thereafter, she was examined by emergency room physician Dr. Ansel Anderson. Dr. Anderson determined that there was no new injury to Mrs. Thibodeau’s knee and that her pain was a result of her chronic arthritis. She was given pain medication and discharged with instructions to follow-up with her physicians in Massachusetts.

Thereafter, Mr. Cole and two other St. Thomas employees – a registered nurse and a patient care technician – assisted in transporting Mrs. Thibodeau to Plaintiffs’ vehicle located in the St. Thomas ambulance bay. Because Mrs. Thibodeau weighed “just under 500” pounds, the St. Thomas employees considered the way in which Plaintiffs normally accomplished such transfers in developing a plan for the transfer. Mr. Cole explained Plaintiffs’ procedure as follows:

[Plaintiffs] said what they typically did was is [sic] that they would put crutches under her arms when she got up, she came to a standing position, she would pivot and get into the wheelchair, they would transfer her to wherever she was going to, then she would - her husband would assist her and she would get back up on her crutches and ambulate to where she needed to be in the room.

In an effort to reduce the number of times Mrs. Thibodeau would have to come to a standing position, the St. Thomas employees developed a modified plan for the transfer.² Mr. Cole described the modified plan as follows:

¹ Mrs. Thibodeau passed away on May 10, 2014. The trial court entered an amended order on September 16, 2014, substituting the Estate of Phyllis Thibodeau for her.

² The details of the plan utilized by the St. Thomas employees are disputed; nevertheless, because it is undisputed that the St. Thomas employees developed and utilized a predetermined plan for the transfer, the parties acknowledge that these disputes are immaterial for the purpose of summary judgment.

So we said well, again, each time you make a patient transfer that it's more stress on that knee. If you go into a sitting position and you stand up, you're going to put more weight on that knee each time that you have to stand up. So we told her that if it would be okay, we would take and - take the bariatric bed to cut down on one of the transfers so it would be easier on her and we'd take that out into the bay area, if they would pull the van up and her husband would assist us doing what he normally did and we would help them get into the van.

After the St. Thomas employees developed the plan, they began the process of transporting Mrs. Thibodeau to her vehicle. However, when Mrs. Thibodeau was near her vehicle and ready to come to a standing position, she fell and experienced the onset of "terrible pain" in her left ankle. Thereafter, she was transported back inside St. Thomas and admitted for injuries she suffered from the fall.

Plaintiffs brought a personal injury action against St. Thomas for ordinary negligence and a derivative loss of consortium claim. Plaintiffs alleged that St. Thomas was vicariously liable for its employees' failure to "properly support" Mrs. Thibodeau as they attempted to transfer her from a bariatric stretcher to her automobile and that the employees' negligence directly and proximately caused Plaintiffs' injuries. St. Thomas filed an answer asserting that Plaintiffs' cause of action sounded in health care liability pursuant to Tenn. Code Ann. § 29-26-101 and that it should be dismissed for Plaintiffs' failure to provide pre-suit notice and a certificate of good faith with the complaint as required by the health care liability act. *See* Tenn. Code Ann. §§ 29-26-121 and -122. Thereafter, St. Thomas filed a motion for judgment on the pleadings on the same grounds asserted in its answer. By order entered March 1, 2013, the trial court denied St. Thomas' motion concluding that under the common law analysis outlined in *Estate of French v. Stratford House*, 333 S.W.3d 546 (Tenn. 2011) Plaintiffs "claim constitutes a prima facie cause of action for ordinary negligence as the conduct complained of is not substantially related to the rendition of medical treatment," and because Plaintiffs' action did not sound in health care liability, they "were not required to comply with the pre-suit notice and certificate of good faith requirements."

Following written and oral discovery, St. Thomas filed a motion for summary judgment accompanied with a statement of undisputed facts contending that the allegations of Plaintiffs' complaint, as supplemented by discovery, demonstrated that Plaintiffs' cause of action sounded in health care liability rather than ordinary negligence. To support its position, St. Thomas presented two arguments. First, St. Thomas asserted Plaintiffs' action must be found to be a health care liability action under the common law analysis used in *Estate of French* and pursuant to a long line of cases involving alleged patient falls. Second, St. Thomas asserted that Plaintiffs' cause of action was a "health care liability action" as defined in Tenn. Code Ann. § 29-26-101. St. Thomas further asserted that this definition was intended to broaden and clarify the types of actions

subject to the requirements of the health care liability act and thus abrogated the common law analysis in *Estate of French*.

Following a hearing on the motion, the trial court dismissed Plaintiffs' complaint by order entered June 5, 2014. In its order, the trial court recognized a lack of clear and controlling authority as to how the enactment of Tenn. Code Ann. § 29-26-101 altered the common law analysis for determining whether an action sounds in medical malpractice or ordinary negligence outlined in *Estate of French*. As a result, the trial court analyzed Plaintiffs' complaint under both the statutory and common law analysis. Under each analysis, the trial court concluded Plaintiff's cause of action was a health care liability action subject to the pre-suit notice and certificate of good faith provisions of Tenn. Code Ann. §§ 29-26-121 and -122. The trial court dismissed Plaintiffs' complaint with prejudice, finding it undisputed that Plaintiffs failed to comply with the statutory requirements. This appeal followed.

STANDARD OF REVIEW

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Tenn. R. Civ. P. 56.04. The party seeking summary judgment bears the burden of demonstrating that no genuine dispute of material fact exists and that it is entitled to a judgment as a matter of law. *Armonait v. Elliot Crane Service, Inc.*, 65 S.W.3d 623, 627 (Tenn. Ct. App. 2001). If the facts are undisputed, the moving party who does not bear the burden of proof at trial can prove that it is entitled to a judgment as a matter of law if it “[s]ubmits affirmative evidence that negates an essential element of the nonmoving party's claim” or “[d]emonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.” *See* Tenn. Code Ann. § 20-16-101.

The decision to grant or deny a motion for summary judgment is a matter of law, and this court reviews such decisions de novo with no presumption of correctness. *Dick Broad Co. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013) (quoting *Kinsler v. Berkline, LLC*, 320 S.W.3d 796, 799 (Tenn. 2010)). Accordingly, we must make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Armonait*, 65 S.W.3d at 628. In so doing, we must consider the evidence in the light most favorable to the non-moving party and resolve all inferences in its favor. *Id.*

This action also presents a matter of statutory interpretation. Statutory construction is a question of law that this court reviews de novo with no presumption of correctness. *In re Estate of Tanner*, 295 S.W.3d 610, 613 (Tenn. 2009). When interpreting a statute, our primary objective “is to carry out legislative intent without broadening or restricting the statute beyond its intended scope.” *Id.* (citing *Houghton v. Aramark Educ. Res., Inc.*

90 S.W.3d 676, 678 (Tenn. 2002)). Courts ascertain legislative intent “from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language.” *Faust v. Metro. Gov’t. of Nashville*, 206 S.W.3d 475, 490 (Tenn. Ct. App. 2006) (quoting *LensCrafters, Inc. v. Sundquist*, 33 S.W.3d 772, 777 (Tenn. 2002)). Although every word that the legislature uses must be given effect, this court “must be circumspect about adding words to a statute that the General Assembly did not place there.” *Coleman v. State*, 341 S.W.3d 221, 241 (Tenn. 2011) (citing *City of Knoxville v. Entm’t Res., LLC*, 116 S.W.3d 650, 658 (Tenn. 2005)). When the statute is clear, we need go no further than its written language; however, when the statute is ambiguous we may reference the statutory scheme, history of the legislation, or other sources. *See In re Estate of Tanner*, 295 S.W.3d at 614.

ANALYSIS

St. Thomas asserts that the Tennessee Civil Justice Act of 2011 (“TCJA”) unambiguously expanded the scope of actions subject to the health care liability statutes and abolished the common law tests for determining whether an action constitutes a medical malpractice or ordinary negligence action. St. Thomas further asserts that Plaintiffs were required to comply with the mandatory filing provisions of the Tennessee Health Care Liability Act (“THCLA”) because the clear and unambiguous language of the THCLA reflects that Plaintiffs’ claim is a health care liability action pursuant to Tenn. Code Ann. § 29-26-101. Specifically, St. Thomas notes that the case arises out of the alleged negligence of various health care providers relating to the health care services received by Plaintiff.

Plaintiffs respond that the enactment of Tenn. Code Ann. § 29-26-101 did not end the common law analysis outlined in *Estate of French* to determine whether a plaintiff’s cause of action sounds in ordinary negligence or health care liability. Plaintiffs insist their cause of action sounds in ordinary negligence because, *inter alia*, expert testimony is not required to establish that St. Thomas was negligent by failing to properly support Mrs. Thibodeau during the attempted transport. Plaintiffs further insist that because their action sounds in ordinary negligence, it is not subject to the filing provisions of the THCLA.

Because this precise issue, the effect of the THCLA on the *Estate of French* analysis, was pending before the Supreme Court at the time of writing this opinion, we decided to hold this case pending a ruling by the Court in its case. The Supreme Court has now decided that case, and the ruling is a complete answer to the issue in this appeal:

We hold that the Tennessee Civil Justice Act of 2011, which amended the THCLA, statutorily abrogated our decision in *Estate of French* by providing that “[a]ny such civil action or claim is subject to [the THCLA]

regardless of any other claims, causes of action, or theories of liability alleged in the complaint.”

Ellithorpe v. Weismark, ___ S.W.3d ___, No. M2014-00279-SC-R11-CV, 2015 WL 5853873, at *1 (Tenn. Oct. 8, 2015) (quoting Tenn. Code Ann. § 29-26-101).

In arriving at this decision, the Court first considered the history of the THCLA, formerly identified as the Tennessee Medical Malpractice Act,³ and its judicial interpretations. *Id.* at *4. The Court began with the 2008 amendment to the Tennessee Medical Malpractice Act, which introduced new provisions that required a party initiating a medical malpractice claim to give pre-suit notice to the implicated health care providers and a certificate of good faith served to confirm that one or more experts had been consulted and provided a signed written statement of their belief that there was a good faith basis for filing the complaint. *Id.* (citing Tenn. Code Ann. §§ 29-26-121(a)(1), -122). The Medical Malpractice Act was again amended in 2009 to clarify these new requirements.⁴ *Id.* (citations omitted).

The Court then noted that “[w]hile the 2008 and 2009 amendments to the Medical Malpractice Act established new procedural requirements for plaintiffs seeking to file medical malpractice actions, these amendments failed to sufficiently define a medical malpractice claim and left Tennessee courts to distinguish between claims sounding in ordinary negligence and those involving medical malpractice.” *Id.* at *5. As a result, a substantial body of common law was developed to aid in the determination of whether an action was properly classified as an ordinary negligence action or medical malpractice action. *Coggins v. Holston Valley Med. Ctr.*, No. E2014-00594-COA-R3-CV, 2015 WL 3657778, at *4 (Tenn. Ct. App. June 15, 2015) *perm. app. denied* (Tenn. Oct. 15, 2015). This culminated in the Court’s January 2011 decision in *Estate of French*, which provided a comprehensive and detailed analysis of the interaction between ordinary negligence principles and the Medical Malpractice Act. *Ellithorpe*, 2015 WL 5853873, at *5.

³ In 2011, pursuant to the TCJA, Tennessee Code Annotated sections 29-26-115 through 122 and 202 of the Medical Malpractice Act were amended to replace the term “medical malpractice” with the term “health care liability.” Tennessee Civil Justice Act of 2011, ch. 510 § 9. “[B]ecause the title ‘Tennessee Medical Malpractice Act’ and the term ‘medical malpractice’ were used in the discussed statutes prior to 2011, the terms will continue to be appropriately used throughout this opinion.” *Ellithorpe*, 2015 WL 5853873, at *4, n.6.

⁴ “Tennessee Code Annotated section 29-26-121(a)(1) was amended to require that pre-suit notice only be given to persons or entities named as defendants in the action, *see* Tenn. Code Ann. § 29-26-121(a)(1) (Supp. 2009), and section 121(a)(2) was amended to specify what information was required to be included in the pre-suit notice.” *Ellithorpe*, 2015 WL 5853873, at *4 (citations omitted). Section 29-26-122 was amended to require the filing of the certificate of good faith with the complaint instead of within ninety days after its filing. *Id.* (citing Tenn. Code Ann. § 29-26-122).

The Court summarized its decision in *Estate of French* as follows:

We explained that, “[b]ecause medical malpractice is a category of negligence, the distinction between medical malpractice and negligence claims is subtle; there is no rigid analytical line separating the two causes of action.” [*Estate of French*, 333 S.W.3d] at 555 (citations omitted). Thus, the Court resolved that “whether claims should be characterized as ordinary negligence or medical malpractice claims obviously depends heavily on the facts of each individual case.” *Id.* at 556. However, the Court provided the following guidance in distinguishing between ordinary negligence and medical malpractice:

[W]hen a claim alleges negligent conduct which constitutes or bears a substantial relationship to the rendition of medical treatment by a medical professional, the medical malpractice statute is applicable. Conversely, when the conduct alleged is not substantially related to the rendition of medical treatment by a medical professional, the medical malpractice statute does not apply.

....

Medical malpractice cases typically involve a medical diagnosis, treatment or other scientific matters. The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring specialized skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of common everyday experience of the trier of fact. *Id.* at 555-56 (alteration in original) (citations omitted); *see also Draper v. Westerfield*, 181 S.W.3d 283, 290 (Tenn. 2005) (“[I]n determining whether an action is for medical malpractice or for common law negligence, the issue is whether the alleged negligent conduct ‘bears a substantial relationship to the rendition of medical treatment by a medical professional.’” (citing *Gunter v. Lab. Corp. of Am.*, 121 S.W.3d 636, 641 (Tenn. 2003))). The Court ultimately concluded that it is “the responsibility of the courts to ascertain the nature and substance of a claim” and that the “designation given those claims by either the plaintiff or the defendant is not determinative.” *Estate of French*, 333 S.W.3d at 557.

Ellithorpe, 2015 WL 5853873, at *5-6.

However, the Supreme Court recognized that roughly four months after its decision in *Estate of French*, the General Assembly passed the TCJA, which further amended the Medical Malpractice Act. *Id.* at *6 (citations omitted). Specifically, it

removed all references to “medical malpractice” from the Tennessee Code and replaced them with “health care liability” or “health care liability action” as applicable. *Id.* Additionally, with the passage of the TCJA the General Assembly enacted Tenn. Code Ann. § 29-26-101, which defined a “health care liability action” as:

[A]ny civil action, including claims against the state or a political subdivision thereof, alleging that a health care provider or providers have caused an injury related to the provision of, or failure to provide, health care services to a person, *regardless of the theory of liability on which the action is based.*

Tenn. Code Ann. § 29-26-101(a)(1) (emphasis added). Moreover, “[t]his same section went on to provide that ‘[a]ny such civil action or claim is subject to the provisions of this part regardless of any other claims, causes of action, or theories of liability alleged in the complaint.’” *Ellithorpe*, 2015 WL 5853873, at *6 (quoting Tenn. Code Ann. § 29-26-101(c)).

After analyzing the history of the THCLA and its judicial interpretations, the Court held that its decision in *Estate of French* was statutorily abrogated by the TCJA. *Ellithorpe*, 2015 WL 5853873, at *7. The Court stated:

Giving every word in this section its full effect and plain meaning, we hold that section 29-26-101 establishes a clear legislative intent that *all* civil actions alleging that a covered health care provider or providers have caused an injury related to the provision of, or failure to provide health care services be subject to the pre-suit notice and certificate of good faith requirements, regardless of any other claims, causes of action, or theories of liability alleged in the complaint. Furthermore, we are mindful of the fact that the [TCJA] was enacted mere months after this Court’s decision in *Estate of French*. Under the canons of statutory construction, we presume that the Legislature was aware of this Court’s decision in *Estate of French* and acted accordingly in passing an act that rendered it effectively moot. We need not engage in further statutory interpretation in the face of this clear legislative edict. Thus, we hold that the “nuanced” approach for distinguishing ordinary negligence and health care liability claims as outlined in *Estate of French* has been statutorily abrogated.

Id.

Accordingly, we need not analyze Plaintiffs’ complaint under the abrogated common law analysis outlined in *Estate of French*. Instead, we will apply the clear language of the THCLA to Plaintiffs’ complaint in determining whether the allegations

contained therein meet the definition of a health care liability action as defined in Tenn. Code Ann. § 29-26-101(a)(1). *Id.*

I. TENN. CODE ANN. § 29-26-101

The plain language of the THCLA designates a potential claim as a “health care liability action” if: “(1) it is a civil action; (2) the claim is against a health care provider; and (3) the harm complained of arises from ‘the provision of, or failure to provide, health care services.’” *Igou v. Vanderbilt Univ.*, No. M2013-02837-COA-R3-CV, 2015 WL 1517794, at *4 (Tenn. Ct. App. Mar. 27, 2015) (quoting Tenn. Code Ann. § 29-26-101(a)(1)) *no perm. app. filed* (footnotes omitted).

The THCLA defines a “health care provider” as:

- (A) A health care practitioner licensed, authorized, certified, registered, or regulated under any chapter of title 63 or title 68, including, but not limited to, medical resident physicians, interns, and fellows participating in a training program of one of the accredited medical schools or of one of such medical school’s affiliated teaching hospitals in Tennessee;
- (B) A nongovernmental health care facility licensed under title 68, chapter 11;
- (C) A nongovernmental health facility licensed under the Mental Health, Developmental Disability, and Personal Support Services Licensure Law, compiled in title 33, chapter 2, part 4;
- (D) The employee of a health care provider involved in the provision of health care services, including, but not limited to, physicians, nurses, licensed practical nurses, advance practice nurses, physician assistants, nursing technicians, pharmacy technicians, orderlies, certified nursing assistants, technicians and those physicians and nurses employed by a governmental health facility; or
- (E) A professional corporation or professional limited liability company established pursuant to title 48, a registered limited liability partnership rendering professional services under title 61 and which consists of one (1) or more health care practitioners licensed, authorized, certified, registered, or regulated under any chapter of title 63 or title 68, or any legal entity that is not itself required to be licensed but which employs one or more health care practitioners licensed, authorized, certified, registered, or regulated under any chapter of title 63 or title 68.

Tenn. Code Ann. § 29-26-101(a)(2).

The THCLA defines a “health care services” as:

(b) Health care services to persons includes care by health care providers, which includes care by physicians, nurses, licensed practical nurses, pharmacists, pharmacy interns or pharmacy technicians under the supervision of a pharmacist, orderlies, certified nursing assistants, advance practice nurses, physician assistants, nursing technicians and other agents, employees and representatives of the provider, and also includes staffing, custodial or basic care, positioning, hydration and similar patient services. .

..

Tenn. Code Ann. § 29-26-101(b).

Applying the clear language of the THCLA to Plaintiffs’ complaint, we conclude that the allegations contained therein meet the definition of a health care liability action as defined in section 29-26-101(a)(1). It is undisputed that Plaintiffs’ action is a civil action against a health care provider. Moreover, Plaintiffs’ complaint alleges that a health care provider caused an injury to Mrs. Thibodeau “related to the provision of, or failure to provide, health care services to a person.” Tenn. Code Ann. § 29-26-101(a)(1). Specifically, the complaint alleges that St. Thomas owed “Mrs. Thibodeau a duty of care and is vicariously liable for its employees, servants and/or agents’ *failure to properly support Mrs. Thibodeau as they attempted to transfer her from a bariatric stretcher to her automobile.*” (Emphasis added). The broad plain language of Tenn. Code Ann. § 29-26-101(b) provides that in order for conduct to constitute “health care services” it need only constitute “care by health care providers,” which specifically includes “custodial or basic care, positioning . . . and similar patient services.” Here, the alleged conduct at issue constitutes the provision of a health care service involving the “positioning” of Mrs. Thibodeau. Thus, because Plaintiffs’ complaint alleges negligence in the provision of health care services by a covered health care provider, it is subject to the THCLA “regardless of any other claims, causes of action, or other theories of liability alleged in the complaint.” Tenn. Code Ann. § 29-26-101(c); *Ellithorpe*, 2015 WL 5853873, at *7. Because Plaintiffs failed to comply with the pre-suit notice and certificate of good faith requirements of the THCLA, dismissal of their complaint is appropriate.

For the foregoing reasons, we affirm the trial court’s summary dismissal of Plaintiffs’ complaint with prejudice.⁵

⁵ St. Thomas contends the trial court correctly dismissed Plaintiffs’ complaint with prejudice. Plaintiffs do not argue that any other outcome was appropriate.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Plaintiffs, Estate of Phyllis Thibodeau and Robert Thibodeau.

FRANK G. CLEMENT, JR., JUDGE