

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 21, 2017 Session

DEBORAH LACY v. SAINT THOMAS HOSPITAL WEST, ET AL.

**Appeal from the Circuit Court for Davidson County
No. 15C2556 Thomas W. Brothers, Judge**

No. M2016-01272-COA-R3-CV

Appellant brought a *pro se* action against several medical providers for injuries sustained when she was allegedly beaten during medical procedures. The trial court dismissed the complaint, under Tennessee Rule of Civil Procedure 12.02, for failure to comply with the procedural requirements of the Tennessee Health Care Liability Act (THCLA). On appeal, Appellant contends that she was not obligated to comply with the THCLA's procedural requirements because her claim was based in tort and did not assert a health care liability claim. After reviewing the complaint, we conclude that it asserts several distinct claims, some of which are health care liability claims and some are not. We, therefore, affirm the trial court's dismissal of the health care liability claims, but reverse the trial court's grant of Appellees' motions to dismiss the non-health care liability claims.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Reversed in Part, and Remanded.

KENNY ARMSTRONG, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and BRANDON O. GIBSON, J., joined.

Deborah Lacy, Madison, Tennessee, appellant, *Pro Se*.

Robert L. Trentham and Kevin C. Baltz, Nashville, Tennessee, for the appellee, Robert Clendenin, III, M.D.

Wendy L. Longmire and T. William A. Caldwell, Nashville, Tennessee, for the appellee, Premier Radiology.

Christen C. Blackburn and Michael S. Holder, Nashville, Tennessee, for the appellee, Austin Bragdon.

OPINION

I. Background

On July 1, 2015, Appellant Deborah Lacy filed a complaint against Saint Thomas Hospital West; Saint Thomas East Tennessee; Orthopaedic Alliance One City Formerly Baptist; Saint Thomas Premier Radiology; Dr. Robert Clendenin, III; and Austin Bragdon, PA-C. Saint Thomas Premier Radiology, Dr. Robert Clendenin, III, and Austin Bragdon, PA-C are the Appellees in this appeal. The events giving rise to Appellant's complaint took place on July 22, 2014, July 23, 2014, August 1, 2014, and March 17, 2015. In her complaint, Ms. Lacy alleges that the Appellees "committed the offense of assault and battery," by beating, electrocuting, and burning her while she was undergoing medical testing. Specifically, Ms. Lacy alleges that, on July 22, 2014, Dr. Clendenin "shocked and beat [her] over four times, and left a hole in [her] right hand palms side up on end of [her] thumb." She also alleges that the right side of her body is shrinking from overdose of electrical current administered by Dr. Clendenin. Ms. Lacy's amended complaints, filed on September 1, 2015 and October 8, 2015, allege that Dr. Clendenin asked her to turn her palm up while he got a larger probe. Dr. Clendenin allegedly told Ms. Lacy that "this is going to hurt real bad." Ms. Lacy alleges that the pain was so great that she "almost passed out." Ms. Lacy also alleges that "[Dr. Clendenin] physically beat [her] after the shock," hitting her four times on the front part of her right shoulder.

Ms. Lacy's allegations against Austin Bragdon took place on July 23, 2014 and August 1, 2014. Specifically, Ms. Lacy alleges that as Mr. Bragdon was positioning her in the MRI machine, he "beat her three to four times in the shoulder" on her left side. Additionally, Ms. Lacy alleges that, after Mr. Bragdon took her back to her room, he took her "medical file and beat [her] from head to ankle up and down never saying a word." Ms. Lacy's allegations against Premier Radiology took place on March 17, 2015. Ms. Lacy's complaints allege that she was placed in the MRI machine, and the MRI technician beat her left leg four times causing bruising. Ms. Lacy also alleges that she was burned during the MRI because the machine was "too hot."

All of the Appellees filed motions to dismiss pursuant to Tennessee Rule of Civil Procedure 12.02. Appellees argued that Appellant's allegations involve several health care providers causing injury as part of the provision of health care services to Ms. Lacy. Accordingly, Appellees argue that Appellant's claims are subject to the Tennessee Healthcare Liability Act (Tenn. Code Ann. §29-26-101 et seq.). Because Ms. Lacy failed to provide pre-suit notice and a certificate of good faith as required by Tennessee Code Annotated Sections 29-26-121 and 29-26-122, Appellees argue that her complaint should be dismissed. Ms. Lacy clearly anticipated Appellees' argument because she asserts, in her complaint, that "this is a case based upon assault and intent to do physical and bodily (sic) harm, so there is no need for a good faith letter."

On July 7, 2016, the trial court entered an order granting Dr. Clendenin's motion to dismiss. The trial court found that Appellant's complaint was a "health care liability action as defined by T.C.A. § 29-26-101 even though other claims, causes of action, or theories of liability are alleged in the complaint." The trial court further found that:

[a] failure to file a certificate of good faith with the complaint in a healthcare liability action which would require supporting expert opinion testimony requires that the complaint be dismissed with prejudice pursuant to T.C.A. §29-26-122(c) and the holding of the Tennessee Supreme Court in *Ellithorpe, et al. v. Weismark*, 479 S.W.3d 818.

The trial court entered another order on July 7, 2016, dismissing Ms. Lacy's claims against Austin Bragdon and Premier Radiology. Like the order dismissing Ms. Lacy's claims against Dr. Clendenin, the trial court cited the *Ellithorpe* opinion and found that Ms. Lacy's allegations "clearly arise in part from the administration of health care services, specifically injuries related to magnetic resonance imaging. For this reason, [Ms. Lacy] was required to provide pre-suit notice and a certificate of good faith. This court finds that [Ms. Lacy] failed to comply with either of these requirements." Ms. Lacy appeals.

II. Issues

The Appellant raises one issue, which we restate as follows:

Whether the trial court erred in dismissing Appellant's complaint based on her failure to comply with the procedural requirements of THCLA?

III. Standard of Review

A motion to dismiss for failure to state a claim is the proper method for challenging whether a plaintiff has complied with the THCLA's pre-suit notice and certificate of good faith requirements. *Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300, 307 (Tenn. 2012). A motion to dismiss based upon Tennessee Rule of Civil Procedure 12.02 challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. *Phillips v. Montgomery Cnty.*, 442 S.W.3d 233, 237 (Tenn. 2014) (quoting *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011)).

A defendant filing a motion to dismiss "admits the truth of all the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action." *Id.* (quoting *Webb*, 346 S.W.3d at 426)(internal citations omitted). The resolution of such motion is determined by examining the pleadings alone. *Id.* In adjudicating such motions, courts "must construe the complaint liberally,

presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.” *Id.* (citing *Webb*, 346 S.W.3d at 426; *Cullum v. McCool*, 432 S.W.3d 829, 832 (Tenn. 2013)). A motion to dismiss should be granted only if it appears that “the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” *Webb*, 346 S.W.3d at 426 (quoting *Crews v. Buckman Labs. Int’l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002)). We review a lower court’s decision on such a motion *de novo* without any presumption of correctness. *Ellithorpe v. Weismark*, 479 S.W.3d 818, 823-24 (Tenn. 2015) (citing *Phillips*, 442 S.W.3d at 237).

We recognize that Ms. Lacy is representing herself *pro se* on appeal as she did in the trial court. Parties who decide to represent themselves are entitled to equal treatment by the court. *Murray v. Miracle*, 457 S.W.3d 399, 402 (Tenn. Ct. App. 2014). The court should take into account that many *pro se* litigants have no legal training and little familiarity with the judicial system. *Id.* However, the court must also be mindful of the boundary between fairness to the *pro se* litigant and unfairness to the *pro se* litigant’s adversary. *Id.* While the court should give *pro se* litigants who are untrained in the law a certain amount of leeway in drafting their pleadings and briefs, it must not excuse *pro se* litigants from complying with the same substantive and procedural rules that represented parties are expected to observe. *Lacy v. Mitchell*, No. M2016-00677-COA-R3-CV, 2016 WL 6996366, at *2 (Tenn. Ct. App. Nov. 30, 2016), *perm. app. denied* (Tenn. Feb. 24, 2017) (citing *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003)).

IV. Analysis

Tennessee Code Annotated Section 29-26-101(a)(1) defines a health care liability action as “any civil action ... 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.” Subsection 101(c) makes “[a]ny such civil action or claim [] subject to this part regardless of any other claims, causes of action, or theories of liability alleged in the complaint.” Tenn. Code Ann. §29-26-101(c).

The trial court and the Appellees rely on the Tennessee Supreme Court’s opinion in *Ellithorpe v. Weismark*, 479 S.W. 3d 818 (Tenn. 2015), to support the position that Ms. Lacy’s assault allegations cannot be separated from her allegations arising from health care liability and should, therefore, be dismissed. The *Ellithorpe* case involved a clinical social worker who provided counseling to a minor child without the parents’ consent. The parents filed a complaint alleging negligence and intentional infliction of emotional distress. In *Ellithorpe*, the parents argued that their case sounded in negligence, not healthcare liability, and, therefore, the pre-suit notice requirements and the certificate of good faith required by the THCLA did not apply. In analyzing the meaning of the language of the relevant code sections, the Tennessee Supreme Court stated:

[G]iving 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.

Id at 827 (emphasis added). In *Ellithorpe*, the Tennessee Supreme Court ultimately held that the parents' complaint alleged negligence in the provision of healthcare services by a covered healthcare provider (*i.e.*, counseling provided by a licensed clinical social worker), and that the complaint was subject to the THCLA regardless of any other claims, causes of action, or other theories alleged in the complaint. The Supreme Court concluded that dismissal of the parents' complaint was appropriate in light of their failure to comply with the pre-suit notice and certificate of good faith requirement of the THCLA.

A claim is subject to the THCLA if it qualifies as a "health care liability action" pursuant to the statutory definition in Tennessee Code Annotated section 29-26-101(a)(1). *Osunde v. Delta Med. Ctr.*, 505 S.W.3d 875, 884 (Tenn. Ct. App. 2016) (citation omitted). This statutory definition is broad and conclusive. In fact, this Court has previously remarked that "it should not be surprising if most claims now arising within a medical setting constitute health care liability actions." *Id.* However, "whether a health care liability action is implicated is entirely dependent on whether the factual allegations meet the definition outlined in the statute." *Id.* at n.6.

This Court has recently held that allegations "related to the provision of, or failure to provide health care services" should be treated differently from allegations not related to the provision of health care services. In the case of *Lacy v. Mitchell*, No. M2016-00677-COA-R3-CV, 2016 WL 6996366 (Tenn. Ct. App. November 30, 2016), *perm. app. denied* (Tenn. Feb. 24, 2017),¹ Ms. Lacy brought a claim against a chiropractor for a heart injury that she allegedly suffered when the chiropractor jumped on her back while she was on the chiropractic table, and for an injury suffered when the chiropractor allegedly hit her on the back with her medical folder as the chiropractor was walking out the door. *Id.* at *1. The trial court dismissed the case for failure to comply with the procedural requirements of the THCLA. This Court affirmed the dismissal of the claims related to Ms. Lacy's treatment by the chiropractor while lying on the chiropractic table, concluding that these claims were undeniably related to the provision of chiropractic health care services. However, this Court was unable to conclude that the alleged injury sustained after being struck by a folder was necessarily a healthcare liability claim and remanded the case to the trial court for further adjudication of that particular claim. We

¹ The Plaintiff in the case of *Lacy v. Mitchell* is the same plaintiff in the present case.

held that an interpretation of Tennessee Code Annotated Section 29-26-101(c) that required the dismissal of non-health care liability claims based on noncompliance with procedural requirements that do not apply to them is far too broad. *Id.* at *4. Therefore, a plaintiff's failure to comply with the THCLA will not subject non-health care liability claims to dismissal.

In this case, Ms. Lacy's pleadings are not clearly drafted. For the most part, the pleadings are handwritten and contain little-to-no punctuation. Additionally, the allegations contained therein are not always cogent. However, we ascertain that Ms. Lacy's complaints contain allegations that qualify as health care liability actions, as well as allegations that resound in tort. In reviewing the trial court's ruling on a motion to dismiss, we "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Id.* (citing *Webb*, 346 S.W.3d at 426; *Cullum v. McCool*, 432 S.W.3d 829, 832 (Tenn. 2013)). When Ms. Lacy describes the painful use of a large probe on her hand and the "overdose of electrical current" as administered by Dr. Clendenin, it is clear that Ms. Lacy is complaining about the electro-diagnostic testing performed by Dr. Clendenin. These claims are health care liability claims requiring a certificate of good faith and the appropriate pre-suit notice. Therefore, we affirm the trial court's dismissal of these claims against Dr. Clendenin. Similarly, in regard to Premier Radiology, Ms. Lacy complains that she was burned during her MRI because the machine was too hot. This claim is clearly related to the administration of the MRI test, and, as such, is a health care liability claim requiring a certificate of good faith and pre-suit notice. Accordingly, the dismissal of this claim by the trial court was appropriate.

However, Ms. Lacy makes additional allegations against the Appellees that are not clearly defined as health care liability claims. Ms. Lacy alleges that "[Dr. Clendenin] physically beat [her] after the shock" hitting her four times on the front part of her right shoulder. Likewise, Ms. Lacy alleges that Mr. Bragdon "beat her three to four times in the shoulder" and that he took her medical file and "beat [her] from head to ankle up and down never saying a word." In regard to Premier Radiology, Ms. Lacy alleges that the MRI technician "beat" her leg four times causing bruising. Under Tennessee Rule of Civil Procedure 12.02, we must presume that Ms. Lacy's allegations are true, and we must give her the benefit of all reasonable inferences. Using the plain and ordinary meaning of the language contained in Ms. Lacy's complaints, we cannot conclude that the alleged willful and malicious "beatings" by Dr. Clendenin, Mr. Bragdon, and the MRI technician constitute health care liability claims under the THCLA. It strains credulity to view a willful assault as being related to the provision of health care services. While we recognize that further evidence may show otherwise, we are not prepared to hold that Ms. Lacy can prove no set of facts in support of these claims that would warrant relief. Therefore, we reverse the trial court's dismissal regarding the allegations of beating by Dr. Clendenin, Mr. Bragdon, and the MRI technician at Premier Radiology. We remand the case to the trial court for further proceedings consistent with this opinion.

V. Conclusion

For the foregoing reasons, we affirm the trial court's dismissal of all claims except those alleging "beating." We reverse the trial court's dismissal of those "beating" claims, which sound in tort. We remand for further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed one-half against Appellant, Deborah Lacy, and her surety and one-half to Appellees to be equally divided, for all of which execution may issue if necessary.

KENNY ARMSTRONG, JUDGE