IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 16, 2014 Session

ADAM ELLITHORPE, ET AL. V. JANET WEISMARK

Appeal from the Circuit Court for Davidson County
No. 13C2775 Thomas W. Brothers, Judge

No. M2014-00279-COA-R3-CV - Filed October 31, 2014

Parents and minor child brought this action against a licensed clinical social worker, alleging that the social worker provided counseling to the minor child in violation of a court order. The social worker moved to dismiss the complaint for failure to comply with the Tennessee Health Care Liability Act's procedural requirements. The trial court found that the complaint sounded in health care liability and accordingly dismissed it in its entirety. We conclude that the trial court applied an improper standard in dismissing the complaint, vacate the judgment, and remand for further proceedings.

Tenn. R. App. P. 3. Appeal as of Right; Judgment of the Circuit Court Vacated and Remanded

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the Court, in which JOHN W. MCCLARTY, J., and BRANDON O. GIBSON, J., joined.

Connie Reguli, Brentwood, Tennessee, for the appellants, Adam Ellithorpe, Ashley Ellithorpe, and M.L.E., a minor child.[1]

John F. Floyd and Daniel C. Todd, Nashville, Tennessee, for the appellee, Janet Weismark.

OPINION

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[1]It is the policy of this Court to remove the full names of minor children to protect their identities.

Background[2]

On July 11, 2013, Plaintiff/Appellants Adam and Ashley Ellithorpe ("Parents"), individually, and on behalf of their minor child M.L.E. ("the child," together with Parents, "Appellants") filed this action alleging that Defendant/Appellee Janet Weismark, a licensed clinical social worker, had provided counseling services to the child without Parents' valid consent. Appellants' complaint includes claims for negligence, negligence per se, and intentional infliction of emotional distress ("IIED").

Parents are the legal and biological parents of the child. However, on February 1, 2012, the Juvenile Court of Sumner County, Tennessee, allegedly issued an order ("Juvenile Court's order") giving Ronda and Eugene Melton (collectively, "the Meltons") temporary custody of the child. The Meltons are the paternal great aunt and uncle of the child. Notably, the Juvenile Court's order is neither attached to Appellants' complaint nor included in the record on appeal. Appellants allege that the Juvenile Court's order gave the Meltons authority to make medical decisions for the child. However, the order also allegedly provided that Parents were to "be kept informed of counseling progress and be allowed to participate, including counseling . . . ." Further, Appellants allege that the Juvenile Court's order gave them the right to receive copies of the child's medical, health, and other treatment records directly from the physician or health care provider who provided the treatment. According to Parents, the Juvenile Court's order also provided that Ms. Melton was to reunite the child with Parents, and the court was to establish a "structured schedule" (presumably toward reunification).[3]

On June 11, 2011, Appellants allege that Ms. Weismark completed an intake form,[4] signaling the beginning of Ms. Weismark's counseling of the child. According to Parents, they were completely unaware that Ms. Weismark had begun counseling the child because they were never allowed to participate in the counseling. In their complaint, Appellants specifically state that Ms. Weismark "[was] negligent in providing health services without following the parameters of the court order by notifying the parents and allowing them to participate in said counsel[ing]." Ms. Weismark allegedly held multiple counseling sessions

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[2]The trial court decided this case on a motion to dismiss. Because a motion to dismiss tests the legal sufficiency of the complaint alone, the facts have been elicited from the pleadings.

[3]The record on appeal is unclear the type of "structured schedule" to which Parents refer.

[4]The intake form completed by Ms. Weismark is not attached to the complaint, but the Appellants did include it in their Response to Defendants' Motion to Dismiss. Ms. Weismark's intake notes purport to provide that Ms. Melton, the child's legal guardian, consented to the child's counseling treatment. On Ms. Weismark's intake notes, Ms. Melton is noted as a "great aunt" of the child.

with the child without informing Parents or inviting them to participate. According to Appellants, Ms. Weismark continued counseling until at least April 9, 2013, and they believed counseling with the child was ongoing at the time they filed this action against Ms. Weismark.

Appellants further allege that Ms. Weismark would not provide Parents with a copy of the child's records unless they sought a court order because they were not the legal custodians of the child. They assert that Ms. Weismark knew that Ms. Melton was not the parent of the child because she was listed as a "great aunt" on the intake form. According to Appellants' complaint, Ms. Weismark neither took steps to confirm Ms. Melton's identity nor did she verify any court ordered restrictions on her authority.

According to Appellants, the morning of April 10, 2013 was the first time Parents received any notice that the child had been in counseling. Appellants allege in their complaint that the assigned Guardian Ad Litem "let the information slip out" that the child was in counseling with Ms. Weismark. Thereafter, Appellants assert that the Guardian Ad Litem "was asked to disclose the name and phone number of the counselor. He reluctantly gave the name of Ms. Weismark and her phone number." The same morning, Appellants assert that:

> a phone call was made to Ms. Weismark's office and she was asked to provide a complete copy of the child's records to the parents and was told that the parent's [sic] would come by to pick up the records. She was reluctant and stated that she would need $25 to pay for the records. She was told that would be fine.

According to Appellants, Ms. Weismark called back within twenty minutes and left a message that she had been "advised not to give out the records." Ms. Weismark, Appellants assert, was asked who advised her to withhold the records, and she refused to respond to that inquiry. Appellants also state that Ms. Weismark wrote a letter on January 16, 2013 recommending that they be denied contact with the child.[5] According to Appellants, this recommendation directly contravened the current court order for visitation.

During the Circuit Court proceedings, Appellants allege that a subpoena was issued

[5]In her answer, Ms. Weismark admits that she recommended that the child have no further visits with Parents "because of her parents' erratic and abusive behaviors and [the child's] fearful and confused feelings."

to Ms. Weismark. Ms. Weismark produced her counseling records pursuant to the subpoena, and Appellants allege that these records did not contain the court order. According to Appellants, "[t]his demonstrates her reckless disregard for the rights of the parents to participate."

Because of this allegedly "secret" counseling, Appellants state that the child has been "harmed emotionally in not being allowed to counsel with her parents." Parents also claim they have suffered emotional distress. Appellants contend that the counseling is the direct and proximate cause of injury to Parents and the child. Further,

> [t]he parents believe that the proof will show that [the child] has suffered severe emotional harm from being forcefully kept separated from her parents. In fact, in the notes of Weismark, it shows that [child] calls the custodian "mommy" and Ms. Weismark has done nothing to correct this. The custodian is NOT the "mommy" of [the child] and should not be substituted in the child's mind as her parent. This is evidence of the deep psychological damage that has occurred to the child while in counseling with Weismark.

On August 15, 2013, Ms. Weismark answered Appellants' complaint, denying all material allegations in the complaint. She also asserted several affirmative defenses in her answer, including Appellants' alleged failure to comply with the pre-suit notice and certificate of good faith requirements of the Tennessee Health Care Liability Act ("THCLA"). On November 15, 2013, Ms. Weismark filed a Motion to Dismiss, also premised on Appellants' alleged failure to comply with the THCLA's procedural requirements. Appellants filed their response on November 27, 2013, arguing that their claims were not subject to the THCLA's procedural requirements because the claims sounded in ordinary negligence.

The trial court heard and granted Ms. Weismark's Motion to Dismiss on December 13, 2013. An order was entered on January 9, 2014 dismissing all of Appellants' claims with prejudice. In its verbal ruling on Ms. Weismark's motion to dismiss, the trial court stated that the THCLA was "very broad" and encompassed this claim because it related to the provision of health care services by a health care professional. Appellants timely filed this appeal on February 7, 2014.

Issue Presented

Appellants raise the following issue for review, which we restate slightly: Whether

the trial court erred in dismissing the Appellants' negligence, negligence per se, and IIED claims for failure to comply with the written notice and certificate of good faith requirements of the THCLA.

Standard of Review

The trial court in this case granted Ms. Weismark's motion to dismiss for failure to comply with the THCLA, Tennessee Code Annotated Section 29-26-101, *et. seq.* The Tennessee Supreme Court has previously held that the proper way to challenge a plaintiff's compliance with the health care liability notice requirements is through a motion to dismiss:

> The proper way for a defendant to challenge a complaint's compliance with Tennessee Code Annotated section 29-26-121 and Tennessee Code Annotated section 29-26-122 is to file a Tennessee Rule of Procedure 12.02 motion to dismiss. In the motion, the defendant should state how the plaintiff has failed to comply with the statutory requirements by referencing specific omissions in the complaint and/or by submitting affidavits or other proof. Once the defendant makes a properly supported motion under this rule, the burden shifts to the plaintiff to show either that it complied with the statutes or that it had extraordinary cause for failing to do so. Based on the complaint and any other relevant evidence submitted by the parties, the trial court must determine whether the plaintiff has complied with the statutes. If the trial court determines that the plaintiff has not complied with the statutes, then the trial court may consider whether the plaintiff has demonstrated extraordinary cause for its noncompliance. If the defendant prevails and the complaint is dismissed, the plaintiff is entitled to an appeal of right under Tennessee Rule of Appellate Procedure 3 using the standards of review in Tennessee Rule of Appellate Procedure 13. If the plaintiff prevails, the defendant may pursue an interlocutory appeal under either Tennessee Rule of Appellate Procedure 9 or 10 using the same standards.

Myers v. AMISUB (SFH), Inc., 382 S.W.3d 300, 307 (Tenn. 2012). Accordingly, we review the trial court's decision under the standard of review applicable to motions to dismiss for failure to state a claim upon which relief can be granted. ***Id.*** at 306 & n.5 (citing Tenn. R. Civ. P. 12.02(6) (providing the method for raising the defense of failure to state a claim upon which relief can be granted)).

A Tennessee Rule of Civil Procedure 12.02(6) motion to dismiss a complaint for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. ***Lanier v. Rains***, 229 S.W.3d 656, 660 (Tenn. 2007). It admits the truth of all relevant and material allegations, but asserts that such allegations do not constitute a cause of action as a matter of law. ***Riggs v. Burson***, 941 S.W.2d 44, 47 (Tenn. 1997). When considering a motion to dismiss for failure to state a claim upon which relief can be granted, we are limited to an examination of the complaint alone. ***Wolcotts Fin. Servs., Inc. v. McReynolds***, 807 S.W.2d 708, 710 (Tenn. Ct. App. 1990). The basis for the motion is that the allegations in the complaint, when considered alone and taken as true, are insufficient to state a claim as a matter of law. ***Cornpropst v. Sloan***, 528 S.W.2d 188, 190 (Tenn. 1975). In short, a Rule 12.02(6) motion to dismiss seeks only to determine whether the pleadings state a claim upon which relief can be granted, and such a motion challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof. ***Bell ex rel. Snyder v. Icard***, 986 S.W.2d 550, 554 (Tenn. 1999). In considering such a motion the court should construe the complaint liberally in favor of the plaintiff, taking all of the allegations of fact as true. ***Cook ex rel. Uithoven v. Spinnaker's of Rivergate, Inc.***, 878 S.W.2d 934, 938 (Tenn. 1994). However, we are not required to accept as true factual inferences or conclusions of law. ***Riggs***, 941 S.W.2d at 47–48 (Tenn. 1997). An appellate court should uphold the grant of a motion to dismiss only when it appears that the plaintiff can prove no set of facts in support of a claim that will entitle him or her to relief. ***Young v. Barrow***, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003). In reviewing a motion to dismiss, this Court is presented with matters of law, thus, our review is *de novo* with no presumption of correctness. ***Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995).

Discussion

The trial court's consideration of this case focused on the nature of Appellants' complaint—that is, whether it sounded in ordinary negligence or health care liability. The inquiry is relevant because, before proceeding in a health care liability action, a plaintiff must fulfill certain procedural requirements. It is undisputed that Appellants provided neither written pre-suit notice, as required by Tennessee Code Annotated Section 29-26-121(a)(1),[6]

[6]Tennessee Code Annotated Section 29-26-121(a)(1) provides:

> Any person, or that person's authorized agent, asserting a potential claim for medical malpractice shall give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon medical malpractice in any court of this state.

nor a certificate of good faith, as required by Tennessee Code Annotated Section 29-26-122.[7] Failure to adhere to these procedural requirements may lead to dismissal of the complaint. *See* Tenn. Code Ann. §§ 29-26-121(b); 29-26-122(a). However, these procedural requirements do not apply to a claim for ordinary negligence. *See* ***Estate of French v. Stratford House***, 333 S.W.3d 546, 555 (Tenn. 2011). Thus, the determination of whether this case involves claims of ordinary negligence or health care liability is central to its survival.

Appellants contend that their claims sound solely in the realm of ordinary negligence and that they do not allege any professional negligence against Ms. Weismark. In contrast, Ms. Weismark argues that the trial court properly classified the claims as health care liability pursuant to Tennessee Code Annotated Section 29-26-101(a)(2) because the statute includes all claims that "allege that a health care provider or providers have caused injury related to the provision of, or for failure to provide, health care services to a person, regardless of the theory of liability on which the action is based."

As an initial matter, we note that at oral argument on this cause, counsel for the Appellants indicated that the Appellants' claims were based solely on Ms. Weismark's treatment of the child in violation of the court order. At oral argument, counsel for Appellants attempted to clarify the basis for their claims:

> COURT: So, everything . . . every cause of action you're asserting results from the juvenile court order?
> COUNSEL: Yes.

Thus, Appellants argue that their claims do not sound in health care liability, but rather result from the simple matter of a violation of a court order.[8] However, the Tennessee Supreme

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[7]Tennessee Code Annotated Section 29-26-122, in relevant part, provides:

> In any medical malpractice 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 ordinary cause . . .

[8] When asked at oral argument why the Appellants did not file a simple contempt action against Ms. Weismark, counsel for Appellants indicated that the damages allegedly sustained by the Appellants could not be fully recovered in a contempt action.

Court has specifically held that "[t]he designation given those claims by either the plaintiff or the defendant is not determinative." ***Estate of French v. Stratford House***, 333 S.W.3d 546, 557 (Tenn. 2011). Instead, "[i]t is, of course, the responsibility of the courts to ascertain the nature and substance of a claim." ***Id.***

In order to fully consider the issue of whether the Appellants' claims result from a simple violation of a court order or from health care liability, a review of the relevant order is necessary. However, our review of this issue is hampered in this case by the failure of the Appellants to include the juvenile court order in the appellate record. According to Rule 10.03 of the Tennessee Rules of Civil Procedure:

> Whenever a claim or defense is founded upon a written instrument other than a policy of insurance, a copy of such instrument or the pertinent parts thereof shall be attached to the pleading as an exhibit . . .[9]

Additionally, Rule 15 of the Rules of the Court of Appeals of Tennessee provides a mechanism for litigants to file additional documents with their appellate briefs, including filing additional documents under seal.

Despite Rule 10.03, the only language in the complaint provided to this Court from the Juvenile Court's order states that the Parents were to "be kept informed of counseling and be allowed to participate, including counseling . . . ."[10] If, in fact, "every cause of action [Appellants assert] results from the juvenile court order," this Court cannot properly assess the claims asserted in this case without the entire order. Appellants' claims of negligence, negligence per se, and IIED claims all involve questions that require illumination from the Juvenile Court order they are premised on. Despite this deficiency, we soldier on to consider whether the trial court properly dismissed the Appellants' complaint based upon the pleadings contained in the appellate record.

In order to determine whether the trial court properly dismissed Appellants' case, we begin with an examination of the complaint. As previously discussed, Appellants assert three

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[9]Rule 10.03 does make an exception for "a matter of public record in the county in which the action is commenced" if "its location in the record is set forth in the pleading." Neither party has asserted that the juvenile court order is a public record. Further, none of the pleadings in the record provide this Court with any indication of the order's location pursuant to this "public record" exception to the Rule.

[10]The complaint also purports to include another quote from the order; however, it is unclear from the complaint what exact language is from the order because it contains no beginning quotation mark.

causes of action: negligence, negligence per se, and IIED.[11] As to the negligence and negligence per se claims, Appellants state:

> 31. The plaintiffs would show that Weismark is negligent in providing health services without following the parameters of the court order by notifying the parents and allowing them to participate in said counsel. Because the order is clear on its face, the plaintiffs would show that this is negligence and negligence per se.
> 32. Weismark had a duty, she breached that duty, the plaintiffs have suffered damages, and these damages are the legal and proximate result of her breach of duty.

Regarding the IIED claim, Appellants state:

> 33. The plaintiff [sic] would show that Weismark has acted with a reckless disregard for the rights of the parents to participate in the counseling as ordered by the Court, causing a prolonged disruption in the relationship between the child and her parents. She should be keenly aware of the gross deviation from the standard of care that an ordinary person would exercise under this situation and is guilty of intentional and reckless infliction of emotional distress to the plaintiffs.

Relying only on the THCLA's language, the trial court entered its Final Order of Dismissal on January 9, 2014. While the written order provides no justification for the trial court's decision beyond the notation that the motion had been filed based upon the Appellants' failure to comply with the health care liability notice requirements, the trial court indicated during the motion to dismiss hearing that the THCLA is "very broad" and encompasses all actions where a health care provider provides health services negligently, even if based on the provider's alleged failure to obtain valid consent. Thus, the trial court concluded that the entire complaint must be dismissed for failure to comply with the procedural notice requirements of the THCLA.

There is no dispute that the Appellants failed to comply with the procedural requirements of the THCLA. Instead, the Appellants only argue that they were not required

[11]The trial court's Final Order of Dismissal purports to dismiss the complaint in its entirety, including the IIED claim.

to comply with the THCLA because their claims sound in ordinary negligence and IIED. Consequently, our only task is to determine whether the trial court correctly classified all of the Appellants' claims as sounding in healthcare liability, rather than ordinary negligence or intentional torts. A brief discussion of the proof required in an ordinary negligence action and a health care liability action is helpful to our analysis. The elements of a claim for common law negligence are well-established and include: "(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause." ***Estate of French***, 333 S.W.3d at 554 (citing ***Giggers v. Memphis Hous. Auth.***, 277 S.W.3d 359, 364 (Tenn. 2009)).

Health care liability, on the other hand, is specifically governed by the THCLA, which essentially codified the elements of common law negligence. ***Estate of French***, 333 S.W.3d at 546 (citing ***Gunter v. Lab. Corp. of Am.***, 121 S.W.3d 636, 639 (Tenn. 2003); ***Kilpatrick v. Bryant***, 868 S.W.2d 594, 598 (Tenn. 1993)). Tennessee Code Annotated Section 29-26-115(a) requires a plaintiff in a health care liability action to prove the following statutory elements:

> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

Tenn. Code Ann. § 29-26-115(a); *see* ***Estate of French***, 333 S.W.3d at 554–55. Health care liability actions also impose a burden upon the plaintiff to use expert testimony to prove the elements of Tennessee Code Annotated Section 29-26-115(a). *See* Tenn. Code Ann. § 29-26-115; ***Shipley v. Williams***, 350 S.W.3d 527, 537 (Tenn. 2011) ("[E]xpert testimony must be provided by a plaintiff to establish the elements of his or her medical negligence case[.]").

Finally, with regard to an IIED claim, a plaintiff must show that the defendant's conduct was "(1) intentional or reckless, (2) so outrageous that it is not tolerated by civilized society, and (3) resulted in serious mental injury to the plaintiff." ***Rogers v. Louisville Land Co.***, 367 S.W.3d 196, 205 (Tenn. 2012). Thus, while claims involving ordinary negligence

or health care liability only require negligent action on the part of the defendant, an IIED claim must be supported by proof of intentional or reckless conduct. In addition, unlike a health care liability claim, there is no requirement of expert proof to make out an IIED claim. ***Id.*** at 209 (citing ***Miller v. Willbanks***, 8 S.W.3d 607, 612, 616 (Tenn.1999)).

Beyond the basic proof requirements outlined above, Tennessee courts have offered additional guidance as to when a claim sounds in ordinary negligence or health care liability. According to the Tennessee Supreme Court:

> When a plaintiff's claim is for injuries resulting from negligent medical treatment, the claim sounds in medical malpractice. *See, e.g.,* ***Seavers***, 9 S.W.3d at 86. When a plaintiff's claim is for injuries resulting from negligent acts that did not affect the medical treatment of a patient, the claim sounds in ordinary negligence. *See, e.g.,* ***Bradshaw***, 854 S.W.2d at 870. The New York courts have specifically addressed this issue and have concluded as follows:
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> > a claim sounds in medical malpractice when the challenged conduct "constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician." By contrast, when "the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital's failure in fulfilling a different duty," the claim sounds in negligence.
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> ***Weiner***, 650 N.Y.S.2d 629, 673 N.E.2d at 916 (quoting ***Bleiler v. Bodnar***, 65 N.Y.2d 65, 489 N.Y.S.2d 885, 479 N.E.2d 230, 234–35 (1985)). We embrace this analysis and hold that when 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.

Gunter v. Laboratory Corp. of America, 121 S.W.3d 636, 640 (Tenn. 2003). Thus, according to ***Gunter***, the "crucial question" is whether the claim "constitutes or bears a

substantial relationship to the rendition of medical treatment by a medical professional." ***Id.***

In ***Gunter***, the plaintiff brought claims against a medical laboratory for negligence in processing a DNA test for purposes of establishing paternity. ***Id.*** at 638. No medical treatment of the plaintiff was involved. Accordingly, the Court held that "the core issue in this case—the adequacy of the laboratory's blood testing procedures—does not implicate issues of medical competence or judgment linked to [the plaintiff's] treatment." ***Id.*** at 641. Thus, the Court held that the claim was not subject to the medical malpractice statute.

The ***Gunter*** Court's holding was reiterated by the Tennessee Supreme Court in ***Draper v. Westerfield***, 181 S.W.3d 283, 290–91 (Tenn. 2005). As explained by the Court:

> Cases involving health or medical entities do not automatically fall within the medical malpractice statute. ***Gunter***, 121 S.W.3d at 640. Rather, in 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." ***Id.*** at 641. If so, the medical malpractice statute applies. ***Id.*** If, however, the plaintiff seeks compensation for injuries resulting from negligent conduct not affecting a patient's medical treatment, the claim falls under common law negligence. ***Id.*** at 640.

Draper, 181 S.W.3d at 290–91. The plaintiff in ***Draper*** filed a complaint against the defendant medical provider for negligence involving the medical provider's alleged inaction in failing to report suspected child abuse to investigators. ***Id.*** at 286–87. The medical provider never examined or treated the child, but was asked to review the child's medical records in furtherance of an investigation into whether the child's injuries were caused by child abuse. ***Id.*** at 286. The Tennessee Supreme Court concluded that this claim sounded in ordinary negligence, rather than medical malpractice:

> [Plaintiff] seeks relief based upon [the medical provider's] conduct in reviewing [the child's] records and providing information to investigators. [The medical provider's] actions do not relate to the medical treatment of [the child]. Rather, the purpose of [the medical provider's] conduct was to provide aid to investigators seeking to protect [the child] from child abuse. Thus, [plaintiff's] cause of action is for that of common law negligence.

Id. at 291.

The Tennessee Supreme Court recently reexamined the holdings in ***Gunter*** and ***Draper*** in considering another case in which the question of whether the claim sounded in medical malpractice was at issue. *See* ***Estate of French v. Stratford House***, 333 S.W.3d 546 (Tenn. 2011). The Court noted that all cases involving health or medical care do not automatically qualify as health care liability claims. ***Id.*** at 555. In ***Estate of French***, the plaintiff brought two types of claims against a nursing home related to the death of the decedent nursing home resident: (1) claims regarding the assessment of the decendent's condition and resulting plan of care outlined by physicians; and, (2) claims regarding the provision of basic care by nurses assistants. The trial court dismissed all the plaintiffs claims for failure to comply with the health care liability notice requirements. On appeal, the plaintiff argued that its claims did not sound in health care liability, and that, therefore, it was not required to comply with the health care liability act. The Tennessee Supreme Court affirmed in part and reversed in part. Specifically, the Court held that the claims involving the assessment, diagnosis, and development of care plan for the resident "requir[e] specialized skills and training," and were thus, properly termed healthcare liability claims subject to the procedural requirements. ***Id.*** at 558. In contrast, claims arising from the provision of basic care, including whether nurses assistant's followed the prescribed care plan, sounded in ordinary negligence. ***Id.*** at 559.

The ***Estate of French*** Court's holding demonstrated that the categorization of certain claims often depends heavily on the facts of each individual case. *See* ***id.*** at 556. "[T]he distinction between medical malpractice and negligence is subtle; there is no rigid analytical line separating the two causes of action." ***Id.*** at 555 (citing ***Draper v. Westerfield***, 181 S.W.3d 283, 290 (Tenn. 2005)). Due to the fact-intensive analysis required, the Tennessee Supreme Court somewhat abandoned the broad "gravamen of the complaint" test outlined in ***Gunter***, in favor of "a more nuanced approach" in which the trial court must examine the claims individually to determine whether they sound in ordinary negligence or health care liability. ***Id.*** at 560 n.14. As guidance to other courts in applying this "nuanced approach," the Court offered the following:

> "'If the patient requires professional nursing or professional hospital care, then expert testimony as to the standard of that type of care is necessary.' However, if the patient requires nonmedical, administrative, ministerial or routine care, the standard of care need not be established by expert testimony." ***Kujawski v. Arbor View Health Care Ctr.***, 139 Wis.2d 455, 407 N.W.2d 249, 252 (1987) (quoting ***Cramer v. Theda Clark Mem. Hosp.***, 45 Wis.2d 147, 172 N.W.2d 427, 428 (1969)). Several

> other jurisdictions have approved of the language used in ***Cramer***, holding that claims concerning basic care sound in ordinary negligence rather than medical malpractice. The Alabama Supreme Court, for example, held that a nurse's failure to respond to a patient's call for assistance "clearly f[ell] within the category of routine hospital care," and thus the claim arising from the act was one of negligence, not medical malpractice. ***Ex parte HealthSouth Corp.***, 851 So.2d 33, 39 (Ala.2002) ("A jury could use 'common knowledge and experience' to determine whether the standard of care was breached in this case, where custodial care, not medical care, is at issue."). Similarly, the West Virginia Supreme Court held that expert testimony was not required in a suit brought for injuries suffered when the plaintiff fell out of his hospital bed, because the failure to monitor him constituted routine care. ***McGraw v. St. Joseph's Hosp.***, 200 W.Va. 114, 488 S.E.2d 389, 396 (1997). Other courts have similarly held that expert testimony is not required when the care out of which the claims arose was "'administrative,' 'ministerial,' 'routine,' or the like, as distinguished from medical or professional." ***Bennett v. Winthrop Cmty. Hosp.***, 21 Mass.App.Ct. 979, 489 N.E.2d 1032, 1035 (1986); see also ***Kastler v. Iowa Methodist Hosp.***, 193 N.W.2d 98, 101 (Iowa 1971); ***Golden Villa Nursing Home, Inc. v. Smith***, 674 S.W.2d 343, 349 (Tex. App .1984).

Estate of French, 333 S.W.3d at 559–560. Further, the Court indicated that "a relevant factor in comparing ordinary negligence with medical malpractice should be 'whether the defendant's acts or omissions relate to a particular patient or to an entire group of persons.'" ***Id.*** at 559 n.13 (quoting ***Turner v. Steriltek, Inc.***, No. M2006-01816-COA-R3-CV, 2007 WL 4523157, at *5 (Tenn. Ct. App. Dec. 20, 2007)). The Court also held that "[t]he physician-patient relationship is an essential element of a cause of action for medical malpractice, but not for common law negligence." ***Estate of French***, 333 S.W.3d at 555.

Based on our reading of the ***Estate of French*** case, it appears that the Tennessee Supreme Court has offered several factors courts should consider in determining whether a claim sounds in health care liability or some other form of liability, including: (1) whether a patient-physician relationship exists between the plaintiff and the defendant medical provider; (2) whether the alleged acts of negligence relate to a specific patient or to an entire

group of people: (3) whether expert testimony is required to establish the standard of care;[12] (4) whether the alleged negligence involves the provision of routine care; and (5) whether the alleged negligent acts or omissions were properly classified as administrative, ministerial, or routine, rather than medical or professional. *See generally* ***Estate of French***, 333 S.W.3d at 555–60.

The trial court retains the responsibility of deciding the "nature and substance" of a claim, and the parties' designation of the claims is not conclusive. ***Estate of French***, 333 S.W.3d at 557. Further, it is possible that a single complaint may contain claims based in both ordinary negligence and health care liability principles. ***Id.*** Here, the trial court dismissed the complaint in its entirety, reasoning that the THCLA encompassed all claims involving the provision of health care services or treatment by a health care provider. However, the Tennessee Supreme Court has held that this determination must be nuanced. Nothing in the trial court's written order or oral ruling indicates that the trial court considered the standard outlined in ***Estate of French*** in dismissing the complaint; instead, it appears the the trial court relied on the gravamen of the complaint standard rejected in ***Estate of French***.[13] "Often when a trial court's decision rests upon an improper legal standard and omits necessary factual and legal analysis, it is appropriate to remand the case to the trial court for reconsideration." ***Raines v. Natl. Health Corp.***, No. M2006-1280-COA-R3-CV, 2007 WL 4322063, at *7 (Tenn. Ct. App. 2007). In this case, the trial court dismissed Appellants' complaint in its entirety, without first dissecting the allegations and then categorizing them into their proper causes of actions. Because it appears that the trial court

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[12] A health care provider-defendant can still be held liable for damages to a non-patient caused by the health care provider's ordinary negligence. *See* ***Estate of French***, 333 S.W.3d at 555; ***Pittman v. Upjohn Co.***, 890 S.W.2d 425, 431 (Tenn. 1994). Again drawing a line between health care liability and ordinary negligence, the court in ***Bradshaw v. Daniel***, 854 S.W.2d 865 (Tenn. 1993), opined:

> The defendant contends that the absence of a physician-patient relationship negates the existence of a duty in this case. While it is true that a physician-patient relationship is necessary to the maintenance of a medical malpractice action, it is not necessary for the maintenance of an action based on negligence, and this Court has specifically recognized that a physician may owe a duty to a non-patient third party for injuries caused by the physician's negligence, if the injuries suffered and the manner in which they occurred were reasonably foreseeable.

Id. at 870.

[13] The Opinion in ***Estate of French*** was filed on January 26, 2011. The trial court entered its order in December of 2013. However, the parties offered minimal or no analysis pertaining to ***Estate of French*** to the trial court or this Court. Further, there is no indication that it was considered by the trial court in its decision.

dismissed the complaint on the basis of the "gravaman" of the complaint, we vacate the order of the trial court and remand for reconsideration of the entire complaint pursuant to the standard articulated in ***Estate of French***. Specifically, this Court is of the opinion that, upon remand, the trial court should consider the factors outlined in ***Estate of French*** to determine which claims sound in ordinary negligence or IIED and which claims fall within the purview of the THCLA. Because there is no dispute that the Appellants did not comply with any of the pre-suit notice requirements, and did not demonstrate either good cause[14] or extraordinary cause[15] for their noncompliance, those individual claims that the court determines sound in health care liability should properly be dismissed upon remand.

V. Conclusion

The judgment of the Circuit Court of Davidson County is vacated and this cause is remanded to the trial court for all further proceedings as are necessary and are consistent with this Opinion. Costs of this appeal are taxed one-half to the Appellants Adam and Ashley Ellithorpe, individually, and on behalf of their minor child M.L.E., and their surety, and one-half to Appellee Janet Weismark, for all of which execution may issue if necessary.

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J. STEVEN STAFFORD, JUDGE

[14] Tennessee Code Annotated Section 29-26-122(c) provides that the court may grant an extension to file a good faith certificate where 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."

[15] Tennessee Code Annotated Section 29-26-121(b) provides that the court has discretion to excuse compliance with the pre-suit notice requirements "only for extraordinary cause shown."