

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 22, 2017 Session

DEBORAH LACY v. HCA HEALTH SERVICE OF TN, INC., ETAL.

Appeal from the Circuit Court for Davidson County
No. 14C4642 Thomas W. Brothers, Judge

No. M2016-01027-COA-R3-CV

Plaintiff appeals the dismissal of her case and the award of sanctions against her. The trial court dismissed the action for failure of Plaintiff to comply with the pre-suit notice and certificate of good faith requirements of the Tennessee Health Care Liability Act. Plaintiff also argues that the trial court engaged in judicial misconduct. Discerning no reversible error, we affirm the judgment as modified.

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

RICHARD H. DINKINS, J., delivered the opinion of the court, in which W. NEAL MCBRAYER and BRANDON O. GIBSON, JJ., joined.

Deborah Lacy, Madison, Tennessee, Pro Se.

Alan S. Bean and Kaycee L. Weeter, Nashville, Tennessee, for the appellee, HCA Health Services of Tennessee, Inc. d/b/a TriStar Centennial Medical Center.

MEMORANDUM OPINION¹

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 When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 31, 2014, Deborah Lacy (“Ms. Lacy”) filed suit against HCA Health Services of Tennessee, Inc., Centennial Hospital (“Centennial”) and CT Corporation System,² to recover damages of \$400,000, asserting that employees of the defendants “committed the offense of assault and battery.” Centennial moved for a more definite statement, which was granted, and Ms. Lacy filed an Amended Complaint, alleging that on October 31, 2013, when she was in the process of undergoing a surgical procedure at the hospital, she was assaulted and battered by several unnamed employees of Centennial,³ and that the defendants failed to keep her safe, violated her human and civil rights, and placed her under “fear and duress.” Centennial moved to dismiss Ms. Lacy’s complaint for failure to comply with the pre-suit notice and certificate of good faith requirements at Tennessee Code Annotated sections 29-26-121 and -122; Centennial also moved for sanctions pursuant to Rule 11.03 of the Tennessee Rules of Civil Procedure, seeking reimbursement for attorney’s fees and related costs incurred in responding to Ms. Lacy’s pleadings. The court dismissed the healthcare liability claims and allowed the non-medical assault and battery claims to proceed; with respect to those claims, the court held that “[t]o the extent discovery establishes that these remaining claims are actually claims related to the provision of health services, the Defendant is not precluded from renewing this motion on any of these remaining claims.”

Following discovery, Centennial moved for summary judgment on the remaining claims, supported by a statement of undisputed facts and the affidavit of Charlene Gableman, a registered nurse who had been identified in the course of discovery by Ms. Lacy as a person who provided care to her on October 31, 2013. The court granted summary judgment to Defendant on the claims of false imprisonment, civil rights violations, and intentional infliction of emotional distress and denied summary judgment with respect to the assault claims; the court permitted Defendant to file a renewed motion to dismiss the assault claims for failure to comply with the healthcare liability act.⁴ Defendants subsequently renewed their motions to dismiss and for sanctions; the court granted both motions, awarding sanctions in the amount of \$40,566.00.

Ms. Lacy appeals. The specific issues as stated in her brief are unintelligible; she contends generally that the trial court erred in granting the motions to dismiss and for summary judgment. She also argues that the court engaged in judicial misconduct by

² CT Corporation System was dismissed as a defendant and is not a party to this appeal.

³ Ms. Lacy provided physical descriptions for the employees.

⁴ Centennial’s brief states that the decision to grant it leave to renew the motion to dismiss followed Ms. Lacy’s oral admission during the hearing on the motion for summary judgment that the alleged assault occurred in relation to her surgery on October 31, 2013.

excluding certain evidence favoring the defendants, in awarding sanctions, and in intimidating her.

Centennial argues on appeal that the court should reverse the denial of its motion for summary judgment as to Ms. Lacy's assault claims.

II. DISCUSSION

A. 12.02(6) Motion to Dismiss

In *Myers v. AMISUB (SFH), Inc.*, our Supreme Court set forth the mechanism for challenging a plaintiff's compliance with the Tennessee Health Care Liability Act's pre-suit notice and certificate of faith requirements:

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.

382 S.W.3d 300, 307 (Tenn. 2012).

Because a 12.02(6) motion to dismiss challenges the legal sufficiency of the complaint, resolution of the motion is done by examining the pleadings alone. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). In considering the motion, the court "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Id.* (quoting *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31–32 (Tenn. 2007)). On appeal, we review the trial court's ruling on a 12.02(6) motion to dismiss *de novo*, without a presumption of correctness. *Id.* (citing *Brown v. Tennessee Title Loans, Inc.*, 328 S.W.3d 850, 855 (Tenn. 2010); *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997)).

In the amended complaint, Ms. Lacy asserted that on the morning of her surgery, various healthcare providers failed to keep her safe from harm, violated her human and civil rights, and assaulted her. She makes specific allegations that: Defendant 1 – assaulted or attempted to assault her on three occasions and increased her oxycodone medication; Defendant 2 – hit Ms. Lacy three times "in the process of registering"; Defendant 3 - hit Ms. Lacy three times while she was "sitting still on bed in exam room .

. . . waiting on transport”; Defendant 4 – struck and beat Ms. Lacy in the recovery room; Defendant 5 – struck Ms. Lacy three times “when recovery brought [Ms. Lacy] to last holding exam room.” In the motion to dismiss, Defendant cited paragraphs of the amended complaint that asserted facts and argued that:

Based on a plain reading of the Complaint, it is a civil action alleging negligence against Centennial and its employees in relation to various care and treatment rendered before, during, and after an October 31, 2013 surgery, yet Plaintiff never provided notice of her intent to sue, and also failed to file a certificate of good faith with the Complaint.”

In the amended complaint, Ms. Lacy alleged certain healthcare related claims, such as the increase in her dosage of medication and the general statements about the employees’ failure to keep her safe from harm; these claims fall within the purview of the Tennessee Health Care Liability Act, and were subject to the THCLA’s pre-suit notice and certificate of good faith requirements set forth in Tennessee Code Annotated sections 29-26-121 and – 122. Ms. Lacy failed to provide pre-suit notice and did not file a certificate of good faith. Accordingly, the healthcare liability claims were properly dismissed by the trial court. As respects the remaining claims, it is not apparent on the face of the complaint that the allegations of assault, battery, and civil rights violations related to the provision of health care services. Accordingly, denial of the motion with respect to these claims was proper.

B. Motion for Summary Judgment

When a motion for summary judgment is filed by a movant who does not bear the burden of proof at trial, as is Centennial’s position in this case, the moving party may satisfy its burden of production by (1) “affirmatively negating an essential element of the nonmoving party’s claim or (2) by demonstrating that the nonmoving party’s evidence *at the summary judgment stage* is insufficient to establish the nonmoving party’s claim or defense.” *Rye v. Women’s Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 264 (Tenn. 2015). Once the movant had accomplished this, the nonmoving party “may not rest upon the mere allegations of its pleadings,” but must respond, and with affidavits or one of the other mechanisms “provided in Tennessee Rule 56, ‘set forth specific facts’ *at the summary judgment stage* ‘showing that there is a genuine issue for trial.’” *Id.* (quoting Tenn. R. Civ. P. 56.06).

This court reviews a trial court’s ruling on a motion for summary judgment *de novo*, with no presumption of correctness; “[i]n doing so, we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied.” *Rye*, 477 S.W.3d at 250 (citing *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *Abshure v. Methodist Healthcare–Memphis Hosp.*, 325 S.W.3d 98, 103

(Tenn. 2010); *Estate of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013); *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 471 (Tenn. 2012)).

Following discovery, Centennial moved for summary judgment based on Ms. Lacy's failure to put forth any evidence sufficient to establish a genuine issue as to any material fact. To support its motion, Centennial filed a statement of undisputed facts and the affidavit of Charlene Gableman, R.N., who Ms. Lacy identified as an eye witness to the alleged assaults. The statement of undisputed facts contained ten facts, culled from Ms. Lacy's responses to discovery requests and the affidavit of Ms. Gableman, supporting Defendant's contention that, aside from her own allegations, Ms. Lacy had no evidence or proof to establish the claims she specifically alleged in the complaint, specifically, that defendants falsely imprisoned her, that they intentionally inflicted emotional distress on her, that they were negligent, or that she suffered damages. Ms. Gableman's affidavit states that she was involved in Ms. Lacy's care on October 31, 2013, that she did not personally assault or batter Ms. Lacy, and that she did not witness anyone assault or batter Ms. Lacy. This evidence put forth by Centennial shifted the burden to Ms. Lacy, as it shows that she lacks sufficient evidence to prove her claim.

Ms. Lacy filed a narrative response to the statement of material facts, without citation to the record, as well as an unsworn response to the affidavit of Ms. Gableman. We have reviewed each and conclude that Ms. Lacy does not put forth any proof, in compliance with Rule 56, showing that there is a genuine issue for trial. Accordingly, Centennial was entitled to summary judgment on all remaining claims.⁵

C. Judicial Misconduct

Lastly, Ms. Lacy argues that the trial judge engaged in judicial misconduct by excluding certain evidence, favoring the defendants, awarding sanctions, and in intimidating her. Ms. Lacy did not file a motion to recuse the trial judge, which is the means by which such matters are to be addressed; they cannot be raised for the first time on appeal. *See Peck v. Tanner*, 181 S.W.3d 262 (Tenn. 2005) (holding that an appellate court does not have original jurisdiction over allegations of judicial misconduct when they are raised for the first time on appeal). We, therefore, decline to address the merits of her contention.

⁵ The trial court granted summary judgment with respect to the intentional infliction of emotional distress, false imprisonment, and civil rights claims, and denied the motion with respect to Plaintiff's assault claims, which were later dismissed when Defendant renewed its motion to dismiss. Our determination that Defendant was entitled to summary judgment on all remaining claims pretermits any issue as to the propriety of the grant of the renewed motion to dismiss.

D. Sanctions

The court granted Centennial's motion for sanctions and awarded judgment for \$40,566, representing attorney's fees and costs incurred in defending this matter. While Ms. Lacy has not raised a specific issue on appeal as to this award, we have reviewed the record and the material filed in support of the application.

The record shows that Centennial filed a motion for sanctions pursuant to Tenn. R. Civ. P. 11.03 on January 29, 2015. At the hearing on the first motion to dismiss, the court reserved ruling on this motion. Centennial filed an amended motion on March 15, 2016. Ms. Lacy filed unsworn, argumentative narratives in response to the motions. At the hearing on the motion, the court also referenced Tennessee Code Annotated section 20-12-119(c) as a basis for an award of fees.

We review an award of sanctions under Rule 11 under an abuse of discretion standard. *Brown v. Shappley*, 290 S.W.3d 197, 200 (Tenn. Ct. App. 2008). An award of fees and costs under Tennessee Code Annotated section 20-12-119(c) is likewise reviewed for an abuse of discretion. *Perdue v. Green Branch Mining Co.*, 837 S.W.2d 56, 60 (Tenn. 1992). Upon the record presented, we see no abuse of discretion in the decision to award fees pursuant to Rule 11 and section 20-12-119(c). Ms. Lacy was notified by Centennial as required by Rule 11.03 early in the litigation that her suit was without factual basis or grounded in law and, despite engaging in extensive discovery, she persisted in pressing what were clearly unmeritorious claims.

The record does not, however, support the amount awarded. The billing record of Defendant's counsel was filed with the court; the total of the entries on that record is \$38,667.50, rather than the \$40,566.00 awarded by the court. Accordingly, we modify the award to \$38,667.50.

Our resolution pretermits the remaining claims raised by the parties.

III. CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed as modified.

RICHARD H. DINKINS, JUDGE