

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 18, 2015 Session

SHEMEKA IBRAHIM v. VLADA V. MELEKHIN

**Appeal from the Circuit Court for Rutherford County
No. 67610 J. Mark Rogers, Judge**

No. M2014-00885-COA-R3-CV – Filed September 24, 2015

Plaintiff filed a health care liability action against defendant doctor but did not file the certificate of good faith required by Tenn. Code Ann. § 29-16-122. Defendant filed a motion to dismiss; the motion was granted by the trial court. Plaintiff appeals the dismissal of her complaint. Finding no error, we affirm.

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

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

Shemeka Ibrahim, Antioch, Tennessee, *pro se*.

Phillip Lester North, Renee Levay Stewart, Nashville Tennessee, for the appellee, Dr. Vlada V. Melekhin.

MEMORANDUM OPINION¹

Shemeka Ibrahim (“Plaintiff”) filed a health care liability action against Dr. Vlada Melekhin (“Defendant”) on January 24, 2014; she failed to include the certificate of good

¹ Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

faith required by Tenn. Code Ann. § 29-26-122² when she filed her complaint.

² The pertinent provisions of Tenn. Code Ann. § 29-26-122 read as follows:

(a) In any health care liability action in which expert testimony is required by § 29-26-115, the plaintiff or plaintiff's counsel shall file a certificate of good faith with the complaint. If the certificate is not filed with the complaint, the complaint shall be dismissed, as provided in subsection (c), absent a showing that the failure was due to the failure of the provider to timely provide copies of the claimant's records requested as provided in § 29-26-121 or demonstrated extraordinary cause. The certificate of good faith shall state that:

(1) The plaintiff or plaintiff's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:

(A) Are competent under § 29-26-115 to express an opinion or opinions in the case; and

(B) Believe, based on the information available from the medical records concerning the care and treatment of the plaintiff for the incident or incidents at issue, that there is a good faith basis to maintain the action consistent with the requirements of § 29-26-115; or

(2) The plaintiff or plaintiff's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:

(A) Are competent under § 29-26-115 to express an opinion or opinions in the case; and

(B) Believe, based on the information available from the medical records reviewed concerning the care and treatment of the plaintiff for the incident or incidents at issue and, as appropriate, information from the plaintiff or others with knowledge of the incident or incidents at issue, that there are facts material to the resolution of the case that cannot be reasonably ascertained from the medical records or information reasonably available to the plaintiff or plaintiff's counsel; and that, despite the absence of this information, there is a good faith basis for maintaining the action as to each defendant consistent with the requirements of § 29-26-115. Refusal of the defendant to release the medical records in a timely fashion or where it is impossible for the plaintiff to obtain the medical records shall waive the requirement that the expert review the medical record prior to expert certification.

(c) The failure of a plaintiff to file a certificate of good faith in compliance with this section shall, upon motion, make the action subject to dismissal with prejudice. The failure of a defendant to file a certificate of good faith in compliance with this section alleging the fault of a non-party shall, upon motion, make such allegations subject to being stricken with prejudice unless the plaintiff consents to waive compliance with this section. If the allegations are stricken, no defendant, except for a defendant who complied with this section, can assert, and neither shall the judge nor jury consider, the fault, if any, of those identified by the allegations. The court may, upon motion, grant an extension within which to file a certificate of good faith if the court determines that a health care provider who has medical records relevant to the issues in the case has failed to timely produce medical records upon timely request, or for other good cause shown.

Defendant filed a Tenn. R. Civ. P. 12.02(6) motion to dismiss the complaint for failure to comply with the statute; the trial court granted the motion by order entered April 2, 2014, stating:

Plaintiff argued she met the requirements of filing a certificate of good faith with the complaint filed on January 24, 2014, as set forth on page 8, under the heading “Certification of Good Faith” and on page 9, under the heading of “Affidavit.” This Court finds that the Plaintiff failed to do so. Further, this Court finds Plaintiff failed to show that this failure was due to the failure of the provider to timely provide copies of claimant’s records or demonstrated extraordinary cause.

Plaintiff thereafter filed a “Motion to Set Aside and Vacate Order”³; before the motion was ruled on, she filed a Notice of Appeal. On October 27, 2014 this court ordered that the parties obtain a final order from the trial court. On February 13, 2015, the trial court entered an order overruling the motion. Plaintiff appeals, raising a plethora of issues. We have determined that one issue, whether the court erred in dismissing the complaint for her failure to comply with Tenn. Code Ann. § 29-26-122, is dispositive.

In Tennessee, a plaintiff who wishes to file a health care liability action for medical malpractice must comply with Tenn. Code Ann. § 29-26-122. As our Supreme Court has noted, “The legislature expressly provided the consequence of a plaintiff’s failure to file the required certificate of good faith with the complaint in Tennessee Code Annotated section 29-26-122, stating that “*the complaint shall be dismissed, as provided in subsection (c), absent a showing that the failure was due to the failure of the provider to timely provide copies of the claimant’s records requested as provided in § 29-26-121 or demonstrated extraordinary cause.*” *Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300, 311 (Tenn. 2012) (emphasis in original) (citing Tenn. Code Ann. § 29-26-122(a)). Especially pertinent to this case, subsection (c) of the statute provides that “[t]he failure of a plaintiff to file a certificate of good faith in compliance with this section shall, upon motion, make the action *subject to dismissal with prejudice.*” *Id.* (emphasis in original) (citing Tenn. Code Ann. § 29-26-122(c)).

Plaintiff’s complaint included a section entitled “Certification of Good Faith,” which contained the following statements pertinent to her compliance with Tenn. Code Ann. § 29-26-122:

* * *

³ The court treated this motion as a Tenn. R. Civ. P. 59 Motion to Alter or Amend.

I have made good faith efforts do to the extraordinary cause of this case I tried to get my medical records and **I only got all of my records** from both **Murfreesboro Medical Clinic and MMC** and I did not responded and she gave me my record but the X-Ray is missing and the medical records truly alter. **I did not here from or got any records from Doctor Vlada Melekin** nor did she give me any of my medical records. Good Health Associated **did not give me my medical records or have me to review them.**

* * *

Lastly, I have spoken to several expert witnesses that going to testify on the defendant standard of car for this case but due to the new knowledge that The Adams Family in Murfreesboro owes all of the surround county hospital and across state line. I had to search deep locally and out of state to get expert because of the conflict of interest on the unique case.

[Grammatical errors in original.] The entirety of the section of the complaint titled “Affidavit” [sic] read as follows:

I Shemeka Ibrahim, have drafted this Affidavit to state that the information that I am giving in my The Complaint, and Certificate of Service, Good Faith, and Affidavit is true to the best of my ability and I have spoken to a several expert witness that going to testify on the standard of care and medical record altering, tamper, handwritten, etc., on the standard of care for all these[.]

[Grammatical errors in original.] The trial court determined that these sections “failed to show that [Plaintiff’s] failure [to meet the requirements of filing a certificate of good faith] was due to the failure of the provider to timely provide copies of the claimant’s records or demonstrated extraordinary cause.”

The proper way for a defendant in a health care liability action to challenge a plaintiff’s compliance with Tenn. Code Ann. § 29-26-122 is by filing a Tenn. R. Civ. P., 12,02(6) motion to dismiss for failure to state a claim. *Myers*, 382 S.W.3d at 307. Our review of the dismissal of the complaint is *de novo* with no presumption of correctness. *Thurmond v. Mid-Cumberland Infectious Disease Consultants, PLC*, 433 S.W.3d 512, 516 (Tenn. 2014). We presume that all factual allegations in the complaint are true and construe them in favor of the plaintiff as we examine the legal sufficiency of the complaint. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 894 (Tenn. 2011) (citing *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997)).

Upon our review of the complaint, we agree with the trial court that Plaintiff has not shown that the failure to file the certificate with the complaint was due to the failure of Defendant to timely provide copies of Plaintiff's medical records and that Plaintiff did not otherwise show extraordinary cause. The statements in the complaint relative to Plaintiff's efforts to secure medical records are conclusory and not specific as to dates, nature and manner of the efforts she made to obtain records and the reasons she did not receive them. They fail to set forth facts upon which the trial court could base a determination that the provider failed to timely provide the records or otherwise to conclude that extraordinary cause existed insofar as the medical records were concerned.⁴

In like manner Plaintiff's statement which references the "several expert witnesses" to which she spoke does not satisfy the requirement that a Plaintiff's complaint contain a certificate of good faith stating that an expert, competent to testify under the requirements found at Tenn. Code Ann. § 29-26-115, has reviewed the Plaintiff's medical records and believes that there is a good faith basis for maintaining her action. Such a statement from an expert is a foundational requirement for bringing a health care liability claim in Tennessee, and Plaintiff did not comply with it.

For the foregoing reasons, we affirm the judgment of the trial court dismissing this case.

RICHARD H. DINKINS

⁴ Similarly, the statements in the complaint do not cause this court to conclude that the fact that Plaintiff did not file the certificate of good faith was due to Defendant's failure to give her medical records.