STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
OCONEE COUNTY)	TENTH JUDICIAL CIRCUIT
Eddie Pleamon Sosby, and Jamie May Sosby, individually and as Personal Representative of the Estate of G.S, deceased,)	Civil Action No.: 2020CP3700299
Plaintiffs,)	**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' AVEANNA HEALTHCARE AS, LLC, AVEANNA HEALTHCARE, LLC, AND KATHERINE ORR, RN'S MOTION TO DISMISS**
v.)	
Aveanna Healthcare AS, LLC fka PSA Healthcare, Aveanna Healthcare, LLC Katherine Orr, RN, individually and as agent of Aveanna Healthcare AS, LLC, 1st Clemson Rentals, LLC, Davis Creek Baptist Church, ABC Corporation, an unidentified plumbing contractor,)	
Defendants.)	

Plaintiffs Eddie Pleamon Sosby, and Jamie May Sosby, individually and as Personal Representative of the Estate of G.S, respectfully submits their Memorandum of Law in Opposition to Defendants Aveanna Healthcare AS, LLC fka PSA Healthcare ("PSA"), Aveanna Healthcare, LLC ("Aveanna") and Katherine Orr, RN's (collectively "Defendants") Motion to Dismiss. Plaintiffs' Complaint does not challenge a medical judgment call or complex treatment decision on which reasonable nurses may disagree. Plaintiffs instead allege Orr bathed G.S., Plaintiffs' two year old son, in scalding hot water without testing the water first. As a result, G.S. suffered severe burns to his buttocks and legs that contributed to his death.

This substandard care is not medical malpractice, but negligence in a more generalized and ordinary sense. Testing the bathwater of a helpless child under your care is not a medical matter. It is a routine, ministerial responsibility required in a variety of circumstances. Plaintiffs'

claim against Orr and her employers is no different than they would have alleged against any nanny or babysitter who carelessly failed to monitor G.S's bathwater. Moreover, it is common knowledge that what Plaintiffs allege here is unreasonable and culpable under South Carolina tort law. No expert testimony would be required for a juror to determine Defendants should not have exposed Plaintiff to harm in such a haphazard and substantial way.

South Carolina law recognizes the distinction between medical malpractice and "ordinary negligence" by defendants who also happen to be medical providers. Dawkins v. Union Hosp. Dist., 408 S.C. 171, 177, 758 S.E.2d 501, 504 (2014) (finding "medical malpractice" does not include "nonmedical, administrative, ministerial, or routine care" performed by a medical provider). Persuasive authority also rejects Defendants' argument as courts across the country have found negligence by a health care worker while bathing a patient is not medical malpractice. Bryant v. Oakpointe Villa Nursing Centre, 684 N.W.2d 864, 876 (Mich. 2004); Franklin v. Collins Chapel Connectional Hosp., 696 S.W.2d 16, 20 (Tenn. App. 1985).

BACKGROUND

Plaintiffs hired PSA and Aveanna to provide in-home assistance for G.S., Plaintiffs' two-year-old son who suffered from congenital physical and mental ailments. (Compl. ¶¶ 52, 53). PSA and Aveanna assigned Nurse Orr to provide this assistance. (Compl. ¶ 56). On March 4, 2019, Orr prepared to bathe G.S. at his home using a hand-held shower sprayer. (Compl. ¶ 59). The Complaint alleges Orr negligently failed to check the water temperature before she began spraying G.S. (Compl. ¶ 66). Had Orr checked the water, she would have learned the temperature was far too hot and posed a severe threat to G.S.'s health. (Compl. ¶ 63). The scalding hot water caused severe burns to G.S's buttocks and right leg. (Compl. ¶ 68). G.S. was admitted to an Augusta, GA burn center where he underwent surgical debridement and a skin graft procedure.

(Compl. ¶ 75). G.S.'s condition deteriorated in the months following his injury, and he passed away from complications directly and proximately caused by his burns. (Compl. ¶¶ 76-77).

Plaintiffs filed the current action on May 11, 2020, alleging wrongful death, survival, negligent infliction of emotional distress, and necessaries claims against Defendants and other entities or individuals who are not parties to the current motion.[1] All claims against Orr (and PSA/Aveanna as her employers) focused on Orr's common-sense failure to check the water temperature before starting G.S's bath and to monitor G.S. during the bath. (Compl. ¶ 66). Plaintiffs also alleged PSA/Aveanna were guilty of various administrative errors including a failure to determine whether Orr had the necessary skills to "provide non-medical care" for G.S. (Compl. ¶ 67). Since bathing a child requires no medical training and checking bathwater temperature to prevent scalding a toddler is not a medical procedure, the Complaint made clear "[a]ll allegations of negligence . . . against PSA, Aveanna, and Orr **occurred during non-medical treatment** rendered to G.S." (Compl. ¶ 11) (emphasis added).

Defendants filed this current motion on June 2, 2020, asking the Court to dismiss Plaintiffs' Complaint for failure to allege facts to support a cause of action and for lack of subject-matter jurisdiction. Defs.' Mot. at 1 (citing Rule 12(b)(1) and 12(b)(6), SCRCP). Both arguments depend on the misguided notion that Plaintiffs allege "medical malpractice" claims and must meet certain statutory pre-filing requirements. Defs.' Mot. at 1-2 (citing S.C. Code Ann. § 15-79-125).

[1] Defendants 1st Clemson Rentals, LLC and Davis Creek Baptist Church are the property management company and property owner for the home in which the incident occurred. (Compl. ¶¶ 16-20). ABC Corporation represents the plumbing contractor responsible for installing the home's water heater. (Compl. ¶¶ 22-23).

LEGAL STANDARD

A defending party may assert in its answer or in a pre-answer motion a defense alleging the complaint against the defending party fails to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRCP. When reviewing a 12(b)(6) motion, a court must view a complaint in the light most favorable to the plaintiff and every doubt must be resolved in the plaintiff's favor. Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). If the "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case," then the court may not grant a 12(b)(6) motion. Sloan Constr. Co. v. Southco Grassing Co., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008). A court may not dismiss a complaint merely because the court doubts the plaintiff will prevail. Plyler, 373 S.C. at 645, 647 S.E.2d at 192.

ARGUMENT

1. **The Notice of Intent Requirements do not Apply to Negligence Claims Based on Nonmedical, Administrative, Ministerial, or Routine Care.**

Defendants' motion relies on S.C. Code Ann. § 15-79-125 which imposes pre-filing requirements for civil actions alleging "medical malpractice," a term of limited breadth within a statute that must be interpreted narrowly. Grier v. Amisub of S.C., Inc., 397 S.C. 532, 539, 725 S.E.2d 693, 697 (2012) (finding this section must be "strictly construed" because it is in derogation of common law principles). Medical malpractice covers all sorts of intricate surgical procedures and medical judgment calls physicians and nurses must make when treating patients with complex ailments or injuries. However, "not every injury sustained by a patient in a hospital results from medical malpractice." Dawkins v. Union Hosp. Dist., 408 S.C. 171, 177, 758 S.E.2d 501, 504 (2014). Dawkins shows that doctors and nurses acting in their professional capacity and

their professional setting can commit errors grounded in ordinary negligence rather than medical malpractice.

Defendants argue Dawkins prohibits ordinary negligence claims whenever a doctor or nurse is providing "medical services." Defs.' Mem. at 3 (quoting Dawkins, 408 S.C. at 178, 758 S.E.2d at 504). However, Defendants overlook Dawkins' express limitation on the definition of "medical malpractice" in the Notice of Intent statute. "Medical malpractice" does not include "nonmedical, administrative, ministerial, or routine care." Dawkins, 408 S.C. at 178, 758 S.E.2d at 504 (citing S.C. Code Ann. § 15-79-110(6)). Since Dawkins extends ordinary negligence to "nonmedical . . . *or* routine care," the Supreme Court made clear there are some uncomplicated, almost reflexive medical errors that do not qualify as medical malpractice. These cases may include a dental patient struck in the face with an x-ray machine and a surgical patient burned by a surgical lamp from which doctors or nurses had removed a protective heat shield.[2] In these cases, it would not be fair to describe the act as "nonmedical," but the act and error were simple enough to count as "routine." Moreover, to claim any errors in the course of medical services constitutes "medical malpractice" is rejected by persuasive authority. For example, the Florida Supreme Court recently held that a medical provider who negligently kicked a patient's foot while adjusting a footrest during a dialysis session could be sued for ordinary negligence. Nat'l Deaf Acad., LLC v. Townes, 242 So.3d 303, 311 (Fla. 2018) (citing Tenet St. Mary's Inc. v. Serratore, 869 So.2d 729, 730 (Fla. App. 2004)). While certainly dialysis treatment is a "medical service," the medical provider's negligent operation of the footrest during the treatment session did not involve any professional standard of care.

[2] Mobley v. Hirschberg, 915 So.2d 217 (Fla. App. 2005); Jones v. Bates, 403 S.E.2d 804 (Ga. 1991).

Instead of focusing on the tort's location or the tortfeasor's job title, the distinction between these two species of negligence depends on the evidence a juror will need to resolve the liability dispute. Medical providers spend years in schooling, residency, and fellowships understanding the intricacies of patient presentations, potential treatment options, and possible complications once treatment is implemented. Accordingly, no lay juror can be asked to evaluate complex treatment choices without the assistance of a qualified and reliable expert witness. But, some things doctors and nurses do when treating patients are "nonmedical, administrative, ministerial, or routine" such that a jury needs no help and can assess the medical provider's conduct using their own "common knowledge." Dawkins, 408 S.C. at 177-78, 758 S.E.2d at 504.

South Carolina law has long recognized common knowledge as an exception to the expert testimony requirement even in medical malpractice cases. E.g. Green v. Lilliewood, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978) (finding no expert is required "in situations where the common knowledge and experience of layman" can evaluate conduct in question); Cox v. Lund, 286 S.C. 410, 416-17, 334 S.E.2d 116, 120 (1985) (applying Green to defendant doctor's performance of colonoscopy); see also Boyle v. U.S., 948 F. Supp. 2d 570 (D.S.C. 2012) (misfilled prescription); Smith v. U.S., 119 F. Supp. 2d 561 (D.S.C. 2000) (citing 40A Am. Jur. 2d Hospitals and Asylums § 57 (1999) (finding examples of simple negligence claims against a hospital include "failure to prevent a patient's fall, mishandling of a canister containing bone marrow cells, and mistakenly giving one patient another's HIV test results"). Dawkins took a natural step further by recognizing "common knowledge" is also an exception to the Notice of Intent requirements on which Defendants' motion relies. It is only logical that a case on which jurors can reach a final verdict without expert testimony is also a case where the plaintiff need not submit an expert affidavit as part of a pre-filing Notice of Intent. Therefore, as recognized in

Dawkins, the statutory definition of "medical malpractice" and pre-filing requirements for medical malpractice claims "do[] not impact medical providers' ordinary obligation to reasonably care for patients with respect to nonmedical, administrative, ministerial or routine care." 408 S.C. at 178, 758 S.E.2d at 504.

These categories include a variety of events involving medical providers that "common knowledge" can identify as negligence. Dawkins held that an emergency room patient with known balance issues could sue for ordinary negligence when hospital employees left the patient alone in an exam room and she was injured in a fall. Id. at 174, 758 S.E.2d at 502-03.[3] Simple, careless decisions unrelated to the patient's underlying ailment sound in ordinary negligence rather than medical malpractice. Id. at 178 n. 2, 758 S.E.2d at 504 n. 2 (collecting cases of ordinary negligence in hospital setting including claims arising from food poisoning, slippery floors, and vulnerable patients left without assistance); Arora v. James, 689 Fed. Appx. 190 (4th Cir. May 12, 2017) (reversing denial of motion to amend complaint where amendment alleged ordinary negligence claim based on hospital's failure to keep intruders out of patient's room). The phrase "administrative, ministerial or routine care" can apply **even if the medical provider's negligent act was undertaken for a medical purpose**. Dawkins, 408 S.C. at 179, 758 S.E.2d at 505 (citing Kastler v. Iowa Methodist Hosp., 193 N.W.2d 98, 102 (Iowa 1971) ("The character of a particular activity of a hospital—whether professional, on the one hand, or nonmedical, administrative, ministerial, or routine care, on the other—is determined by the

[3] Dawkins should not be read as limiting "ordinary negligence" claims in the medical context to injuries suffered before treatment begins. Dawkins itself rejects that argument by citing with approval Landes v. Women's Christian Ass'n, 504 N.W.2d 139, 141 (Iowa Ct. App. 1993), an ordinary negligence case where patient injured in hospital fall *after* undergoing knee surgery in same facility. Timing is not a defining factor. A claim alleges ordinary negligence when the nature of the medical provider's conduct is administrative, ministerial, or routine as opposed to decisions requiring complex medical judgments beyond a lay juror's ability to understand without expert assistance.

nature of the activity itself, not by its purposes")). For example, a nurse who opens a hospital window for the purpose of making a patient more comfortable may be liable for ordinary negligence if the resulting cooler temperatures causes the patient to develop pneumonia. Cramer v. Theda Clark Mem'l Hosp., 172 N.W.2d 427 (Wis. 1969) (citing Hayhurst v. Boyd Hosp., 254 P. 528 (Idaho 1927)). Opening the window may have had a medical purpose but the nurse's error was ordinary negligence rather than medical malpractice because even a lay juror would know exposing a sick patient to cold winds was unreasonable.

The same principles apply to Plaintiffs' Complaint. Testing bathwater for dangerously high temperatures before bathing G.S. was not a complicated, technical, or even really a medical decision. It was a routine component of protecting any toddler a person accepts into her care. No specialized knowledge or expert assistance is required to spot the negligence. See also Martin v. Our Lady of Bellefonte Hosp., Inc., Case No, 2013-CA-000877-MR, 2014 WL 7339265, at *4 (Ky. App. Dec. 24, 2014) (citing Ratliff v. Employers' Liab. Assur. Corp., Ltd., 515 S.W.2d 225, 228-29 (Ky. 1974) ("professional judgment is not needed to determine whether hospital staff members were negligent in administering routine care equivalent to what patients would receive from non-professionals in their own homes"). The fact that G.S. was splashed with scalding water by a person holding a nursing degree does not fundamentally change the administrative, ministerial, and routine nature of Defendants' duty to use reasonable care when bathing him.

In fact, a number of courts have rejected similar attempts to label this form of negligence as "medical malpractice." A nurse who burns her patient with services ancillary to medical treatment is guilty of ordinary negligence, not medical malpractice. A Florida appellate court held that a nurse who spilled hot tea on a hospital patient was guilty of ordinary negligence. Quintanilla v. Coral Gables Hosp., Inc., 941 So.2d 468, 470 (Fla. App. 2006). Even though the

tea incident happened in the course of medical treatment, "the process of serving the hot tea did not require medical skill or judgment" and the patient would not have to show any breach of a medical standard of care to prevail on his claim. Id. Similarly, a New York court held ordinarily negligent conduct in medical environments including applying a scalding hot water bottle to a patient. Twitchell v. MacKay, 434 N.Y.S.2d 516 (1980) (citing Phillips v. Buffalo Gen. Hosp., 146 N.E. 199 (N.Y. 1924)).

Multiple courts have also rejected attempts to categorize as "medical malpractice" errors by medical providers when bathing a patient. According to the Michigan Supreme Court, "If a party alleges in a lawsuit that [a] nursing home was negligent in allowing the decedent to take a bath under conditions known to be hazardous . . . the claim sounds in ordinary negligence." Bryant v. Oakpointe Villa Nursing Centre, 684 N.W.2d 864, 876 (Mich. 2004). In a factually similar case, the Tennessee Court of Appeals found it was ordinary negligence, not medical malpractice, when a nursing home resident suffered third-degree burns from a bath drawn by a nursing home employee. Franklin v. Collins Chapel Connectional Hosp., 696 S.W.2d 16, 20 (Tenn. App. 1985). The nursing home's attempt to recast its misconduct as a medical malpractice claim was a "stretch" of that term the court was unwilling to accept. Id. Ultimately, Franklin concluded, "[t]he occurrence complained of here is a simple bath . . . We do not believe that we can elevate this case to the status of a medical malpractice case." Id. Finally, case law shows that simple errors by home health nurses are ordinary negligence rather than medical malpractice. In Rogers v. Crossroads Nursing Service, Inc., a Texas appellate court held that a home health nurse's negligent placement of a heavy supply bag on a table which later fell on the patient was not a claim subject to statutory medical malpractice requirements. 13 S.W.3d 417, 419 (Tex. App. 1999). The patient's claim was not for medical malpractice because "the question of how to

place a heavy supply bag in a patient's home so as not to injure the patient is not governed by an accepted standard of safety within the health care industry, but rather is governed by the standard of ordinary care." Id.

In sum, the Court should reject Defendants' argument that Plaintiffs were required to file a Notice of Intent to pursue a negligence claim for Defendants errors in bathing G.S. is scalding hot water. Notices of Intent are required for "medical malpractice" claims, not "ordinary negligence" claims even if they happen to occur in a medical setting. Doctors, nurses, and other hospital workers may be guilty of ordinary negligence by carelessly performing "administrative, ministerial, or routine care." Testing the temperature of bathwater before bathing a toddler is routine, not a matter of complex medical knowledge or judgment. Failing to test the water or to monitor the child during the bath in a way that causes the child to suffer severe pain is negligent even to those with only a common man's knowledge.

2. The Complaint Properly Alleges Defendants' Misconduct was a Failure of Administrative, Ministerial, or Routine Care.

Defendants' pre-answer motion tests only the legal sufficiency of Plaintiffs' claim and may be granted only if, assuming all Complaint allegations are true, Plaintiffs are still unable to recover under South Carolina law. Rule 12(b)(6), SCRCP; Plyer, 373 S.C. at 645, 647 S.E.2d at 192 (holding that a 12(b)(6) motion must be denied where plaintiff could recover "on any theory of the case"). It is not enough for Defendants to challenge the Complaint allegations' veracity or to suggest Defendants' evidence will prove those allegations unfounded.

Defendants' motion implies the conduct in question is grounded in more complicated medical decision making than the Complaint suggests. While Plaintiffs disagree with the implication, Defendants are free to pursue this defense in discovery. However, even the most Defendant-friendly anticipated testimony must be disregarded at this procedural stage. If there is

any way to interpret the Complaint to allege an "ordinary negligence" claim under Dawkins, then Defendants' theory must be rejected for now and their motion denied.

By its plain terms, the Complaint alleges an ordinary negligence claim, making special note of how Dawkins distinguished medical malpractice claims. (Compl. ¶¶ 12-15). Plaintiff further alleges his medical providers' pertinent conduct was "routine" and "ministerial care." (Compl. ¶¶ 22, 57). Specifically, the Complaint alleges Orr failed in the "elementary" duty to "test and monitor the water temperature" of G.S.'s bath. (Compl. ¶¶ 63, 66). In sum, the Complaint made clear "[a]ll allegations of negligence . . . against PSA, Aveanna, and Orr **occurred during non-medical treatment** rendered to G.S." (Compl. ¶ 11) (emphasis added).

Finally, Defendants' memorandum goes far beyond the scope of what is permissible for the motion they chose to file. For a Rule 12(b)(6), SCRCP motion, the court "must base its ruling **solely on allegations set forth in the complaint**." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (emphasis added). Defendants go well beyond the Complaint allegations to offer, mostly without citation, their own version of G.S.'s medical condition and the services Defendants provided him. Defs.' Mem. at 2. Defendants even label these unsubstantiated statements as "Facts." Id. Then, Defendants submit an affidavit from Defendant Orr, another violation of Rule 12(b)(6)'s limited scope. Since discovery has not yet begun and Defendants' motion will be heard in just five days, Plaintiffs have no reasonable opportunity to investigate what Defendants call "Facts" and what Orr states in her affidavit.

Beyond the substantial procedural errors, Orr's affidavit as written does not support dismissal. While Orr claims G.S. required nursing services and even claimed nursing services were necessary during bathing (K. Orr Aff. ¶¶ 4, 7), she never claims that determining proper water temperature was part of those medical services. For example, while Orr claimed G.S's bath

was a medical service because of the risk of infection (K. Orr Aff. ¶ 8), she never explains how running her hand under the water to check its temperature would be related to infection control. Thus, even if the Court were willing to consider this improper affidavit, it offers nothing to change the fundamentally nonmedical, administrative, ministerial, and routine nature of Defendants' alleged negligence.

In sum, only the Complaint allegations may be considered for Defendants' motion and all of those allegations must be assumed true. Using that standard, the Complaint properly states facts sufficient to constitute an ordinary negligence cause of action, and Defendants' motion should be denied.

CONCLUSION

Based on the arguments stated above, Plaintiffs respectfully request an order denying Defendants' motion to dismiss. Plaintiffs properly allege an ordinary negligence claim based on Defendants' errors while bathing G.S. Failing to check the temperature of the water before bathing G.S. under these circumstances was a matter of common knowledge, and Defendants' failure to do so is not subject to the Notice of Intent requirements on which Defendants' motion depends. Defendants' motion should be denied.

Respectfully submitted,

/s/ Jordan C. Calloway
S. Randall Hood
Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
rhood@mcgowanhood.com
jcalloway@mcgowanhood.com

J. Kirkman Moorhead

Moorhead LeFevre P.A.
2203 North Main Street
Anderson, SC 29621
(864) 225-9155
kirk@mllawyers.com

Attorneys for Plaintiffs

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Rock Hill, SC