2011 WL 3624738 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Florida.
Nineteenth Judicial Circuit
Circuit Civil Division
St. Lucie County

Cynthia Saputa HASKETT, as Personal Representative of the Estate of Lottie Saputa, Plaintiff,
v.
LAWNWOOD MEDICAL CENTER, INC., Delvis Celdran, Md., Slobodan Jazarevic, Md., Gloria McNeil, Md., Abdul Shadani, Md., Defendants.

No. 562010CA004274.
April 4, 2011.

Lawnwood Medical Center, Inc's Motion to Dismiss Plaintiff's Amended Complaint

Wicker, Smith, O'hara, McCoy & Ford, P.A., Attorney for Lawnwood, 515 North Flagler, Suite 1600, West Palm Beach, FL 33401, Phone: (561) 689-3800, Fax: (561) 689-9206, Adam W. Rhys, Florida Bar No. 111716.

COMES NOW, the Defendant, LAWNWOOD MEDICAL CENTER, INC. (hereinafter "LAWNWOOD"), by and through the undersigned counsel, and pursuant to Fla. R. Civ. P. 1.140(b), Fla. Stat. §766, and related case law, and files this, its Motion to Dismiss the Plaintiff's Amended Complaint, and in support thereof states as follows:

1. On February 9, 2011, the Plaintiff's Complaint was dismissed without prejudice and the Plaintiff was Ordered to file an Amended Complaint within 10 days of the Order. (See Order dated February 9, 2011, attached hereto as Exhibit "A.")

2. Despite this Court's Order, the Plaintiff failed to file her Amended Complaint within the proscribed time period. Rather, on March 14, 2011, the undersigned's office received an Amended Complaint, dated March 10, 2011. (See the Plaintiff's Amended Complaint, attached hereto as Exhibit "**B.**") Based on this Court's docket, it does not appear that this Amended Complaint has yet been filed.

3. Nonetheless, the Plaintiff generally alleges in her Amended Complaint that Lottie Saputa, age 87, was a vulnerable adult and was admitted to LAWNWOOD on August 14, 2008 for weakness, dehydration, and difficulty swallowing.

4. Specifically, with respect this Defendant, LAWNWOOD, the Plaintiff alleges the following:
a. LAWNWOOD was a "caregiver," as described in Florida Statutes 415.102(4), of Lottie Saputa;

b. Lottie Saputa was a "vulnerable adult," as described in Florida Statutes 415.111 and 415.102(26);

c. Lottie Saputa was "**abused** and neglected by her caregivers," as described in Florida Statues 415.102(4);

d. The Defendants, including LAWNWOOD, were "alleged perpetrators," Florida Statutes 415.102(2), in this **elder abuse** and neglect as described in Florida Statutes 415.102(1) and 415.102(15). (See Exhibit "**B**".)

5. The Plaintiff also specifically alleges that the decedent was not provided assistance to the bathroom, was not bathed, was not given food/nutrition and water. (See Exhibit "**B.**")

6. Further, the Plaintiff alleges that LAWNWOOD failed to timely administer a PEG feeding tube, that LAWNWOOD gave Ms. Saputa Levofed for hypovolemia rather than necessary IV fluids, and that LAWNWOOD failed to give Ms. Saputa a chest tube to remedy her shortness of breath due to a hemothorax for over 12 hours. (See Exhibit "**B.**")

7. The Plaintiff has failed to comply with this Court's Order governing the timing in which to file her Amended Complaint. As such, pursuant to Florida Rules of Civil Procedure, the Amended Complaint should be dismissed.

8. Further, despite the Plaintiff's attempt to frame this lawsuit as an action for **Elder Abuse** and Neglect, this is an action rooted in medical malpractice, and therefore, subject to pre-suit investigation pursuant to Florida Statute, Section 766.

9. Even assuming it is not rooted in medical malpractice, the Amended Complaint fails to state a proper cause of action against LAWNWOOD under the Adult Protective Services Act and should be dismissed in its entirety.

MEMORANDUM OF LAW

I. THE PLAINTIFF'S AMENDED COMPLAINT SHOULD BE DISMISSED FOR THE PLAINTIFF'S FAILURE TO COMPLY WITH THIS COURT'S ORDER

The Florida Rules of Civil Procedure, Rule 1.420, provide that "any party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply with these rules or any order of the court." Where a party is noncompliant with an order of the trial court, it is within the court's discretion to involuntarily dismiss the Plaintiff's action. See *Diaz v. Bushong,* 619 So.2d 1020 (Fla. 3d DCA 1993); *Meida's Boutique, Inc. v. Gabor and Company,* 348 So.2d 1196 (Fla. 3rd DCA 1977).

As the Plaintiff failed to file her Amended Complaint within the deadline in this Court's Order, and further failed to seek any additional time from this Court, this Defendant respectfully requests this Court to dismiss the Plaintiff's action, with prejudice, pursuant to F.R.C.P. 1.420(b).

II. THE PLAINTIFF'S AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE IT IS BASED UPON ALLEGATIONS OF MEDICAL MALPRACTICE AND THE PLAINTIFF FAILED TO COMPLY WITH THE REQUIREMENTS OF PRE-SUIT INVESTIGATION.

The determination of whether the Medical Malpractice Act (the Act) applies to a cause of action is based on the allegations of the plaintiff's complaint. A plaintiff is generally entitled to plead his claims as he wishes, thereby assuming the burden of proving that the acts of the defendant constituted an act of ordinary negligence or other torts unrelated to or independent of any act of medical malpractice. *Stackhouse v. Emerson,* 611 So. 2d 1365 (Fla. 5th DCA 1993). Therefore, whether a plaintiff must give the requisite pre-suit notice and whether the other provisions of the Medical Malpractice Act apply is fact dependent. *Robbins v. Orlando, HMA, Inc.,* 683 So. 2d 664 (Fla. 5th DCA 1996).

Chapter 766 sets out certain presuit notice and screening requirements, which must be met in order to maintain a medical malpractice or medical negligence action against a health care provider. *See J.B. v. Sacred Heart Hosp. of Pensacola,* 635 So. 2d 945 (Fla. 1994). Whether a person is required to comply with the presuit procedures is "fundamentally fact-dependent" and an "inquiry to determine the applicability of the presuit process should begin with the statutory definition of a claim for medical negligence." *See Bloom v. Adventist Health Sys. Sunbelt, Inc.,* 911 So. 2d 211, 213-214 (Fla. 5th DCA 1995). Therefore, it is up to the Court to decide whether the claim arises out of the rendering of or the failure to render medical care or services.

A. LAWNWOOD is a medical provider as defined in the Medical Malpractice Act.

In *Weinstock v. Groth*, 629 So.2d 835 (Fla. 1993), the Supreme Court of Florida concluded that the "proper test for determining whether a defendant is entitled to the presuit requirement of notice ... is whether the defendant is directly or vicariously liable under the medical negligence standard of care set forth in section 766.102(1)." The Medical Malpractice Reform Act requires that the alleged conduct that caused the injury be an act of medical malpractice and that it be committed by a health care provider. The term "health care provider" is defined in F.S.A. 766.102(1) by referring to the definition of that term in F.S.A. 766.202(4) as follows:

> "Health care provider" means *any hospital,* ambulatory surgical center, or mobile surgical facility as defined and licensed under chapter 395; a birth center licensed under chapter 383; any person licensed under chapter 458, chapter 459, chapter 460, chapter 461, chapter 462, chapter 463, part I of chapter 464, chapter 466, chapter 467, or chapter 486; a clinical lab licensed under chapter 483; a health maintenance organization certificated under part I of chapter 641; a blood bank; a plasma center; an industrial clinic; a renal dialysis facility; or a professional association partnership, corporation, joint venture, or other association for professional activity by health care providers." F.S.A. 766.202(4) (emphasis added).

In this case, LAWNWOOD is licensed under chapter 395, and it appears that the Plaintiff alleges recovery against LAWNWOOD vicariously through the acts of its agents and/or employees. (See Exhibit "**B.**")

In *Goldman v. Halifax Medical Ctr., Inc.*, 662 So. 2d 367, 370 (Fla. 5th DCA 1995), the court stated as follows:

> We conclude that the legislature, in enacting *section 766.102*, and the Medical Malpractice Reform Act in general, intended that the negligence of the hospital's agents acting in the course of their employment should be treated as the negligence of the hospital, and that the chapter's presuit requirements should be complied with where an agent of the hospital provides negligent medical care...

The same holds true regardless of whether the employee of the hospital is a health care provider or not. *See also Puentes v. Tenet Hialeah Healthsystem*, 843 So. 2d 356 (Fla. 3d DCA 2003) (although the providers of care may not have been "health care providers" as defined in Chapter 766, they provided care to the Plaintiff in the context of her medical condition such that the Defendant, Hospital is entitled to presuit notice for alleged violations of the Plaintiff's care and treatment.). Accordingly, LAWNWOOD qualifies as a medical provider as defined by the Medical Malpractice Act.

B. Plaintiff's Alleged Damages Arise out of the Rendering of, or the Failure to Render Medical Care or Services.

A cause of action must comply with presuit requirements if the action arises out of any medical, dental, or surgical diagnosis, treatment, or care. *Corbo v. Garcia*, 949 So.2d 366 (Fla. 2nd DCA 2007). It is up to the trial court to decide from the allegations in the complaint whether a claim arises out of the rendering of, or the failure to render, medical care or services. *See Foshee v. Health Mgmt. Assocs.*, 675 So.2d 957, 959 (Fla. 5th DCA 1996). The question in determining if a claim is a medical malpractice claim is whether the plaintiff must rely upon the medical negligence standard of care in order to prove the case. *Tenet South Florida Health Systems v. Jackson*, 991 So.2d 396 (Fla. 3rd DCA 2008).

In 1994, the Supreme Court in *J.B. v. Sacred Heart Hospital of Pensacola*, 635 So.2d 945, defined "treatment" to mean medical or surgical management of the patient and the action or manner of treating a patient medically or surgically. *Id.* at 948. The Court also the defined the term "care" as the application of knowledge to the benefit of an individual to provide for or attend to needs or perform necessary personal services like a parent would for a child." *Id.* The Court explained that the definitions of "diagnosis", "treatment" and "care" are directly related to "ascertaining a patient's medical condition through examination

and testing, prescribing and administrating a course of action to effect a cure, and *meeting the patient's daily needs during the illness*". *Id.* (emphasis added). Thus, the Medical Malpractice Act applies when the allegedly negligent act(s) is directly related to the improper application of medical services, and the use of professional judgment and skill. *See Lynn v. Mount Sinai Medical Center, Inc.*, 692 So.2d 1002 (Fla. 3d DCA 1997).

Here, the allegations as plead in the Amended Complaint pertain to the rendering of, or the failure to render, medical care or services. The Amended Complaint states that the decedent was admitted to LAWNWOOD on August 14, 2008, and was treated for weakness, dehydration, and difficulty swallowing. The Plaintiff specifically alleges that LAWNWOOD failed to perform certain functions during the decedent's treatment. From the plain language of the Amended Complaint, the decedent was suffering from weakness, dehydration, and difficulty swallowing. The very functions which were allegedly not provided by LAWNWOOD, as outlined above, are all directly related to the conditions for which the decedent was admitted.

As such, it is undisputed from the face of the Plaintiff's Amended Complaint that the allegations pertain to alleged failure of LAWNWOOD to provide appropriate medical treatment and care, as well as an alleged failure to meet the decedent's daily needs during her illness. Such conduct is precisely the rendering of or failure to render medical care, treatment, and services contemplated by the legislature when it codified the Medical Malpractice Act. For example, the Plaintiff's allegations that LAWNWOOD failed to provide Ms. Saputa with a PEG feeding tube, that it improperly gave Levofed for hypovolemia rather than necessary IV fluids, and that Ms. Saputa was not given a chest tube to remedy her shortness of breath are all allegations rooted in medical negligence. These allegations can only be proven through evidence that the alleged action or inaction of LAWNWOOD fell below the prevailing standard of care in the community for that health care provider, based on the treatment which the Defendants were providing. *See Tenet*, 991 So.2d at 399.

Further, not only do the services which were allegedly not provided constitute medical treatment and care, but the alleged negligent acts in this case arise only in the context of the Plaintiff's underlying medical condition (weakness, dehydration, and difficulty swallowing). *Puentes*, 843 So. 2d at 358. (finding that a Plaintiffs cause of action was subject to the Medical Malpractice Act where the alleged negligence only arose the in context of the Plaintiff's underlying medical condition).

Therefore, the allegations in the Amended Complaint pertain to medical treatment and care of the decedent by LAWNWOOD. As such, the conduct at issue is medical care and treatment provided by a health care provider, and therefore, this Court should determine that the medical care and treatment in question is subject to the Medical Malpractice Act. Accordingly, LAWNWOOD is entitled to the benefits of presuit notification prior to the commencement of an action pursuant to §766. It is undisputed that the Plaintiff did not provide presuit notice regarding any potential claim, and the Plaintiff has not alleged that she complied with presuit notice in his pleading. As such, the Amended Complaint must be dismissed for failure to comply with Florida's presuit screening requirements.

III. PLAINTIFF'S AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE A PROPER CAUSE OF ACTION PURSUANT TO CHAPTER 415, ADULT PROTECTIVE SERVICES ACT

Pursuant to the Florida Rules of Civil Procedure, Rule 1.110 (b), "a pleading which sets forth a claim for relief ... must state a cause of action and shall contain ... a short and plain statement of the ultimate facts showing that the pleader is entitled to relief. "The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal." *Fox v. Professional Wrecker Operations of Florida, Inc.*, 801 So. 2d 175, 178 (Fla. 5th DCA 2001). As the Plaintiff has failed to allege ultimate facts to support her allegations, the Plaintiff has failed to state a cause of action for which relief could be granted.

To state a cause of action under this section, a complaint must set forth factual allegations which demonstrate that the plaintiff or the plaintiff's decedent was a "vulnerable adult," that the defendant was a "caregiver," and that the defendant committed "**abuse**," or "neglect," or "exploitation" with respect to the vulnerable adult. *Bohannon v. Shands Teaching Hospital and Clinics,*

Inc., 983 So.2d 717, 721 (Fla. 1st DCA 2008). Where the allegations of the compliant are "mere conclusions tracking the language of the statutory definitions, unsupported by facts," the complaint is legally insufficient and dismissal is appropriate.

In the instant matter, the Amended Complaint is legally insufficient in that it fails to support any of the following allegations with facts: (1) that LAWNWOOD was a caregiver, (2) that Lottie Saputa was a vulnerable adult, and (3) that LAWNWOOD committed "**abuse**" or "neglect" with respect to the decedent. Rather, the Amended Complaint states conclusively that LAWNWOOD was a caregiver and that the decedent was a vulnerable adult, per the statute. Without further facts supporting the allegations regarding the hospital's status as a "caregiver" and the decedent's status as a "vulnerable adult," the Amended Complaint fails to state a cause of action under the statute. *See Tenet*, 991 So.2d at 399 (holding that where a complaint failed to specifically allege the necessary components of a caregiver role, it is deficient); *Woodruff v. TRG-Harbour House, Ltd.*, 967 So.2d 248 (Fla. 3rd DCA 2007) (holding that where appellant failed to set forth facts sufficient to state a claim that she was a vulnerable adult, a claim for **elder** **abuse** cannot stand).

Finally, with respect to the allegations regarding alleged **abuse** and neglect to the decedent, the Amended Complaint is completely devoid of any allegations of facts individual to the Defendant, LAWNWOOD, that would support the ultimate legal conclusion that it was an "alleged perpetrator," as described in the statute, and cited in the Amended Complaint. Again, where mere legal conclusions are unsupported by facts, the Amended Complaint is legally insufficient and must be dismissed. *Bohannon*, 983 So.2d at 721.

IV. CONCLUSION

As the allegations in the Amended Complaint pertain to medical treatment and care of the decedent by the Defendants, and the Plaintiff did not provide presuit notice regarding any potential claim, the Amended Complaint must be dismissed for failure to comply with Florida's presuit screening requirements. Further, where the Plaintiff only alleges legal conclusions, misstates the statute, and the allegations that have been presented do not rise to the level necessary to support a claim, the Amended Complaint is insufficient. Therefore, dismissal by this Court for the above-referenced grounds is proper.

WHEREFORE, the Defendant, LAWNWOOD MEDICAL CENTER, INC., respectfully request that this Court grant its Motion to Dismiss the Plaintiff's Amended Complaint.

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this *31 st* day of March, 2011 to all parties on the attached service list.

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