

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 19, 2023 Session

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Appellate Courts

JODY HIGGINS v. CORECIVIC, INC., ET AL.

**Appeal from the Circuit Court for Hamilton County
No. 18C599 Kyle E. Hedrick, Judge**

No. E2022-01101-COA-R3-CV

This appeal concerns an inmate’s lawsuit over injuries he sustained from falling off a top bunk bed in prison. Jody Higgins (“Plaintiff”) was an inmate at Silverdale Detention Facility (“Silverdale”). CoreCivic, Inc. operated Silverdale through a contract with Hamilton County. CoreCivic of Tennessee, LLC (the two CoreCivic entities together, “CoreCivic”) employed security at Silverdale. Correct Care Solutions, LLC (“CCS”) provided medical treatment to Silverdale inmates through a contract with CoreCivic. Plaintiff sued CoreCivic, CCS, and Hamilton County (“Defendants,” collectively) in the Circuit Court for Hamilton County (“the Trial Court”) asserting health care liability and other claims. Defendants filed motions for summary judgment, which the Trial Court granted based in part on a lack of expert proof. Plaintiff appeals. He argues among other things that it is common knowledge that Plaintiff, who suffers from seizures, should have been given a bottom bunk pass and anti-seizure medication. We hold, *inter alia*, that Plaintiff failed to present competent, admissible expert proof in support of his health care liability claim at the summary judgment stage, and that the issues of this case do not fall under the common knowledge exception. Plaintiff’s other claims are barred by the statute of limitations. We affirm.

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

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which JOHN W. MCCLARTY and KRISTI M. DAVIS, JJ., joined.

Whitney Durand, Signal Mountain, Tennessee, for the appellant, Jody Higgins.

Susan West Carey and R. Dale Bay, Nashville, Tennessee, and Janet Strevel Hayes, Knoxville, Tennessee, for the appellee, Correct Care Solutions, LLC.

Joseph F. Welborn, III, Erin Palmer Polly, and Terrence M. McKelvey, Nashville, Tennessee, for the appellees, CoreCivic, Inc., CoreCivic of Tennessee, LLC, and Hamilton County, Tennessee.

R. Dee Hobbs and Sharon McMullan Milling, Hamilton County Attorney's Office, for the appellee, Hamilton County, Tennessee.

OPINION

Background

On March 16, 2017, Plaintiff was arrested in Soddy-Daisy, Tennessee. On April 20, 2017, Plaintiff was transferred from jail to Silverdale. Plaintiff has a history of seizures. On the evening of April 22, 2017, Plaintiff fell off a top bunk bed and sustained major injuries, including skull fractures. He underwent multiple surgeries as a result of the incident. On April 28, 2017, Plaintiff was discharged from the hospital and returned to Silverdale by van. Two correctional officers escorted Plaintiff. During this process, Plaintiff was in handcuffs and leg irons. Whether he was pushed or whether he stumbled, Plaintiff slipped into the van and hit his head. In early May 2017, Plaintiff was released from custody. Plaintiff alleges that as a result of these incidents, he suffers from physical issues, memory loss, emotional distress, and psychological injuries.

On May 15, 2018, Plaintiff sued Defendants in the Trial Court. Thereafter, Plaintiff filed a total of five amended complaints. Plaintiff asserted multiple causes of action, to wit: health care liability; negligence; negligence per se; res ipsa loquitur; gross negligence; reckless conduct; and negligent or reckless infliction of emotional distress. Plaintiff alleged among other things that he should have been given his anti-seizure medication and a bottom bunk pass. Defendants filed motions for summary judgment. CCS, which provided the medical care at issue, contended that Plaintiff failed to present any competent expert proof in support of his health care liability claim. CCS filed the deposition of Steven C. Perlaky, M.D. ("Dr. Perlaky"), an expert for Plaintiff. Dr. Perlaky is an emergency room physician. He did not personally examine Plaintiff. In his deposition, Dr. Perlaky was asked by counsel for CCS as follows:

Q. Do -- have you ever practiced with or overseen nurses who work in a correctional setting?

A. Yes. There's a nurse that works at Memorial Georgia that used to be the full-time nurse at a correctional facility; specifically the Catoosa County Jail. And I know I've worked with other nurses through the years that had worked at the Walker State Prison. So it's not uncommon for some of the ER nurses

to either work part time there or in this one's case, she was full time there before she came to the ER.

Q. Have you overseen any of these nurses that you know who have treated patients in -- at a jail or a correctional setting?

A. Only in the sense of being in the emergency room while I'm the physician there. I have not supervised their work in the jail.

Q. And you've never treated a patient who's in jail.

A. Not while they're in jail. . . .

Q. Are you familiar with the standard of care that applies to nurses in the emergency department?

A. Yes.

Q. And would that be the same standard of care that would apply in the jail setting?

A. I believe yes.

Q. And how so?

A. Well, we take an oath in terms of giving patient care, and so the decision of whether it's -- just because somebody's in jail makes no difference. And I know from my many years of practice, the President of the United States would get the same care as anybody coming in, you know.

Plaintiff's counsel later asked Dr. Perlaky a series of questions. Summarizing his testimony, Dr. Perlaky said:

Q. Dr. Perlaky, I am going to shorten my 11 page list of questions to one; and I want to ask you about how you reached the overall conclusions that you have reached and what those conclusions were.

Have you released -- reached conclusions about the causes and effects of Mr. Higgins['] injuries?

A. Yes.

Q. Are your opinions based on your experience as an emergency room physician at hospitals in the Chattanooga area?

A. Yes.

Q. Are your opinions based on working with and supervision of nurses and other doctors?

A. Yes.

Q. Are your opinions based on your review of the standards applicable to physicians, nurses, and correctional institutions?

A. Yes.

Q. Do you have an opinion about whether Correct Care Solutions and its nurses, and CoreCivic and its employees acted with less than ordinary or reasonable care or, or failed to act with it?

A. Yes.

Q. What is -- what are those opinions based on what you told us today and you've told us in previous written statements which are exhibits to this hearing?

A. Okay. Well, first off, a patient with a history of seizures, to begin with, should not have been in a top bunk. And, you know, we see the obvious injuries that happened as a result of this fall. And second, the question of would he have had the seizure in the first place if he had been on this seizure medications, that's an issue. And thirdly is the care that he is received from the time he started seizing. The fact that it took 81 minutes to get EMS involved is a concern.

EMS should have been called right away, especially on noting, you know, the fact that he had fallen more than three feet -- the fact that he was continuing to seize, and in fact seizing so long that they had time to make phone calls and everything. But, you know -- and it's like obviously critical time was lost, and ultimately he would have died without intervention -- and he cardiac arrested and they had to do CPR. So, you know, it's like that speaks volume as to the serious nature of his injuries and how quickly he was going downhill. So there's a big opportunity for improvement in what happened in terms of his care.

Q. To a reasonable degree of medical certainty, is it more likely than not that their conduct -- that is, the conduct of the two organizations and their respective nurses and employees was the cause and effect of Mr. Higgins' injuries?

A. Yes.

In July 2022, the Trial Court entered an order granting summary judgment in Defendants' favor. The Trial Court incorporated portions of its oral ruling into its written order. In its written final order, the Trial Court stated, as relevant:

1. The actions of Hamilton County jail employees sound in ordinary negligence, not health care liability, and are barred by the applicable one-year statute of limitations.

Higgins contended that the jail personnel who transported Mr. Higgins from the Hamilton County Jail to Silverdale acted as orderlies, thus the claim that these employees transported neither Mr. Higgins's medical records nor medications sounded in healthcare liability. The Court, however, determined that the jail employees acted as couriers of information, and that

any failing in that regard would constitute a general negligence claim, not a health care liability claim, and these claims were subject to dismissal as time-barred.

The Court further finds that, to the extent that there was a failure of the County employees as couriers, the proof demonstrated that CCS would have conducted its own independent medical assessment rather than relying entirely on the County's medical documents and any potential County liability was broken at that point. The Court incorporates by references its findings set forth on pages 93 and 94 of the Transcript.

2. There is no basis upon which to hold CoreCivic liable for the conduct of CCS. There also is no basis upon which to hold Hamilton County liable for the conduct of CoreCivic or CCS.

CoreCivic and CCS were independent contractors, and third parties cannot be held vicariously liable for their conduct. The Court incorporates by reference its findings set forth on page 65 of the Transcript.

3. All of Higgins's claims against CoreCivic and Hamilton County are barred by the applicable one-year statute of limitations.

The Tennessee Health Care Liability Act does not apply to CoreCivic and Hamilton County because they are not healthcare providers as defined by the Act. Also, the Act does not extend the one-year statute of limitations that governs these non-healthcare liability claims in any manner. As a result, summary judgment is warranted on all Higgins's claims against CoreCivic and Hamilton County, including his claims for gross negligence, intentional infliction of emotional distress, negligence, negligence per se, res ipsa loquitur, and reckless conduct. The Court incorporates by reference its findings set forth on page 65 of the Transcript.

4. CoreCivic is not liable for Higgins's fall from the bunk bed because of an intervening, superseding cause.

Higgins contends that he fell from the top bunk to the floor during his incarceration at Silverdale on April 22, 2017, because he was not provided anti-seizure medication and because he was not placed on a bottom bunk. The evidence establishes that these were not the responsibilities of CoreCivic. CoreCivic was not responsible for providing medications to inmates who were incarcerated at Silverdale or for providing bottom bunk passes to inmates who were incarcerated at Silverdale. CCS was responsible for providing medications and issuing bottom-bunk passes, when warranted, to Silverdale inmates. Therefore, to the extent that Higgins attempts to hold CoreCivic responsible for his fall from the top bunk to the floor, the actions of CCS would constitute an intervening, superseding cause of any claimed injuries. As a result, summary judgment is warranted on any claim that CoreCivic bears liability for Higgins's fall from the top bunk to the floor

during his incarceration at Silverdale on April 22, 2017. The Court incorporates by reference its findings set forth on pages 65 through 66 of the Transcript.

5. Higgins cannot hold CoreCivic liable for his fall from the top bunk, or for the treatment that Higgins received following the fall, because CoreCivic did not engage in any wrongdoing.

The undisputed evidence in the record establishes that CoreCivic personnel arrived on the scene within a few minutes and immediately began to render appropriate aid to Higgins. As a result, summary judgment is warranted on any claim that CoreCivic bears liability for Higgins's fall from the top bunk to the floor during his incarceration at Silverdale on April 22, 2017, or that CoreCivic bears liability for the treatment that Higgins received following the fall on April 22, 2017. The Court incorporates by reference its findings set forth on page 66 of the Transcript.

6. The Defendants are not liable for any injuries Higgins sustained during transport from Erlanger Medical Center.

Higgins was released from Erlanger to Silverdale on April 28, 2017. He contends that the two correctional officers did not properly restrain him and did not properly escort him into the transport van, causing him to trip and hit his head. He also contends that the transport van was not appropriately sanitized and that the correctional officers did not appropriately assist him after he tripped and fell in the transport van. Ultimately, Higgins contends that the incident in the transport van caused an infection to the site of a prior surgery and thus required additional surgical procedures. The Court finds that summary judgment should be entered on Higgins's claims against Defendants regarding their handling of his transport on April 28, 2017. CoreCivic disclosed a corrections expert who testified that Higgins was restrained in an appropriate manner, that the transport was performed in an appropriate manner, and that Defendants were not responsible for Higgins's fall in the transport van. CoreCivic also disclosed a neurosurgeon who testified that the fall in the transport van did not cause Higgins any injury. Higgins did not present any competent expert testimony to the contrary. The appropriate manner in which to restrain an inmate and the cause of an infection and neurosurgery are not within the common knowledge of laymen. Higgins needed to present expert testimony on these topics and did not, rendering summary judgment on Higgins's claims regarding his transport from Erlanger to Silverdale warranted.

Further, there is no evidence in this lawsuit that CCS or Hamilton County bore any responsibility whatsoever for Higgins's transport. Thus, there is no genuine issue of material fact on this issue, and CCS and Hamilton County are entitled to judgment as a matter of law.

The Court incorporates by reference its findings set forth on pages 51 through 54 of the Transcript.

7. Higgins is not entitled to recover for injuries that lack competent expert proof.

Higgins claims numerous injuries from his fall from the top bunk at Silverdale, including a post-fall surgery and associated injuries, post-traumatic stress disorder, traumatic brain injury, an increase in seizure activity, chronic pain, and future medical treatment. Whether these injuries and treatment were caused by Higgins's fall is not a matter of common knowledge. Although Higgins has presented testimony from emergency-medicine expert Dr. Steven Perlaky, Dr. Perlaky's opinions are insufficient to establish a causal connection for these injuries. Dr. Perlaky is an emergency-medicine physician, and as such, he is not qualified to offer opinions about the necessity of neurosurgery, increases in seizure activity, post-traumatic stress disorder, traumatic brain injury, chronic pain from a neurologic condition, or other future injuries or treatment. Accordingly, Higgins's evidence is insufficient at the summary-judgment stage to establish a causal connection between the alleged negligence and these injuries. Higgins has not created a genuine dispute of material fact and the Defendants are entitled to judgment as a matter of law with respect to these injuries. The Court incorporates by reference its findings set forth on pages 59 through 62 of the Transcript.

8. Higgins's evidence is insufficient to establish the essential elements of his remaining claims against CCS because his expert is not competent to testify about the applicable standard of care.

Higgins alleges that CCS nursing staff failed to administer seizure medication and provide a bottom-bunk pass after Higgins's initial intake assessment. Higgins further alleges CCS nursing staff caused or contributed to a delay of 81 minutes between the time of Higgins's fall and the arrival of an ambulance. Higgins and CCS are in agreement that these claims against CCS constitute a health care liability action under the Tennessee Health Care Liability Act, but CCS contends that Higgins's proof is insufficient to establish the essential standard-of-care elements for these claims because Higgins lacks competent expert proof under Tennessee Code Annotated § 29-26-115 and Tennessee Rules of Evidence 702-03.

CCS' argument is well-taken. It is undisputed that Higgins's proffered expert, Dr. Steven Perlaky, is an emergency-medicine physician who has never worked or been on staff in a correctional setting, has never treated a patient in a correctional setting, has never taught a class on correctional medicine, has never received training to work in a correctional setting, has never supervised nursing care delivered in a correctional setting,

and has never written any articles, books, or other literature about correctional medicine. While an emergency-medicine physician's experience may be relevant to some issues that could arise in a correctional setting, managing an acute seizure in the emergency-department setting is different than assessing and treating a chronic condition after an intake screening in a correctional setting, which requires—among other things—balancing the needs of other inmates for bottom-bunks and assessing the reliability of information provided by an inmate. Accordingly, Dr. Perlaky's experience does not make his expert testimony relevant to the claims concerning the bottom-bunk pass and administering seizure medication after an initial intake assessment in a correctional setting. Dr. Perlaky is not qualified to render an opinion for these issues in the correctional setting, and his opinion on these issues is inadmissible under Tennessee Code Annotated § 29-26-115 and Tennessee Rule of Civil Procedure 702.

Higgins argues in response that expert testimony is not required under the common-knowledge exception; however, the common-knowledge exception does not apply to these claims. These allegations against CCS nursing staff concern medical assessments and medical decisions that fall outside the scope of common knowledge. Higgins also references negligence per se; however, negligence per se does not remove the requirement for a plaintiff to prove a health care liability action with expert proof. *See* Tenn. Code Ann. § 29-26-115(c).

Similarly, Higgins alleges an 81-minute delay after Higgins's fall before an ambulance arrived. The decision by medical staff concerning when to contact emergency medical services involves medical judgment and is not subject to the common-knowledge exception. Higgins has not provided any expert proof from any correctional or medical expert to establish when CCS staff should have contacted emergency medical services. Therefore, Higgins has not established a genuine issue of material fact for trial on the delay claim.

Further, it is undisputed that Higgins's expert, Dr. Perlaky, did not examine Higgins or review any documents or medical records from CCS or Silverdale where the fall occurred. Accordingly, Dr. Perlaky's opinions lack an adequate basis and are not admissible under Tennessee Rule of Civil Procedure 703.

Because Higgins lacks admissible expert proof to establish the standard of care and any deviations therefrom concerning the issuance of a bunk pass, the administration of seizure medication after the initial intake screening, and the alleged delay in contacting emergency medical services after the fall, Higgins's proof is insufficient to establish the essential elements of his claims against CCS under Tennessee Code Annotated § 29-

26-115. Thus, Higgins has not established the existence of a genuine issue of material fact for trial, and CCS is entitled to judgment as a matter of law. The Court further incorporates its rulings set forth on pages 68, 70 through 71, 88 through 90, and 98 of the Transcript.

9. Higgins’s evidence is insufficient to establish a Res Ipsa Loquitur claim.

For the reasons stated above, Higgins’s claims are not subject to the common-knowledge exception, and he has not presented competent expert proof in support of his claims. Because the claims are not subject to the common-knowledge exception and because Higgins has not presented competent expert proof, Higgins’s evidence fails to establish a genuine dispute of material fact, and the Defendants are entitled to judgment as a matter of law on the res ipsa loquitur claim. The Court incorporates by reference its findings set forth on pages 97 through 98 of the Transcript.

Therefore, it is **ORDERED** that judgment be entered in favor of the Defendants and that this case be dismissed with prejudice. Costs are taxed to Plaintiff for which execution may issue if necessary.

Plaintiff timely appealed to this Court.

Discussion

Plaintiff raises numerous issues on appeal. We restate and consolidate these into the following dispositive issues: 1) whether the Trial Court exercised independent judgment; 2) whether the Trial Court erred in granting summary judgment in favor of CCS on Plaintiff’s health care liability claim based on a lack of expert proof; and 3) whether the Trial Court erred in granting summary judgment in favor of CoreCivic and Hamilton County on Plaintiff’s remaining non-health care liability claims based on the statute of limitations.

This matter was decided by summary judgment. Regarding the standard of review for cases disposed of by summary judgment, the Tennessee Supreme Court has instructed:

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Tenn. R. Civ. P. 56.04. We review a trial court’s ruling on a motion for summary judgment de novo, without a presumption of correctness. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *see also Abshure v. Methodist Healthcare—Memphis Hosp.*, 325 S.W.3d 98, 103 (Tenn. 2010). In doing so, we make a

fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. *Estate of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013) (citing *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 471 (Tenn. 2012)).

[I]n Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by 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. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. [v. Zenith Radio Corp.]*, 475 U.S. [574,] 586, 106 S.Ct. 1348 [89 L.Ed.2d 538 (1986)]. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the

nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

Rye v. Women's Care Ctr. of Memphis, M PLLC, 477 S.W.3d 235, 250, 264-65 (Tenn. 2015).

We first address whether the Trial Court exercised independent judgment. Plaintiff cites various examples of what, in his view, shows a lack of independent judgment on the part of the Trial Court. He states that the Trial Court failed to consider his motion for a statement of legal grounds; that the Trial Court failed in its order to sufficiently delineate the facts or law of its decision; that the Trial Court did not state the rationale for its conclusion that this is not a health care liability action; that the Trial Court did not analyze the doctrines of common knowledge and *res ipsa loquitur*; that the Trial Court forgot about Plaintiff's negligence per se claim; that the Trial Court only made token changes to a proposed order submitted by defense counsel; that the Trial Court failed to give a reasoned explanation for what the qualifications of an expert witness in this case must be and why expert proof is needed at all; and that the Trial Court did not correct misstatements by defense counsel about which party has the burden of proof on a motion for summary judgment.

The Tennessee Supreme Court has stated that “[p]roviding reasons for a decision reinforces the legitimacy of the legal process which, in turn, promotes respect for the judicial system.” *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 313 (Tenn. 2014) (citation omitted). The High Court also explained:

The essential purposes of courts and judges are to afford litigants a public forum to air their disputes, *Childress v. Bennett*, 816 S.W.2d 314, 315 (Tenn. 1991), and to adjudicate and resolve the disputes between the contending parties, *State ex rel. Stall v. City of Knoxville*, 211 Tenn. 428, 434, 365 S.W.2d 433, 435 (1963). To carry out these purposes, judges must arrive at their decisions by applying the relevant law to the facts of the case. *Summers v. Thompson*, 764 S.W.2d 182, 190 (Tenn. 1988) (Drowota, J., concurring) (quoting *Scott v. Marley*, 124 Tenn. 388, 395, 137 S.W. 492, 493 (1911)). Because making these decisions is a “high judicial function,” see *Nashville, Chattanooga & St. Louis Ry. Co. v. Price*, 125 Tenn. 646, 649, 148 S.W. 219, 220 (1911), a court's decisions must be, and must appear to be, the result of the exercise of the trial court's own judgment, *Summers v. Thompson*, 764 S.W.2d at 190 (Drowota, J., concurring) (quoting *Perkins v. Scales*, 2 Tenn. Cas. (Shannon) 235, 237 (1877)). See also *Delevan-Delta Corp. v. Roberts*, 611 S.W.2d [51,] 53 [(Tenn. 1981)] (stating that trial judges

should carefully examine findings and conclusions prepared by counsel to “establish that they accurately reflect his [or her] views and conclusions, and not those of counsel”).

Smith, 439 S.W.3d at 312-13. The Tennessee Supreme Court identified two conditions used historically to determine whether entry of a party-prepared order is consistent with a trial court’s responsibility to exercise independent judgment: “First, the findings and conclusions must accurately reflect the decision of the trial court. Second, the record must not create doubt that the decision represents the trial court’s own deliberations and decision.” *Id.* at 316 (citations omitted).

The Trial Court attached to its final judgment a transcript of parts of its oral ruling from the hearing. In its oral ruling, the Trial Court stated, in part:

THE COURT: Listen, what I intend to do -- the reason I’m going in this backwards fashion is, you know, I’m still going to grant summary judgment, if I grant it on these other basis regardless, because there will be a secondary basis for summary judgment. I don’t intend to just leave them untouched. That way if it goes up on appeal, if I’m wrong on one thing, maybe I’ll get lucky and be right on something else. But it makes sense to rule on all grounds, and that’s what I intend to do.

So let’s hear your entire statute of limitations argument.

MR. WELBORN [counsel for CoreCivic]: CoreCivic is not a healthcare provider. We’re talking about security guards, security personnel. So under the case law we cited, they didn’t get the benefit of the extension of the healthcare liability act, so it has to be brought. . . .

THE COURT: He’s arguing vicarious responsibility.

MR. WELBORN: And it just doesn’t apply here.

THE COURT: I do not believe it applies here. And CoreCivic is a little differently situated from the county and in that CoreCivic also, there is no theory under which CoreCivic was supposed to be transporting records from Hamilton County jail over to Silverdale.

So the Court finds the following: Number one, there is no vicarious responsibility, and the Court finds as a matter of law there is no vicarious responsibility. The Court finds that there is no fact concerning the CoreCivic’s responsibilities being nonmedical related, which makes this purely a negligence claim against CoreCivic. And, therefore, the claims against CoreCivic are barred by the statute of limitations to the extent that

there are any claims that survive the statute of limitations against CoreCivic relating to the bunk pass, et cetera.

The Court believes that there is a superseding intervening cause in that anything CoreCivic could have been responsible for, Correct Care Solutions made all decisions with regard to medications and bunk passes, not CoreCivic. And, therefore, for all those reasons, as well as the earlier reasons the Court stated with regard to the van transport.

And I will make one other finding. The only facts in the record concerning the delay from the time he fell until the time that he ultimately received treatment at Erlanger hospital was never related to CoreCivic. In other words, the only facts in this case is that CoreCivic was there within one minute of his falling from that bunk, called out for emergency services, et cetera, and there aren't even allegations that CoreCivic is responsible for anything that happened as a result of the delay. And so, therefore, CoreCivic is granted summary judgment.

THE COURT: Thank you. Okay.

The Court does believe that at a minimum, with regard to the prescriptions for antiseizure medication, a correctional setting is a completely different setting than an emergency room. The Court does not believe that Dr. Perlaky can speak to what is necessary in a correctional setting. Therefore, with regard to the antiseizure medication, if at the time he presented he was seizing at any point in time, the Court may determine differently, because I still don't see the difference between somebody seizing in an emergency room and someone seizing in a facility. I know that's not what happened. My point is something, just because something happened at a correctional facility, it doesn't mean 100 percent of the time a correctional facility can speak to that. And I was just using that as an example. If he was seizing in the facility, someone who is an expert in emergency medicine could testify about an emergency situation that occurred like that. But that's not what happened here. This gentleman was not seizing at the time. He was simply there for his examination, his initial assessment. And the Court does not believe that Dr. Perlaky is in a position to make that decision.

Also, why I think Dr. Perlaky is eligible to give testimony regarding the need of lowered beds in an emergency room, where as long as there is a bed it can be lowered, that's not the same thing in a correctional facility where decisions have to be made about whether did -- about the reliability not only of the information being given, but whether or not this person

actually suffers from seizure, et cetera, and what the needs of the other people are in the facility for bottom bunks.

Therefore, the Court will find that Dr. Perlaky is not qualified to render an opinion in a correctional setting with regard to a lower bunk.

As a further basis, the Court also recalled once counsel pointed out that the fact that Dr. Perlaky had not reviewed -- not only has he not seen the patient, he has not even reviewed any of the patient's medical records. And, therefore, the Court believes that he does not even have an adequate basis upon which to state those opinions. And for all of those reasons, the Court finds that Correct Care Solutions is entitled to summary judgment.

The transcript reflects that the Trial Court actively considered the issues, questioned counsel, and made up its own mind. The Trial Court did not overlook or pass on any issues. The Trial Court's written judgment is detailed and reflects in substance what is contained in the transcript of its oral ruling. At the hearing, the Trial Court afforded counsel ample opportunity to raise any other issues which counsel believed were not adequately addressed. As for Plaintiff's other examples of the Trial Court's alleged lack of independence, these tend to be more in the nature of alleged error. Nothing in the record suggests that the Trial Court's decision was not of its own making. In sum, the Trial Court performed its "high judicial function." We find that the Trial Court exercised independent judgment.

We next address whether the Trial Court erred in granting summary judgment in favor of CCS on Plaintiff's health care liability claim based on a lack of expert proof. With respect to a plaintiff's evidentiary burden in a health care liability action, the Health Care Liability Act ("the Act") provides:

- (a) In a health care liability action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
 - (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.
- (b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession

or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection (b) when it determines that the appropriate witnesses otherwise would not be available.

(c) In a health care liability action as described in subsection (a), there shall be no presumption of negligence on the part of the defendant; provided, that there shall be a rebuttable presumption that the defendant was negligent where it is shown by the proof that the instrumentality causing injury was in the defendant's (or defendants') exclusive control and that the accident or injury was one which ordinarily doesn't occur in the absence of negligence.

(d) In a health care liability action as described in subsection (a), the jury shall be instructed that the claimant has the burden of proving, by a preponderance of the evidence, the negligence of the defendant. The jury shall be further instructed that injury alone does not raise a presumption of the defendant's negligence.

Tenn. Code Ann. § 29-26-115 (West eff. April 23, 2012).

Plaintiff argues that the Trial Court wrongly disqualified his expert proof at the summary judgment stage. *See Stovall v. Clarke*, 113 S.W.3d 715, 725 (Tenn. 2003) (“On appeal, Dr. McCain argues that Dr. Tuteur was not qualified in the field of cardiology, that he was not competent to testify about the applicable standard of care, and that his statements were vague and conclusory. These arguments, however, take issue primarily with Dr. Tuteur’s qualifications and the *weight* that should be given to his opinions. . . . [T]hese are issues for trial and not for summary judgment.”). Plaintiff also notes that issues of credibility are not resolvable at the summary judgment stage. However, while Plaintiff is correct in that the weighing of evidence and the assessment of credibility are matters for trial, a trial court still has the role of gatekeeper to determine the competency and admissibility of expert proof. The Tennessee Supreme Court has stated:

In its role as a gatekeeper, the trial court is to determine (1) whether the witness meets the competency requirements of Tennessee Code Annotated section 29-16-115(b) and, (2) whether the witness’ testimony meets the admissibility requirements of Rules 702 and 703. The trial court is not to decide how much weight is to be given to the witness’ testimony. Once the minimum requirements are met, any questions the trial court may have about the *extent* of the witness’s knowledge, skill, experience, training,

or education pertain only to the weight of the testimony, not to its admissibility.

Shipley v. Williams, 350 S.W.3d 527, 551 (Tenn. 2011) (citations omitted). “A trial court abuses its discretion when it disqualifies a witness who meets the competency requirements of section 29-16-115(b) and excludes testimony that meets the requirements of Rule 702 and 703.” *Shipley*, 350 S.W.3d at 552.¹ As this Court has explained:

This case involves two interrelated issues: the exclusion of Plaintiff’s causation expert and the grant of summary judgment following the exclusion. A trial court’s decision to exclude an expert is reviewed for an abuse of discretion. *Boyd v. BNSF Ry. Co.*, 596 S.W.3d 712, 724 (Tenn. Ct. App. 2018). “Generally, questions pertaining to the qualifications, admissibility, relevancy, and competency of expert testimony are matters left to the trial court’s discretion. We may not overturn the trial court’s ruling admitting or excluding expert testimony unless the trial court abused its discretion.” *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 273 (Tenn. 2005) (internal citations omitted). “A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.” *Fisher v. Hargett*, 604 S.W.3d 381, 395 (Tenn. 2020) (quoting *Harmon v. Hickman Cmty. Healthcare Servs., Inc.*, 594 S.W.3d 297, 305-06 (Tenn. 2020)).

Jackson v. Thibault, No. E2021-00988-COA-R3-CV, 2022 WL 14162828, at *3 (Tenn. Ct. App. Oct. 25, 2022), *no appl. perm. appeal filed*.

¹ Tenn. R. Evid. 702 provides: “If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.” Tenn. R. Evid. 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

In the case at bar, Plaintiff's expert proof suffers from a major flaw—it fails to specifically contend with medical care in a correctional setting. This is significant because Plaintiff was injured in prison and the alleged negligent medical care was delivered in a correctional setting. Dr. Perlaky, the emergency room physician testifying as an expert for Plaintiff, essentially said when asked about the standard of care for nurses in a correctional setting that medical care is medical care regardless of the setting. However, that is too generalized and ignores the particular challenges of the prison environment. The conditions under which medical care is delivered in prison are quite different from those in a hospital. In prison, there are ever-present and justifiable concerns about security. There are barriers to free movement. There may well be a relative lack of equipment or drugs, or at least equipment or drugs are not as readily accessible as they would be at a hospital. While Dr. Perlaky reviewed certain regulations, he has not completed training on health care in a correctional setting; he has never written or taught on medicine in a correctional setting; and he has not served on staff at a prison. An expert witness in a health care liability case need not have direct or firsthand experience in the defendant's community. *See Shipley*, 350 S.W.3d at 552-53. Nevertheless, it is clear from the record that Dr. Perlaky's expertise is not in correctional medicine, and the specific issues of this case implicate the unique considerations of health care in a correctional setting.² Plaintiff's allegations implicate screening; the assignment of a bed; the provision of drugs; and reaction time to an incident. Dr. Perlaky could not address these special correctional considerations because he lacks experience or background with medicine in a correctional setting, "the community in which the defendant practices. . . ." Tenn. Code Ann. § 29-26-115.

In view of these critical shortfalls, we disagree with Plaintiff that the Trial Court erred by disqualifying his expert proof at the summary judgment stage. That was an appropriate point at which to decide the issue. The Trial Court did not need to and did not weigh Plaintiff's expert proof. Instead, the Trial Court performed its gatekeeping function to assess the competency and admissibility of the expert proof. Dr. Perlaky's lack of correctional care experience was not a question of credibility or weight that could only be properly addressed at trial. It was a threshold question amenable to determination at the summary judgment stage.

Under *Rye*, the standard for summary judgment in Tennessee is akin to the federal standard, which means the non-moving party must create a genuine issue of disputed fact in response to a properly-supported motion for summary judgment in order to withstand the motion. Here, CCS filed a properly-supported motion for summary judgment. In response, Plaintiff failed to present competent and admissible expert proof to support his

² Similarly, another expert of Plaintiff's, counselor Audrey Canaff, lacks a background in correctional medicine. Plaintiff does not rely on Canaff in his appellate briefs.

health care liability claim. The Trial Court did not apply an incorrect legal standard; did not reach an illogical or unreasonable decision; and did not base its decision on a clearly erroneous assessment of the evidence. In short, the Trial Court did not abuse its discretion.

Plaintiff contends that even if he failed to present competent or admissible expert proof, no expert proof was needed. He says that the negligence in this case is clear. Plaintiff invokes the common knowledge exception and *res ipsa loquitur*. “Courts determine on a case-by-case basis whether expert testimony is necessary in a health care liability case.” *Jackson v. Burrell*, 602 S.W.3d 340, 348 (Tenn. 2020). When the subject matter is known by laymen, the common knowledge exception means “that the plaintiff need not produce expert testimony to prove the elements set forth in section 29-26-115(a) of the Act—the standard of care applicable to the defendant, a deviation from that standard of care, and a resulting injury that would not have otherwise occurred.” *Id.* at 346. Our Supreme Court has explained the common knowledge exception thusly:

Medical malpractice cases fitting into the “common knowledge” exception typically involve unusual injuries such as a sponge or needle being left in the patient’s abdomen following surgery or where the patient’s eye is cut during the performance of an appendectomy. *See [German v.] Nichopoulos*, 577 S.W.2d [197,] 203 [(Tenn. Ct. App. 1978)] (citing *Harrison v. Wilkerson*, 56 Tenn.App. 188, 405 S.W.2d 649 (1966); *Meadows v. Patterson*, 21 Tenn.App. 283, 109 S.W.2d 417 (1937)). Jurors in those cases are permitted to infer negligence based upon a common-sense understanding that such injuries do not ordinarily occur unless the attending physician or health-care provider was somehow negligent. The critical question becomes whether the instrumentality causing the injury was under the defendant’s exclusive control when the injury occurred. *Harrison*, 405 S.W.2d at 651; *Meadows*, 109 S.W.2d at 419-20.

Seavers v. Methodist Med. Cntr. of Oak Ridge, 9 S.W.3d 86, 92 (Tenn. 1999). Meanwhile, “*res ipsa loquitur*³ is a form of circumstantial evidence that permits, but does not compel, a jury to infer negligence from the circumstances of an injury.” *Id.* at 91 (footnote in original but renumbered) (citations omitted).

Tennessee law is that only obvious acts of medical negligence are amenable to the common knowledge exception. One such example would be cutting a patient’s eye while performing an appendectomy, the eye being nowhere near the appendix. In that scenario, there is no need for specialized medical knowledge. The negligence in question truly speaks for itself. In the present case by contrast, there are multiple aspects of the care at

³ The term “*res ipsa loquitur*,” translated literally from Latin, means “the thing speaks for itself.”

issue that are not within a layperson’s knowledge. These issues include what exactly caused Plaintiff’s fall off the top bunk; what were the long-term medical repercussions for Plaintiff from his fall; and what sort of medication if any should Plaintiff have been given. The answers to these and other questions implicate various areas of expertise—knowledge of epilepsy, neurology, and medical care in a prison setting. It is not at all obvious that CCS was negligent in its care of Plaintiff, especially in view of the unique conditions attendant to correctional care. For the exact same reasons, *res ipsa loquitur* has not been established—‘the thing does not speak for itself.’ Plaintiff’s health care liability claim required expert proof. Because competent and admissible expert proof was necessary to sustain Plaintiff’s health care liability claim and none was presented at the summary judgment stage in response to a properly-supported motion for summary judgment, we affirm the Trial Court’s grant of summary judgment to CCS on Plaintiff’s health care liability claim.

The final issue we address is whether the Trial Court erred in granting summary judgment in favor of CoreCivic and Hamilton County on Plaintiff’s remaining non-health care liability claims based on the statute of limitations.⁴ CoreCivic and Hamilton County argue that Plaintiff’s non-health care liability claims are time-barred. CoreCivic points to the one-year statute of limitations applicable to injuries to the person. *See* Tenn. Code Ann. § 28-3-104(a)(1)(A). Likewise, claims against governmental entities “must be commenced within twelve (12) months after the cause of action arises.” Tenn. Code Ann. § 29-20-305(b) (West eff. May 5, 2011). For his part, Plaintiff argues that this is a health care liability action and he should benefit from the extension of the statute of limitations on his other claims. He says that even though he alleged multiple causes of action, only one statute of limitations applies.⁵ In addition, Plaintiff asks: “What are the consequences of the trial court’s not considering and ruling on all of the issues in this case, in particular negligence per se because of the failure to follow the standards for cor[r]ectional institutions, gross negligence, negligent infliction of emotional distress, recklessness, and vicarious liability?”

⁴ CoreCivic cites *Taylor v. Miriam’s Promise*, No. M2017-01908-COA-R3-CV, 2019 WL 410700 (Tenn. Ct. App. Jan. 31, 2019), *perm. app. denied June 20, 2019*, for the proposition that different statutes of limitations apply to different causes of action when multiple causes of action are raised in conjunction with a health care liability claim. However, the Tennessee Supreme Court has designated *Taylor* “not for citation.” We may not and do not rely on *Taylor*.

⁵ Plaintiff filed a motion for additional briefing on the Tennessee Supreme Court’s recent opinions in *Gardner v. St. Thomas Midtown Hosp.*, No. M2019-02237-SC-R11-CV, --- S.W.3d ---, 2023 WL 4630706 (Tenn. July 20, 2023) and *Ultsch v. HTI Memorial Hosp. Corp.*, No. M2020-00341-SC-R11-CV, --- S.W.3d ---, 2023 WL 4630894 (Tenn. July 20, 2023). We denied the motion but reviewed the opinions, which discuss the common law operation of law exception and the Act’s statute of limitations prevailing over the common law. We find these opinions inapposite and unavailing to Plaintiff.

As to what constitutes a health care liability action, the Act provides:

(1) “Health care liability action” means any civil action, including claims against the state or a political subdivision thereof, alleging that a health care provider or providers have caused an injury related to the provision of, or failure to provide, health care services to a person, regardless of the theory of liability on which the action is based;

(b) Health care services to persons includes care by health care providers, which includes care by physicians, nurses, licensed practical nurses, pharmacists, pharmacy interns or pharmacy technicians under the supervision of a pharmacist, orderlies, certified nursing assistants, advance practice nurses, physician assistants, nursing technicians and other agents, employees and representatives of the provider, and also includes staffing, custodial or basic care, positioning, hydration and similar patient services.

(c) Any such civil action or claim is subject to this part regardless of any other claims, causes of action, or theories of liability alleged in the complaint; provided, that no provision of this part shall apply to claims against the state to the extent that such provision is inconsistent with or conflicts with the Tennessee Claims Commission Act, compiled in title 9, chapter 8, part 3.

Tenn. Code Ann. § 29-26-101 (West eff. April 24, 2015). There is a one-year statute of limitations for health care liability actions, *see* Tenn. Code Ann. § 29-26-116(a)(1), with a 120-day extension if notice requirements are met. *See* Tenn. Code Ann. § 29-26-121(a)(3).

Plaintiff’s claims against Hamilton County and CoreCivic accrued on April 22, 2017 when his fall occurred or no later than the transport incident on April 28, 2017. In either event, Plaintiff filed his complaint on May 15, 2018, more than one year later and thus beyond the statute of limitations. Plaintiff is correct that causes of action asserted in conjunction with health care liability are brought together with it. However, Plaintiff’s only health care liability claim is against CCS, the sole health care provider in this case. Plaintiff raises theories of vicarious liability and non-delegable duty, but the fact remains that neither CoreCivic nor Hamilton County is a health care provider. These two entities did not provide any health care to Plaintiff. One handles prison administration and security while the other is a county. They are not hospitals or doctors or medical technicians of any sort. Under the Act, only health care providers are subject to a health care liability action. Because Plaintiff did not file his claims against CoreCivic and Hamilton County within the applicable one-year statute of limitations, his claims against them are time-barred. The

Trial Court did not err in granting summary judgment to CoreCivic and Hamilton County. We affirm the judgment of the Trial Court in its entirety.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Jody Higgins, and his surety, if any.

D. MICHAEL SWINEY, CHIEF JUDGE