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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 22, 2023 Session

**ASHLEY DENSON EX REL. BOBBIE J. DENSON v. METHODIST
MEDICAL CENTER OF OAK RIDGE ET AL.**

**Appeal from the Circuit Court for Anderson County
No. C1LA0035 Ryan M. Spitzer, Judge**

No. E2023-00027-COA-R9-CV

This appeal arises from a health care liability action following the death of Ashley Denson from a cardiac event she suffered after being treated and released from Methodist Medical Center. Ms. Denson was unmarried and had two minor children at the time of her death. The statutorily-required pre-suit notice listed Ms. Denson’s mother, Bobbie J. Denson, as the claimant authorizing notice. The minor children were not identified anywhere in the notice. The subsequent complaint was filed by “ASHLEY DENSON, Deceased, by and through her Next Friend and Mother BOBBIE JO DENSON, and BOBBIE JO DENSON, Individually.” The body of the complaint lists, for the first time, Ashley Denson’s children, and states that Bobbie Denson “brings this action individually, and on behalf of Plaintiff, decedent’s surviving minor children ... as Grandmother and Legal Guardian.” The defendants filed motions to dismiss, challenging Bobbie Denson’s standing to bring the action and contending that the pre-suit notice failed to comply with the requirements of the Tennessee Health Care Liability Act.¹ The trial court initially granted the motions to dismiss but reversed course after the plaintiff filed a motion to reconsider. We hold that, although Grandmother has standing, the pre-suit notice does not comply with the requirements of the Tennessee Health Care Liability Act. The judgment of the trial court is ultimately affirmed in part and reversed in part.

**Tenn. R. App. P. 9 Appeal as of Right; Judgment of the Circuit Court
Affirmed in Part and Reversed in Part; Case Remanded**

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which THOMAS R. FRIERSON, II, J., joined. JOHN W. MCCLARTY, J., filed a separate dissenting opinion.

¹ The defendants also alleged that the plaintiff’s HIPAA authorization was not compliant. That issue is not before this Court.

Rachel Park Hurt, Knoxville, Tennessee, for the appellants, Methodist Medical Center of Oak Ridge and Covenant Health.

Jimmie C. Miller and Sydney B. Gilbert, Kingsport, Tennessee, for the appellant, Daren W. Cox, D.O.

R. Scott Durham and Andrew S. Roskind, Knoxville, Tennessee, for the appellant, Team Health, LLC.

Edward G. White, II and Joshua J. Bond, Knoxville, Tennessee, for the appellants, Larry Todd Justice, M.D., and Parkway Cardiology Associates, P.C.

Timothy R. Holton, Memphis, Tennessee, for the appellee, Ashley Denson ex rel. Bobbie J. Denson.

OPINION

I. BACKGROUND

Ashley Denson (“Decedent”) went to Methodist Medical Center (“Methodist”) on February 3, 2020, at 4:12 a.m., complaining of left anterior chest pain radiating down to her left arm. Decedent, who had a history of hypertension, underwent testing but was ultimately discharged at 7:26 a.m. Following her discharge, a cardiologist noted an abnormality in her electrocardiogram. Approximately one hour after she returned home, an ambulance was called to Decedent’s home, where she was found to be in cardiac arrest. She was transported back to Methodist, where it was determined that her left anterior descending artery was completely blocked. Decedent suffered a hypoxic brain injury and never regained neurological function. She was transitioned to comfort care and died on March 23, 2020.

Decedent had two minor children who were placed with their maternal grandmother, Bobbie Jo Denson (“Grandmother”), after Decedent’s death. Grandmother was named temporary custodian of the children. The custodial order from the Anderson County Juvenile Court states that Grandmother “shall have the authority to consent to any ordinary or necessary medical, surgical, hospital, educational, institutional, psychiatric, or psychological care pending further determination of the child’s/children’s custodial status by this Court.”

In January of 2021, Grandmother sent pre-suit notice letters to the defendants, which stated the following: “Name/Relationship of Claimant(s) Authorizing Notice: Bobbie Denson, Mother of Ashley Denson.” The pre-suit notice contains no reference whatsoever to Decedent’s two minor children. In the subsequently filed complaint, Grandmother asserted that she was bringing the lawsuit as Decedent’s mother and next friend and

individually. She further alleged, for the first time, that she was bringing the lawsuit “on behalf of . . . decedent’s surviving minor children . . . as Grandmother and Legal Guardian.” This was the first time the defendants became aware that Decedent had two minor children.

The defendants filed motions to dismiss pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure alleging, as relevant, that: (1) Grandmother lacked standing to bring the suit on behalf of her grandchildren because she was a custodian, not a legal guardian; (2) the pre-suit notice was deficient because it did not list the minor children as the claimants; and (3) the defendants were prejudiced because the statutory maximum value of the claim was higher for the minor children than for the Grandmother.² In response, Grandmother contended that she had authority to file the pre-suit notice and the lawsuit because she was the “legal guardian” of the children.³

The trial court held a hearing on the motions on December 20, 2021, and ultimately granted the motions. The trial court found as follows:

- (1) Under Tennessee Code Annotated section 20-5-106, the right to assert the claim in this wrongful death action belongs to the decedent’s minor children; as such, the decedent’s minor children are the actual claimants in this suit and Bobbie Jo Denson does not have standing under section 20-5-106 to bring this action;
- (2) [Tennessee Code Annotated] [s]ection 29-26-121(a)(2)(B) requires that the name and address of the claimant authorizing notice be provided to defendants in the pre-suit notice and, under the Opinion of the Court of Appeals in *Igou v. Vanderbilt Univ.*, 2015 Tenn. App. LEXIS 162 (Tenn. Ct. App. March 27, 2015), section 29-26-121(a)(2)(B) intends and requires that the pre-suit notice provides the defendants with notice of the identity of the actual claimant(s), or plaintiff(s), in the action;

² Tennessee Code Annotated section 29-39-102 states, in pertinent part:

- (c) If an injury or loss is catastrophic in nature, as defined in subsection (d), the seven-hundred-fifty-thousand-dollar amount limiting noneconomic damages, as set forth in subdivision (a)(2) and subsection (b) is increased to, but the amount of damages awarded as noneconomic damages shall not exceed, one million dollars (\$1,000,000).
- (d) “Catastrophic loss or injury” means one (1) or more of the following:
...
- (4) Wrongful death of a parent leaving a surviving minor child or children for whom the deceased parent had lawful rights of custody or visitation.

³ Initially, Grandmother contended that she was a legal guardian of the minor children, but she ultimately conceded that she was a custodian.

- (3) Plaintiff's pre-suit notice provided only that Bobbie Jo Denson was bringing suit on behalf of her deceased daughter, Ashley Denson. The notice did not contain any reference to the fact that Bobbie Jo Denson was not the actual claimant in this lawsuit and that she was pursuing the action on behalf of Ashley Denson's minor children; and
- (4) Pursuant to decisions rendered by the Appellate Courts of this jurisdiction, a plaintiff must strictly comply with the requirements of pre-suit notice enumerated in section 29-26-121(a)(2)(B).

Grandmother filed a motion to reconsider or clarify the trial court's order on January 14, 2022, contending that the trial court should have considered Rule 17 of the Tennessee Rules of Civil Procedure in making its ruling. Grandmother argued that Rule 17 allowed her to substitute the children as the real parties in interest. After a hearing, the trial court reversed its previous decision and denied the defendants' motions to dismiss. The trial court did not rely upon Rule 17 but rather found that the failure to list the children in the pre-suit notice was a "technical defect" and that Grandmother substantially complied with the pre-suit notice requirements. The trial court found that "there was little or no prejudice to the defendants." The trial court did not address the argument that Grandmother lacked standing.

The defendants filed motions for interlocutory appeal in April of 2022, and at various hearings on the motions, the issue of standing was raised again. At a hearing on November 30, 2022, the trial court determined that Grandmother, as temporary legal custodian, had standing to give the pre-suit notice and to file the lawsuit on behalf of the minor children and further determined that even if she did not have standing as a custodian, Rule 17 allowed for the substitution of the proper parties. The trial court also granted the defendants' motions for interlocutory appeal, and this Court subsequently granted the defendants' Application for Permission to Appeal an Interlocutory Order pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure.

II. ISSUES

We certified the following issues for appeal:

(1) Did Plaintiff Bobbie Jo Denson substantially comply with the pre-suit notice requirement regarding identification of the "claimant" pursuant to Tennessee Code Annotated § 29-26-121(a)(2)(B) when she did not indicate in the pre-suit notice that she was acting on behalf of Decedent's surviving minor children?

(2) Did Plaintiff Bobbie Jo Denson, as mother of Decedent and Grandmother and temporary legal custodian of the surviving minor children pursuant to a Juvenile Court order, have standing to give the pre-suit notice and file the complaint in this case?

III. STANDARD OF REVIEW

The Tennessee Supreme Court has held that Rule 12.02(6) of the Tennessee Rules of Civil Procedure is the proper mechanism to challenge a plaintiff's compliance with Tennessee Code Annotated section 29-26-121. *Myers v. Amisub (SFH), Inc.*, 382 S.W.3d 300, 307 (Tenn. 2012). This Court reviews such questions of law *de novo*, with no presumption of correctness. *Id.* (citing *Graham v. Caples*, 325 S.W.3d 578, 581 (Tenn. 2010)). The same standard of review applies to issues of standing and interpretation of statutes. *Blackburn v. Blackburn*, 270 S.W.3d 42, 47 (Tenn. 2008); *State v. Crank*, 468 S.W.3d 15, 21 (Tenn. 2015). "When the statutory language is clear and unambiguous, we must apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the statute's application." *Eastman Chemical Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004).

IV. ANALYSIS

The first issue certified is whether Grandmother substantially complied with the pre-suit notice requirement regarding identification of the "claimant" pursuant to Tennessee Code Annotated section 29-26-121(a)(2)(B) when she did not indicate in the pre-suit notice that she was acting on behalf of Decedent's surviving minor children. It is undisputed that the pre-suit notice provided by Grandmother states the following: "Name/Relationship of Claimant(s) Authorizing Notice: Bobbie Denson, Mother of Ashley Denson." The notice contains no reference whatsoever to Decedent's two minor children.

We begin with an examination of Tennessee's wrongful death statutes, the purpose of which "is to provide 'for the continued existence and passing of the right of action of the deceased, and not for any new, independent cause of action'" for survivors. *Beard v. Branson*, 528 S.W.3d 487, 499 (Tenn. 2017) (quoting *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 598 (Tenn. 1999)). Tennessee's wrongful death statute provides:

The right of action that a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by the person's death but shall pass to the person's surviving spouse and, in case there is no surviving spouse, to the person's children or next of kin[.]

Tenn. Code Ann. § 20-5-106(a). The superior right to bring a wrongful death action falls first to the surviving spouse, then to any children, then to a parent, then to a sibling, then to a grandparent. *See* Tenn. Code Ann. § 31-2-104. An inferior beneficiary may not sue until those persons with a superior right waive their right of action. *Busby v. Massey*, 686

S.W.2d 60, 62 (Tenn. 1984) (citing *Koontz v. Fleming*, 65 S.W.2d 821, 824 (Tenn. Ct. App. 1933)).

In the present case, right to bring the wrongful death action is vested with Decedent's minor children. Grandmother, individually, has no legally cognizable interest in this case. Nevertheless, Grandmother individually submitted the pre-suit notice required by Tennessee Code Annotated section 29-26-121. The statute provides, in pertinent part, as follows:

(a)(1) Any person or that person's authorized agent, asserting a potential claim for health care liability shall give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon health care liability in any court of this state.

(2) The notice shall include:

(A) The full name and date of birth of the patient whose treatment is at issue;

(B) *The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;*

(C) The name and address of the attorney sending the notice[];

(D) A list of the name and address of all providers being sent a notice; and

(E) A HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.

Tenn. Code Ann. § 29-26-121(a) (emphasis added).

The purpose of pre-suit notice is to afford a potential defendant in a health care liability action timely notice to allow the defendant to investigate the merits of the claim and pursue settlement negotiations prior to the lawsuit being filed. *Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist.*, 549 S.W.3d 77, 86 (Tenn. 2018). "Pre-suit notice benefits the parties by promoting early resolution of claims, which also serves the interest of judicial economy." *Id.* The first three content requirements of section -121(a)(2) "facilitate early resolution of healthcare liability claims by requiring plaintiffs to advise defendants *who the plaintiff is*, how to reach him or her, and how to contact his or her attorney." *Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs., Inc.*, 418 S.W.3d 547, 554 (Tenn. 2013) (emphasis added).

The “statutory requirement of timely, written pre-suit notice is mandatory and may be satisfied only by strict compliance[.]” *Martin v. Rolling Hills Hosp.*, 600 S.W.3d 322, 331 (Tenn. 2020). On the other hand, “[t]he statutory content requirements are directory and may be satisfied by substantial compliance.” *Id.* at 331. “[A] reviewing court should consider the extent and significance of the plaintiff’s errors and omissions and whether the defendant was prejudiced by the plaintiff’s noncompliance.” *Stevens ex rel. Stevens*, 418 S.W.3d at 556. The Tennessee Supreme Court explained the prejudice requirement as follows:

[P]rejudice is not a separate and independent analytical element; rather, as *Stevens* explained, prejudice is a consideration relevant to determining whether a plaintiff has substantially complied. Prejudice, or the absence of prejudice, is especially relevant to evaluating the extent and significance of the plaintiff’s noncompliance. If a plaintiff’s noncompliance with Section 121 frustrates or interferes with the purposes of Section 121 or prevents the defendant from receiving a benefit Section 121 confers, then the plaintiff likely has not substantially complied with Section 121. On the other hand, if the plaintiff’s noncompliance neither frustrates or interferes with the purposes of Section 121 nor prevents a defendant from receiving a benefit the statute confers, then a court is more likely to determine that the plaintiff has substantially complied.

Martin, 600 S.W.3d at 333–34 (internal citations omitted).

In the present case, the trial court found that the pre-suit notice substantially complied with Tennessee Code Annotated section 29-26-121(a)(2). The trial court determined that the failure to include the children as the claimants was a “technical defect” from which the defendants suffered little to no prejudice. We disagree. Grandmother’s failure to list the only proper claimants was not a technical defect but rather a substantial deviation from the clear requirements of the statute. One of the primary purposes of that section of the pre-suit notice is to identify to the defendants “who the plaintiff is.” *Stevens ex rel. Stevens*, 418 S.W.3d at 554. Based on the content of the pre-suit notice, the defendants could only believe that the claimant was Decedent’s mother. Moreover, we cannot agree with the trial court that the defendants suffered no prejudice as a result of the defect. Again, the purpose of the statute is to allow the defendants to gather all relevant information in order to facilitate early settlement of the claim. It is axiomatic that identification of the proper plaintiff is a significant piece of information. And the significance is great in this case because the presence of the children as proper claimants changes the claim to a “catastrophic loss” and increases its maximum value by \$250,000. *See* Tenn. Code Ann. § 29-39-102.

Grandmother contends that the defendants could have learned that Decedent had two children because there was information in her medical records indicating that she had

two previous cesarean sections and also that “her family” was with her at the emergency room. This is a stretch. First, Decedent’s “family” could have been anyone. This vague description certainly does not lead to the conclusion that Decedent had minor children. Second, even if the defendants had seen the information about Decedent’s prior cesarean sections in her medical records, this would not have confirmed the existence of two living minor children. Furthermore, it is well-established that the defendants are not required to search for information that should have been contained in the pre-suit notice. Defendant providers owe no duty to plaintiffs to help them achieve compliance with the requirements of the statute. *J.A.C. by and through Carter v. Methodist Healthcare Memphis Hosps.*, 542 S.W.3d 502, 515 (Tenn. Ct. App. 2016).

For these reasons, we hold that the trial court erred in finding that Grandmother substantially complied with the pre-suit notice requirements. The trial court should have granted the defendants’ motions to dismiss.

Our determination of the first issue is dispositive in this case. However, we certified two issues on appeal. Accordingly, we will address the second certified issue, i.e., whether the Grandmother, as mother of Decedent and Grandmother and temporary legal custodian of the surviving minor children pursuant to a juvenile court order, has standing to give the pre-suit notice and file the complaint in this case.

The parties spent much time in the trial court arguing the rights of a custodian versus a guardian and the effect of Rule 17 of the Tennessee Rules of Civil Procedure on these issues. The defendants contend that a custodian does not have the authority to file suit on behalf of minor children. They rely first on the custodianship statute, which provides as follows:

A custodian to whom legal custody has been given by the court under this part has the right to the physical custody of the child, the right to determine the nature of the care and treatment of the child, including ordinary medical care and the right and duty to provide for the care, protection, training and education, and the physical, mental and moral welfare of the child, subject to the conditions and limitations of the order and to the remaining rights and duties of the child’s parents or guardian....

Tenn. Code Ann. § 37-1-140(a). As set forth *supra*, the Anderson County Juvenile Court’s order establishing Grandmother as custodian states that Grandmother “shall have the authority to consent to any ordinary or necessary medical, surgical, hospital, educational, institutional, psychiatric, or psychological care pending further determination of the child’s/children’s custodial status by this Court.”

The defendants contrast the custodianship statute and the narrow order of the juvenile court with the guardianship statute, which provides that a permanent guardian has

the right to “obtain representation for the child in legal actions.” Tenn. Code Ann. § 37-1-804(a)(8). They contend that only a legal guardian, not a custodian, has the right to file suit on behalf of the minor children.

In response, Grandmother relies on Rule 17 of the Tennessee Rules of Civil Procedure and the unpublished opinion of this Court in *In re Lackey*, No. 01-A-01-9010PB00358, 1991 WL 45394 (Tenn. Ct. App. Apr. 5, 1991). Rule 17.01 provides:

Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, bailee, trustee of an express trust, a party to whose rights another is subrogated, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his or her own name without joining the party for whose benefit the action is brought. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification or commencement by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

With respect to minors, Rule 17.03 provides:

Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, or if justice requires, he or she may sue by next friend. The Court shall at any time after the filing of the complaint appoint a guardian ad litem to defend an action for an infant or incompetent person who does not have a duly appointed representative, or whenever justice requires. The court may in its discretion allow the guardian ad litem a reasonable fee for services, to be taxed as costs.

In *In re Lackey*, a minor whose biological father was incarcerated sought to change her last name to that of her stepfather. 1991 WL 45394, at *1. The minor’s mother brought the petition for name change on behalf of her daughter. *Id.* Although the issue to be resolved in that case is not germane to the present case, we noted that “[i]n circumstances where a minor lacks the capacity to bring suit on its own, Tenn. R. Civ. P. 17.03 empowers the minor’s parents, *custodian*, or legal guardian to sue or defend on the minor’s behalf.” *Id.*

In this case, the trial court ultimately concluded, based on Rule 17 and *In re Lackey*, that Grandmother had standing to pursue the claim on behalf of the minor children. We agree with the trial court on this issue. The defendants propose too narrow a reading of the custodianship statute and Rule 17. The custodianship statute is housed within Chapter 37 of the Tennessee Code Annotated, which concerns juvenile courts and proceedings. Section 37-1-102(b)(8) defines custodian as “a person, other than a parent or legal guardian, who stands in loco parentis to the child or a person to whom temporary legal custody of the child has been given by order of a court[.]” Custody is then defined as “the control of actual physical care of the child and includes the right and responsibility to provide for the physical, mental, moral and emotional well-being of the child.” *Id.* at 37-1-102(b)(9). “‘Custody,’ as [t]herein defined, relates to those rights and responsibilities as exercised either by the parents or by a person or organization granted custody by a court of competent jurisdiction.” *Id.* As set forth, *supra*, section 37-1-140 defines the duties of the custodian, and includes “the right to determine the nature of the care and treatment of the child, including ordinary medical care and the right and duty to provide for the care, protection, training and education, and the physical, mental and moral welfare of the child, subject to the conditions and limitations of the order....”

We conclude that the right to determine the nature and care of the child and the general duty to provide for the child are broad enough to encompass the filing of a legal claim on behalf of the minor children.⁴ Likewise, we do not view the trial court’s custodianship order as limiting the rights and duties of Grandmother as suggested by the defendants. According to the defendants, Grandmother’s rights and obligations were limited to making educational and medical decisions for the children. Ostensibly, she would be divested of the duty to provide for their general welfare and well-being. We conclude that the order, rather than limiting Grandmother’s rights and obligations to generally provide for the children’s welfare, provides more specific authority relative to educational and medical decisions.

Likewise, Rule 17.03 allows a “representative” to file suit on a minor’s behalf, “such as a general guardian, conservator, or other like fiduciary....” The plain language of Rule 17.03 does not limit the persons who can file suit on a minor’s behalf to guardians or conservators but rather allows representatives *such as* guardians or conservators to represent a minor in litigation. We hold that Grandmother, as custodian, is an appropriate representative under Rule 17.03 to file suit on behalf of the minor children.

V. CONCLUSION

The judgment of the trial court is affirmed in part and reversed in part. Although Grandmother had standing to file suit on behalf of the minor children, Grandmother’s

⁴ Without question, Grandmother does not have standing, individually, to file a wrongful death claim.

pre-suit notice was defective, resulting in prejudice to the defendants, and the case should have been dismissed on this basis. This case is remanded to the trial court for proceedings consistent with this opinion. Costs on appeal are assessed against the appellee, Ashley Denson ex rel. Bobbie J. Denson, for which execution may issue if necessary.

KRISTI M. DAVIS, JUDGE