STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
GREENVILLE COUNTY	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Desiree Moffitt and Jacob Fields, Individually, and as Parents and Next Friends of their Minor Child,	)	Civil Action No.: 2020-CP-23-04033
	)	
Plaintiffs,	)	**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**
v.	)	
	)	
Chestnut Hills Mental Health, Inc., d/b/a Springbrook Autism Behavioral Health f/k/a Springbrook Behavioral Health,	)	
	)	
Defendant.	)	
	)	

Plaintiffs Desiree Moffitt and Jacob Fields, individually and as parents/next friends of their Minor Child, respectfully submit their memorandum of law in opposition to Defendant Chestnut Hills Mental Health, Inc., d/b/a Springbrook Autism Behavioral Health f/k/a Springbrook Behavioral Health's ("Springbrook") Motion to Dismiss.

INTRODUCTION

Plaintiffs' general negligence and intentional tort claims allege their six-year-old son ("Minor Child") was abused and neglected by non-medical staff members during Minor Child's fifteen-month residency in Springbrook's facility. None of the allegations challenge treatment decisions for Minor Child's autism. Instead the focus is on a number of disturbing incidents including instances where Minor Child was dragged by his arms and placed in a locked, unmonitored seclusion room. When Plaintiffs would call to check on Minor Child, Springbrook staff often ignored their inquiries. When Plaintiffs came to visit, Minor Child looked sleep deprived, bearing brises and scratches all over his body that Springbrook could not adequately explain. Springbrook's tortious conduct was not just in these instances themselves but in its poor

oversight of its non-medical employees. Despite a number of similar incidents involving Minor Child and other residents, Springbrook failed to discipline or supervise its personnel in direct contact with these vulnerable children.

Springbrook now argues Plaintiffs' Amended Complaint should be dismissed because it was not accompanied by an expert affidavit. Def.'s Mot. at 1 (citing S.C. Code Ann. § 15-36-100(B)). However, section 15-36-100 must be strictly construed, and its affidavit mandate only applies to lawsuits bearing three key characteristics not present here. First, an affidavit is only required if the alleged wrongdoer works in one of 22 specifically-identified professions (S.C. Code Ann. 15-36-100(G)), and the "mental health assistants" faulted in Plaintiffs' claims are not among that group. Second, the mandate only applies to "professional negligence," not allegations of general negligence for assaulting and battering a six-year-old child. Third, even if Springbrook's torts could qualify as professional negligence, no affidavit is required since the alleged errors "lie within the ambit of common knowledge and experience." S.C. Code Ann. § 15-36-100(C)(2).

COMPLAINT ALLEGATIONS AND PROCEDURAL HISTORY

Plaintiffs filed their Summons and Complaint as anonymous plaintiffs on August 31, 2020, and the documents were served on September 2, 2020. Before Springbrook's response was due, Plaintiffs filed the Amended Complaint on October 8, 2020, which left the original pleading unchanged except for identifying Plaintiffs by name. Plaintiffs' son, Minor Child, lived with Plaintiffs in North Carolina where he was diagnosed with autism and Fragile X syndrome, conditions associated with intellectual disability and behavioral difficulties. (Am. Compl. ¶¶ 88-92). After an extensive search, Plaintiffs applied for Minor Son to live at Springbrook, a residential behavioral health facility located in Travelers Rest, South Carolina. (Am. Compl. ¶¶ 16-18; 94-96). Minor Son moved to Springbrook in January 2019, and Plaintiffs began quickly began

noticing worrying signs. Within a week of arriving at Springbrook, Minor Son was taken to the emergency room with vomiting and a urinary tract infection. (Am. Compl. ¶ 136). When Plaintiffs called Springbrook to check on Minor Child's well-being, Springbrook often ignored them. (Am. Compl. ¶ 112). When Plaintiffs' visited Minor Child, they began observing troubling changes in his appearance and demeanor. On multiple occasions, they noticed Minor Child had "a large number of bruises, scratches, scrapes, bumps, rashes" and "wounds" on his body that Springbrook personnel did not adequately explain. (Am. Compl. ¶¶ 114-19). Plaintiffs also noted dark circles under Minor Child's eyes consistent with sleep deprivation, an especially dangerous problem for an autistic child. (Am. Compl. ¶¶ 122-24).

Plaintiffs have since learned the reasons for Minor Child's deteriorating condition. First, Minor Child was often housed in seclusion by Springbrook. (Am. Compl. ¶ 127). He was held in a darkened room where, despites contrary assurances to Plaintiffs, the door was locked and no one was monitoring Minor Son's condition during moments of crisis. (Am. Compl. ¶¶ 128-31). Plaintiffs also learned Minor Son's care went beyond neglect to include active abuse. In one instance, Minor Son was pinned to the ground by five Springbrook staff members. (Am. Compl. ¶ 140). Over time, Springbrook employees "repeatedly dragged and forced [Minor Son] into the seclusion room by his wrists, arms, and/or armpits while he kicked and screamed in protest." (Am. Compl. ¶ 141). Springbrook's abuse and neglect issues were systemic. Despite knowledge of similar incidents involving Minor Son and other residents, Springbrook's leadership failed to intervene, failed to report to state authorities, and failed to properly supervise the abusers in their employ. (Am. Compl. ¶¶ 27; 159-61; 172).

The Amended Complaint focuses on two claims. First, Plaintiffs allege a general negligence claim for the nonmedical services Springbrook offered leading to Minor Son's injuries.

(Am. Compl. ¶¶ 174-80). While Springbrook offers medical treatment, Plaintiffs' claims focus only on non-medical services. (Am. Compl. ¶ 42). This is evidenced by the Springbrook employees faulted in the Amended Complaint. Rather than faulting treatment decisions by any medical doctor or psychiatrist Springbrook employs, Plaintiffs' allegations focus on Springbrook's "mental health assistants" ("MHA") that have no medical education and training and whose work focuses on day-to-day non-medical services including feeding/providing security for residents. (Am. Compl. ¶¶ 52-63). Springbrook's general negligence included both its abuse and neglect of Minor Child and its failures in hiring/supervising its low-level non-medical personnel whom Springbrook knew to have a history of mistreating residents. (Am. Compl. ¶ 178). Second, Plaintiffs allege intentional tort claims for assault and battery when Springbrook employees committed "unlawful, unauthorized violence on the Minor Child through offensive touching or threat." (Am. Compl. ¶¶ 181-86).[1] In sum, the Amended Complaint alleges non-medical general negligence and intentional tort claims. Even if these claims were medical in nature, the alleged wrongdoing lies within the common knowledge of an average juror. (Am. Compl. ¶ 173).

After accepting service for the Amended Summons and Complaint on October 8, 2020, Springbrook made two filings on October 22nd: an answer and a motion to dismiss pursuant to Rule 12(b)(6), SCRCP. The motion argues some or all of Plaintiffs' claims are subject to section 15-36-100(B)'s expert affidavit requirement. For the reasons discussed above, 15-36-100 does not apply here, and Springbrook's motion should be denied.

[1] Plaintiffs' third and fourth causes of action alleged Springbrook violated its voluntarily undertaken duty of care in violation of Restatement (Second) of Torts § 323 (Am. Compl. ¶¶ 187-96) and that Plaintiffs are entitled to recover for Minor Child's claim-related medical expenses while he is a minor. (Am. Compl. ¶¶ 197-202).

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). 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). 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

Springbrook's alleged abuse and neglect of Minor Child was committed by low-level, non-medical employees (MHAs) and not as part of medical treatment or in the course medical decision making. Springbrook's contention that Plaintiffs were required to file an expert affidavit with their pleading mistakenly relies on section 15-36-100 because that statute limits the affidavit filing requirement to cases involving claims and defendants unlike those at issue here. Specifically, the expert affidavit requirement is stated as follows:

> Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the

> factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

S.C. Code Ann. § 15-36-100(B). Additionally, the requirement is subject to a statutory exception as follows:

> The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

S.C. Code Ann. § 15-36-100(C)(2). Thus, by its plain language, the expert affidavit mandate only applies (1) when the alleged wrongdoer works in one of the 22 professions listed in 15-36-100(G); (2) the pleading alleges "professional negligence" rather than general negligence"; and (3) if professional negligence is alleged, the nature of the wrongdoing is beyond "the ambit of common knowledge and experience." None of these requirements are met in this case.

1. **Claims Based on MHAs' Conduct are Not Covered by the Expert Affidavit Requirement.**

The Amended Complaint unambiguously identifies the direct wrongdoers responsible for the abuse and neglect of Minor Child. (Am. Compl. ¶ 63) (noting "negligent, grossly negligent, and reckless actions by the MHAs of Springbrook . . . are the basis of this complaint"). Pursuant to section 15-36-100, claims based on MHA misconduct is not subject to the expert affidavit requirement. When the named defendant is a facility like Springbrook, the requirement only applies if the alleged wrongdoer works in one of the professions listed later in subsection 15-36-100(G). 15-36-100(B) ("based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G)"). That list includes medical doctors, nurses, osteopathic doctors, physicians' assistants, professional counselors, and psychologists. S.C. Code Ann. § 15-36-100(G) (7), (9), (12), (15), (16) and (19). However, MHAs are not among the 22 professions identified by statute, and by law the mandate does not apply to any claim based

on MHA misconduct. This direct and strict interpretation of the statute is directed by Supreme Court precedent. Since 15-36-100 imposes filing requirements in derogation of common law, it must be strictly construed" and "cannot extend any further than what the General Assembly clearly intended." Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 538, 725 S.E.2d 693, 697 (2012).

2. The Amended Complaint Does Not Allege "Professional Negligence."

An expert affidavit is not required unless the pleading alleges "professional negligence" against a medical provider. S.C. Code Ann. § 15-36-100(B). Plaintiffs' Amended Complaint does not allege professional negligence or medical malpractice, only "general negligence" and an intentional tort claim for assault and battery. (Am. Compl. ¶¶ 74-86). Thus, even to the extent the Amended Complaint is based on conduct of doctors or nurses, no expert affidavit was required.

Under South Carolina law, "professional negligence" does not include every tortious act a medical professional undertakes in the course of his/her duties. Dawkins v. Union Hosp. Dist., 408 S.C. 171, 177, 758 S.E.2d 501, 504 (2014) ("not every injury sustained by a patient in a hospital results from medical malpractice"). For medical providers, professional negligence (aka 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)). The distinction between "professional negligence" and "general 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.

Here, Plaintiffs' core allegations are that Springbrook's MHAs locked Minor Child in an unmonitored darkened room and physically assaulted him on multiple occasions over more than a year as a Springbrook resident. (Am. Compl. ¶¶ 128-31; 140-41; 181-86). Plaintiffs also allege Springbrook's administration overlooked this wrongdoing and failed to supervise its employees for the protection of the vulnerable placed in their custody. (Am. Compl. ¶¶ 27, 33, 142, 178). Plaintiffs never challenge a diagnosis made or treatment ordered by a Springbrook physician. The MHAs abuse of Minor Child was often perpetrated during the simple act of moving him from one part of Springbrook's facility to another. (Am. Compl. ¶¶ 140-41). This is an act with no medical component that is simply incidental to having Minor Child in Springbrook custody.

Hiring, retention, and supervision failures are also nonmedical in nature. (Am. Compl. ¶¶ 27, 33, 142, 178). Several courts have held similar types of misconduct is ordinary rather than "professional" negligence. See e.g. Jackson v. Burrell, 602 S.W.3d 340, 350 (Tenn. 2020) (common knowledge exception applied to claim by sexual assault victim against salon owner that failed in hiring, retaining, and supervising the salon's massage therapist whom salon owner knew to have history of inappropriate conduct); Snyder v. Injured Patients & Families Comp. Fund, 768 N.W.2d 271, 273 (Wis. App. 2009) (hospital's alleged failure to screen patient for weapons upon return to facility after day pass was ordinary negligence because it was "negligence in the hospital's provision of custodial care, and not in the provisions of health care service"); Paddock v. Chacko, 522 So.2d 410, 417 (Fla. App. 1988) (collecting cases where courts held that a "hospital's standard of care for the supervision" of mentally ill patients "is not a question involving medical judgment or expertise").

3. Even if the Amended Complaint Alleged "Professional Negligence," the "Common Knowledge" Exception Negates the Expert Affidavit Requirement.

For the reasons stated above, Springbrook's argument fails because Plaintiffs' claims do not meet the personal (i.e. wrongdoer listed in section 15-36-100(G)) or subject matter (i.e. "professional negligence") components section 15-36-100(B) requires to apply the expert affidavit mandate. Moreover, even if the mandate's requirements were met, Plaintiffs properly relied on an express statutory exception when filing their complaint without an affidavit. See S.C. Code Ann. § 15-36-100(C)(2) (providing that affidavit requirement does not apply to professional negligence claim alleging misconduct "within the ambit of common knowledge and experience"). In other words, even if the blatant abuse, neglect, and failure to supervise Plaintiffs allege could be construed as "professional negligence," South Carolina law indicates that an expert affidavit was not required because a reasonable juror would not require expert assistance to appreciate the unreasonableness of Springbrook's conduct.

At this first stage of litigation, a plaintiff must only plausibly allege the defendant's misconduct meets section 15-36-100(C)(2)'s "common knowledge" exception. Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 518, 763 S.E.2d 200, 202 (2014) (applying exception where complaint alleged plaintiff's "good faith belief" that defendant's misconduct was common knowledge). In Brouwer, the plaintiff alleged her doctors and nurses providing post-surgical care disregarded a latex allergy clearly indicated in her chart and caused an allergic reaction that sent her to the intensive care unit. Id. When determining whether the "common knowledge" exception applied to the plaintiff's resulting claims, the Court first considered whether the error was the violation of a specialized medical standard of care or negligence in a more generalized sense. Id. 409 S.C. at 521, 763 S.E.2d at 203. Brouwer confirmed that even medical professionals performing medical tasks can make such commonplace, non-technical mistakes that any reasonable juror could

see the error without assistance. Id. at 522, 763 S.E.2d at 204 (citing Thomas v. Dootson, 377 S.C. 293, 659 S.E.2d 253 (Ct. App. 2008) (burning patient with surgical drill) and Hickman v. Sexton Dental Clinic, P.A., 295 S.C. 164, 367 S.E.2d 453 (Ct. App. 1988) (dental assistant rammed sharp object into patient's mouth)).

Ultimately, while the "common knowledge" exception's application is fact-specific, Brouwer holds that it applies when the defendant's alleged negligence is "quite obvious" such that no affidavit is needed to meet statutory goal of weeding out meritless lawsuits. 409 at 522, 763 S.E.2d at 204 (quoting 70 C.J.S. *Physicians & Surgeons* § 142 (Supp. 2014)). Like in Brouwer, Plaintiffs' Amended Complaint states their good faith belief that Springbrook's misconduct lies within a reasonable person's common knowledge. (Am. Comp. ¶ 173). That belief is well supported in the substantive allegations. A reasonable juror would not need an expert to explain the illegality in a MHA assaulting a six-year-old boy. (Am. Comp. ¶¶ 140-41; 181-86). Nor would that same juror need an expert to explain why it is unreasonable to lock an autistic child in an unmonitored, dark seclusion room for extended periods especially after misleading the child's parents on how the seclusion room is used. (Am. Compl. ¶¶ 127-31; 178). It is also within a lay person's common knowledge that a treatment facility with custody of young children has a duty to reasonably supervise its employees, especially after the facility is on notice of inappropriate conduct by those employees. (Am. Compl. ¶¶ 25, 27-28, 146, 163, 178).

Finally, Brouwer also shows that it is often helpful for courts to look to previous rulings to determine what constitutes "common knowledge" in the medical setting. Courts from around the country have held that claims based on assaults and inadequate monitoring in residential treatment facilities are claims based on common knowledge for which no expert testimony is required. See e.g. Virginia S. v. Salt Lake Care Ctr., 741 P.2d 969, 971-72 (Utah App. 1987) (finding no expert

testimony was needed to show nursing home was negligent in failing to supervise residents after mentally incompetent 17-year-old was sexually assaulted and impregnated in the home's facility); Juhnke v. Evangelical Lutheran Good Samaritan Soc'y, 634 P.2d 1132, 1136 (Kan. App. 1981) (applying common knowledge exception applied to claim that nursing home failed to protect vulnerable resident from assault by fellow resident whom home knew to be dangerous); see also Mast v. Magpusao, 180 Cal. App. 3d 775, 780 (Cal. App. 1986) (applying Juhnke); see also Payne v. Milwaukee Sanitarium Found., Inc., 260 N.W.2d 386, 392 (Wis. 1977) (noting that "[i]n some cases the supervision and custodial care of mental patients is a subject within the realm of the ordinary experience of mankind").

CONCLUSION

Based on the arguments stated above, Plaintiffs respectfully request the Court deny Defendants' Motion to Dismiss. Plaintiffs were not required to file an expert affidavit with their Complaint because their claims do not fall within the expert affidavit mandate imposed by section 15-36-100(B). Even if the mandate's general requirements were met, the Amended Complaint was proper without an affidavit because of section 15-36-100(C)(2)'s "common knowledge" exception which applies here to claims based on child abuse and negligent employee supervision.

Respectfully submitted,

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

Jay F. Wright
McGowan, Hood & Felder, LLC
135 Edinburgh Ct., Suite 202
Greenville, SC 29607
(864) 252-4406
jaywright@mcgowanhood.com

Attorneys for Defendant

January 6 2021
Rock Hill, SC