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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 5, 2023 Session

LINDA MEARS v. NASHVILLE CENTER FOR REHABILITATION AND HEALING, LLC

Appeal from the Circuit Court for Davidson County
No. 21C-2303 Thomas W. Brothers, Judge

No. M2022-00490-COA-R3-CV

Plaintiff alleges she was injured from a fall at a skilled nursing facility while using a defective shower chair with a broken lock and torn netting. The circuit court concluded the Plaintiff did not need to file a certificate of good faith under the Tennessee Health Care Liability Act because the common knowledge exception is applicable and the complaint's negligence allegations do not require expert testimony. The nursing facility appeals, arguing expert testimony is required to establish both the standard of care and proximate causation; therefore, a certificate of good faith must be filed. Because the allegations set forth in the complaint do not require expert testimony to maintain the Plaintiff's claim, we affirm the circuit court's judgment.

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

JEFFREY USMAN, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Howard B. Hayden and Whitney Horak, Memphis, Tennessee, for the appellant, Nashville Center for Rehabilitation and Healing, LLC.

Chadwick W. Stanfill, Nashville, Tennessee, for the appellee, Linda Mears.

OPINION

I.

The Plaintiff, Linda Mears, was a resident of the Nashville Center for Rehabilitation and Healing, LLC, a skilled nursing facility, which is the Defendant in the present case.

According to her complaint, the facility's policy required residents to use a shower chair when showering. On December 31, 2020, Ms. Mears was provided with a shower chair that she alleges was "defective and dangerous" in that "[t]he lock on the wheels of the shower chair did not work properly and the netting on the back of the chair was torn." Ms. Mears placed towels around the wheels of the shower chair to try to keep the broken chair from rolling. The complaint alleges that, nevertheless, "the chair rolled" and that Ms. Mears fell, injuring her back and buttocks. The complaint further alleges that "but for Defendant's negligence in maintaining and providing a dangerous and defective shower chair, she would not have been injured."

The acts of negligence alleged are that:

> a. Defendant failed to maintain its premises and equipment in a reasonably safe condition;
> b. Defendant carelessly and negligently maintained its premises and equipment in such a manner as to make it unreasonably dangerous for Plaintiff or other residents;
> c. Defendant carelessly and negligently failed to warn Plaintiff of the dangerous and defective condition of the shower chair, about which it knew or through the exercise of reasonable and ordinary care should have known;
> d. Defendant carelessly and negligently failed to correct the dangerous and defective condition; and
> e. Defendant failed to take reasonable precautions to insure the safety of Plaintiff and its residents on its premises.

Ms. Mears claimed that the negligence of the nursing facility proximately caused her fall and injuries. She listed the following injuries and damages suffered as a result of the fall:

> a. Pain, both past and future;
> b. Suffering, both past and future;
> c. Loss of earnings, both past and future;
> d. Health care expenses, both past and future;
> e. Loss of enjoyment of life, both past and future;
> f. Permanent impairment; and
> g. All other damages allowed under the laws of the State of Tennessee.

Ms. Mears did not provide pre-suit notice as required for health care liability actions by Tennessee Code Annotated section 29-26-121(a)(1) nor did she file a certificate of good faith under Tennessee Code Annotated section 29-26-122. The nursing facility moved to dismiss the action under both grounds, asserting that the suit is a health care liability action and that the certificate of good faith is required because expert testimony is necessary to establish both the standard of care and proximate causation.

The circuit court concluded that Ms. Mears's suit constitutes a health care liability action and that it should be dismissed without prejudice for failure to file the required pre-suit notice. However, the circuit court determined that "the allegations of negligence in the Complaint are based on conduct and conditions that do not require expert medical testimony and come within the common knowledge of laymen" and, therefore, that a certificate of good faith is not required. The circuit court, therefore, denied the motion to dismiss with prejudice for failure to file a certificate of good faith. The nursing facility appeals, arguing a certificate of good faith is required and thus the dismissal should have been with prejudice. Ms. Mears does not challenge the circuit court's ruling that her action constitutes a health care liability action and the associated dismissal of her action without prejudice for failure to file pre-suit notice. Ms. Mears contends the circuit court correctly determined that no certificate of good faith is required, given the nature of the action she has brought.

II.

A motion to dismiss under Tennessee Rule of Civil Procedure 12.02(6) is the proper method to challenge the plaintiff's failure to file a certificate of good faith. *Ellithorpe v. Weismark*, 479 S.W.3d 818, 823 (Tenn. 2015). In evaluating a Rule 12.02(6) motion for failure to state a claim upon which relief can be granted, this court construes the complaint liberally, presumes that the factual allegations of the complaint are true, and draws reasonable inferences in favor of the plaintiff. *Cooper v. Mandy*, 639 S.W.3d 29, 33 (Tenn. 2022). "A motion to dismiss should be granted only if it appears that 'the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.'" *Ellithorpe*, 479 S.W.3d at 824 (quoting *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011)). This court reviews the trial court's decision on a motion to dismiss de novo. *Id.* Likewise, the application of the common knowledge exception is a question of law reviewed de novo with no presumption of correctness. *Jackson v. Burrell*, 602 S.W.3d 340, 344 (Tenn. 2020).

III.

The Defendant nursing facility argues that expert testimony is required in the present case both to prove the standard of care for Ms. Mears's negligence claim and to establish proximate causation. In this section, we address the nursing facility's first argument – the contention that expert testimony is necessary to establish the standard of care in this case. In opposition to the nursing facility's position, Ms. Mears contends that the common knowledge exception is applicable; accordingly, she argues that the circuit court properly concluded that no certificate of good faith is required. We agree with the circuit court's conclusion that the allegations advanced in Ms. Mears's complaint do not require expert medical proof to establish a standard of care. Accordingly, no certificate of good faith is required on this basis.

The Tennessee Health Care Liability Act ("THCLA") governs "any civil action . . . 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," and "[a]ny 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." Tenn. Code Ann. § 29-26-101(a)(1), (c). Not all claims that fall within the expansive ambit of the THCLA, however, require the filing of a certificate of good faith. The Tennessee General Assembly limited the requirement to file a certificate of good faith to health care liability actions "in which expert testimony is required by [Tennessee Code Annotated] § 29-26-115." Tenn. Code Ann. § 29-26-122(a).[1]

In health care liability actions, the Tennessee Supreme Court has observed that the common knowledge exception can excuse a plaintiff from having to rely upon expert testimony "to establish the recognized standard of acceptable professional practice in the profession." *Ellithorpe*, 479 S.W.3d at 829. Expounding further upon the impact of the common knowledge exception, the Tennessee Supreme Court has explained as follows:

> The practical effect of applying the common knowledge exception is 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. It follows that if the plaintiff does not have to present expert testimony at trial to prove her case, then she need not file a certificate of good faith confirming that the negligence claim is supported by a competent expert witness and that there is a good faith basis for the claim.

Jackson v. Burrell, 602 S.W.3d 340, 346 (Tenn. 2020). The common knowledge exception "comes into play when the subject matter of the alleged misconduct is 'within the understanding of lay members of the public.'" *Id.* (quoting Joseph H. King, *The Common Knowledge Exception to the Expert Testimony Requirement for Establishing the Standard of Care in Medical Malpractice*, 59 Ala. L. Rev. 51, 62-63 (2007)). In general, "expert

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[1] Tennessee Code Annotated section 29-26-122(a) provides as follows:

> In any health care liability action *in which expert testimony is required by § 29-26-115*, the plaintiff or plaintiff's counsel shall file a certificate of good faith with the complaint. If the certificate is not filed with the complaint, the complaint shall be dismissed, as provided in subsection (c), absent a showing that the failure was due to the failure of the provider to timely provide copies of the claimant's records requested as provided in § 29-26-121 or demonstrated extraordinary cause.

(Emphasis added).

testimony is not required where the act of alleged wrongful conduct lies within the common knowledge of a layperson." *Jackson*, 602 S.W.3d at 348 (quoting *Osunde v. Delta Medical Center*, 505 S.W.3d 875, 886-87 (Tenn. Ct. App. 2016)).

The Defendant notes that "[m]edical 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." *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86, 92 (Tenn. 1999); *see Murphy v. Schwartz*, 739 S.W.2d 777, 778 (Tenn. Ct. App. 1986) ("We see little difference in matters of medical malpractice between the question of the applicability of *res ipsa* at the close of a plaintiff's proof and the common knowledge exception to the expert medical proof requirement in a summary judgment before trial."). According to the Defendant nursing facility, the common knowledge exception applies only "to cases in which the medical negligence is as blatant as a 'fly floating in a bowl of buttermilk' so that all mankind knows that such things are not done absent negligence." *Graniger v. Methodist Hosp. Healthcare Sys., Inc.*, No. 02A01-9309-CV-00201, 1994 WL 496781, at *3 (Tenn. Ct. App. Sept. 9, 1994) (quoting *Murphy*, 739 S.W.2d at 778). The nursing facility is correct insofar as the common knowledge exception has been applied often "in cases involving the application of *res ipsa loquitur*, which 'allows an inference of negligence where the jury has a common knowledge or understanding that events which resulted in the plaintiff's injury do not ordinarily occur unless someone was negligent.'" *Osunde*, 505 S.W.3d at 886 (quoting *Seavers*, 9 S.W.3d at 91). The Defendant asserts that the negligence alleged here is not so patently obvious that it falls under the umbrella of these cases.

However, the Defendant's argument misses a second vein in which the exception has been applied. The common knowledge exception has also been applied to cases which may not fit within a *res ipsa loquitur* analysis but in which "expert proof may be dispensed with when the trier of fact can determine, based on common knowledge, that the direct allegations against a defendant constitute negligence." *Osunde*, 505 S.W.3d at 886. As this court observed in *Osunde*, such a claim may sound in ordinary negligence and not require expert medical testimony. *Id*. After the General Assembly expanded the statutory reach of the THCLA, such application has particular relevance to ordinary negligence claims which arise in a health care setting and fall under the THCLA but which do not require expert testimony. *Id.* at 886 n.7 (observing that the common knowledge exception was previously applied only in exceptional cases but noting that health care liability claims now encompass a larger class of claims than those asserting medical malpractice).

Accordingly, this court has applied the common knowledge exception to claims of ordinary negligence which are brought under the THCLA. *See C.D. v. Keystone Continuum, LLC*, No. E2016-02528-COA-R3-CV, 2018 WL 503536, at *6-7 (Tenn. Ct. App. Jan. 22, 2018) (concluding that negligent supervision and training claims against a residential treatment facility fell within the common knowledge exception when the

facility's employee allegedly assaulted a minor resident); *Zink v. Rural/Metro of Tenn., L.P.*, 531 S.W.3d 698, 707 (Tenn. Ct. App. 2017) ("[I]t would be within the common knowledge of a layperson whether an EMT's alleged negligent, reckless, or intentional striking of a patient's face while the patient is strapped to a gurney would fall below the standard of care."); *Redick v. Saint Thomas Midtown Hosp.*, 515 S.W.3d 853, 859 (Tenn. Ct. App. 2016) (no expert proof was required to establish the standard of care when the plaintiff alleged that she was placed under fall precautions but the hospital failed to comply with the precautions by placing the portable commode out of reach and failed to assist her in moving from the commode to the bed); s*ee also Morrow v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, No. 3:19-CV-00351, 2020 WL 5106763, at *8 (M.D. Tenn. Aug. 31, 2020) (dismissal was inappropriate when it was not clear whether the negligence alleged — noncompliance with a statutory requirement of conducting a hearing prior to restraint in excess of 24 hours — required the exercise of medical judgment or skill); *Mullin v. Rolling Hills Hosp.*, No. 3:16-CV-02609, 2017 WL 6523482, at *7-8 (M.D. Tenn. Apr. 17, 2017) (no expert medical proof was required for claims of false imprisonment, failure to follow statutory procedures, intentional and negligent infliction of emotional distress, conversion, assault, and failure to comply with statute); *compare Cathey v. Beyer*, No. W2019-01603-COA-R3-CV, 2020 WL 1970722, at *6 (Tenn. Ct. App. Apr. 24, 2020) (holding that "the creation and maintenance of counseling records is not within the scope of a layman's knowledge"); *Newman v. Guardian Healthcare Providers, Inc.*, No. M2015-01315-COA-R3-CV, 2016 WL 4069052, at *7 (Tenn. Ct. App. July 27, 2016) (how and when to restrain or supervise a potentially dangerous patient with mental health challenges required expert testimony); *Estate of Bradley v. Hamilton Cnty.*, No. E2014-02215-COA-R3-CV, 2015 WL 9946266, at *6 (Tenn. Ct. App. Aug. 21, 2015) (rejecting the claim that a jail's breach of duty was "ordinary negligence" which would be subject to the common knowledge exception and concluding that the claim involved the diagnosis and treatment of an inmate, not the denial of access to medical care); *see also Champluvier v. Simpson*, No. 21-CV-2072-JPM-TMP, 2021 WL 1555098, at *6 (W.D. Tenn. Mar. 30, 2021) (failure to diagnose an abscess from an x-ray did not fall under the common knowledge exception).

Ultimately whether expert health care testimony is required, and hence a certificate of good faith is mandated, is determined on a case-by-case basis. *Jackson*, 602 S.W.3d at 348. Distilling Tennessee case law regarding the community knowledge exception, the Tennessee Supreme Court explained in *Jackson* the following:

> What all of these cases have in common is the fundamental consideration of whether the conduct at issue involved the exercise of medical judgment or skill. In other words, whether the alleged negligent conduct involved technical or specialized knowledge of a medical procedure or a patient's medical condition or whether the alleged negligent conduct involved medical decision-making — such as determining the type of treatment or procedure to perform or the type of equipment or medicine to use. If so, then expert proof would be necessary. As Professor King has suggested, this inquiry

> might be phrased as whether "[t]he specific decision making by the health care provider . . . involve[d] the exercise of uniquely professional medical skills, a deliberate balancing of medical risks and benefits, or the exercise of therapeutic judgment."

Jackson, 602 S.W.3d at 350 (citation omitted). Applying this framework in *Jackson*, the Tennessee Supreme Court reasoned as follows:

> [The Plaintiff] does not allege that [the massage therapist] negligently performed the massage, used improper technique or excessive force, or erred in decision-making as a massage therapist. Thus, there is no need for expert testimony about different types of massage, proper techniques for performing a type of massage, or other specialized knowledge that an expert in the massage industry would know and the average layperson likely would not. Instead, [the Plaintiff] alleges that [the massage therapist] sexually assaulted her during a massage and that [the salon] knew or should have known that [the massage therapist] had previously acted inappropriately, making two other clients feel uncomfortable, and thus posed a risk of sexually assaulting [the Plaintiff]. A layperson could understand that a salon may be negligent in its training, supervision, and retention of a massage therapist who sexually assaults a disrobed customer in a private setting during a massage when the salon knew of the massage therapist's prior inappropriate actions.

Id.

Consistent with this framework, the circumstances of this case are closely akin to those of the *Osunde v. Delta Medical Center* case, in which the plaintiff was injured when she fell after being directed to stand on a stool to facilitate taking an x-ray. 505 S.W.3d at 877.[2] The plaintiff asserted that the radiology technician provided her with a faulty, uneven, or "wobbly" stool. *Id.* at 888-89. The court in *Osunde* concluded that "[i]t is within the common knowledge of a layperson to determine whether the provision of an unstable stool is negligent." *Id.* at 889. The court noted particularly that "the resolution of the negligence question here does not require medical judgment." *Id.* at 889 n.9. This is

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[2] In *Wilson v. Monroe County*, addressing an argument that expert testimony was required to establish the standard of care in an injury sustained as a result of a failure by a paramedic to lock a stretcher in an ambulance, this court stated the following:

> We conclude that the determination of whether an ambulance attendant falls below the standard of care by not locking the stretcher in place in the ambulance is a matter that can be assessed on the basis of common experience without the need for expert medical testimony. . . . [S]ince this case involves ordinary negligence and not medical malpractice, no expert testimony was required . . . .

Wilson v. Monroe Cnty., 411 S.W.3d 431, 440–41 (Tenn. Ct. App. 2013).

because the gravamen of the complaint was "that the specific stool with which [the plaintiff] was provided was wobbly and unstable. Inasmuch as her challenge is to the technician's provision of a stool that was inherently faulty, the question is not one of medical soundness but rather, is one of common knowledge." *Id.*

We conclude that *Osunde* is indistinguishable from the case at bar. Ms. Mears's complaint does not allege negligence arising from any conduct involving the exercise of medical judgment or skill. Instead, the complaint alleges that the shower chair was defective in that the wheel lock was broken and the netting was torn. Ms. Mears's complaint does not dispute the medical judgment of the nursing facility that residents must sit in a shower chair while showering; rather, she contends the chair she was given was broken. There is no specialized knowledge that health care experts possess regarding chair locking mechanisms and torn chair netting that the average layperson likely would not have. Like the wobbly stool of *Osunde*, the determination of whether providing an allegedly defective shower chair is negligent presents a question not of medical expertise but instead is within the knowledge and experience of an ordinary layperson. Simply put, the rolling chair is indistinguishable from the wobbly stool.[3]

The nursing facility asserts that nevertheless expert testimony would be necessary to establish whether the standard of care was met because it is not within the knowledge of a layperson to know: 1) the level of assistance with bathing that Ms. Mears, as a skilled nursing facility resident, required; 2) whether the nursing facility's employee provided the proper level of assistance;[4] 3) whether the shower chair was an appropriate piece of equipment to meet Ms. Mears's needs; and 4) whether the lock was defective. The nursing facility's argument ignores that Ms. Mears has not alleged an improper level of assistance with her bathing or that the facility's decision to use shower chairs, in general, or even that the particular type of shower chair used, resulted in her injuries.

Summarizing this line of argument, the nursing facility contends that "[t]here is no injury from a defective chair unless a decision is made to use it." Ms. Mears, however, is

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[3] We need not tarry long over the Defendant's attempt to distinguish the cases on the basis that one involved radiology and the other a residential nursing home or that "[m]ost people" have had an x-ray but have not used a shower chair. The common knowledge exception does not require the trier of fact to have personally experienced the tort; rather, it inquires whether the allegedly wrongful conduct at issue involved the exercise of medical judgment or skill. *See* Jackson, 602 S.W.3d at 350.

[4] We are likewise not convinced by the Defendant's argument that Ms. Mears's allegation that the Defendant failed to take "reasonable precautions" to ensure resident safety transforms her claim of ordinary negligence into a medical malpractice claim by mere use of the phrase "reasonable precautions." *See*, *e.g.*, *Katz v. Sports Auth. of Metro. Gov't of Nashville & Davidson Cnty.*, No. M2016-01874-COA-R3-CV, 2017 WL 3741346, at *1 (Tenn. Ct. App. Aug. 29, 2017) (applying the phrase to ordinary negligence); *Barrett v. Red Food Stores, Inc.*, No. 01-A-019108CV00302, 1992 WL 33891, at *5 (Tenn. Ct. App. Feb. 26, 1992) (same). Expert testimony is not necessary to determine whether the use of a chair known by the facility to be broken constitutes a failure to take reasonable precautions.

not arguing that the facility should not have required her to use a shower chair when showering. She takes no issue with that decision. Like Ms. Osunde's wobbly stool, Ms. Mears's objection is to the nursing facility giving her a broken chair. A motion to dismiss is limited to the pleadings filed, not hypothetical pleadings that could have been advanced under which dismissal could be more easily obtained. The nursing facility characterizes Ms. Mears pleadings as being done "artfully" to try to evade the requirements of expert testimony. Perhaps so, but "[p]laintiffs are the masters of their complaint." *Mullins v. State*, 294 S.W.3d 529, 540 (Tenn. 2009); *Chimneyhill Condo. Ass'n v. Chow*, No. W2020-00873-COA-R3-CV, 2021 WL 3047166, at *13 (Tenn. Ct. App. July 20, 2021), *perm. app. denied* (Tenn. Nov. 17, 2021). Ms. Mears is electing to foreclose certain theories of negligence in framing her complaint as she does. Instead of asserting error in medical judgment or skill, she alleges that she was injured because she sat in a shower chair with a defective wheel lock and torn netting and that because the shower chair rolled when it should not have, she fell and was injured. While allegations of negligence that challenge a choice of medical equipment may involve medical skill or judgment, Ms. Mears's allegations that the specific shower chair she was provided was broken and thus defective need not be established by expert testimony. *See Osunde*, 505 S.W.3d at 889 n.9 (noting that a layperson could "determine whether providing a wobbly stool is negligent"). Accordingly, the circuit court did not err in concluding that expert testimony was not necessary to establish the standard of care.

IV.

Having considered and rejected the nursing facility's primary contention that expert testimony is necessary to establish the standard of care, we turn to the nursing facility's second argument for why expert medical testimony is necessary and hence a certificate of good faith is required. The nursing facility asserts that the allegations in the complaint require expert testimony on the issue of proximate causation of the injuries. Ms. Mears responds that she can establish proximate causation and injury without expert testimony under the common knowledge exception. We conclude that, because Ms. Mears's allegations assert a claim of an injury the existence and proximate causation of which can be established without expert testimony, the circuit court did not err in denying the motion to dismiss her claim with prejudice.

Under Tennessee Code Annotated section 29-26-115:

> (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.

Tenn. Code Ann. § 29-26-115(a). As noted above, this provision is critical in determining whether a certificate of good faith is required because the Tennessee General Assembly has limited the requirement to those health care liability actions "in which expert testimony is required by [Tennessee Code Annotated] § 29-26-115." Tenn. Code Ann. § 29-26-122(a).

In support of its contention that expert testimony is required to establish proximate cause in the present case, the nursing facility relies on this court's decision in *Redick v. Saint Thomas Midtown Hospital*. 515 S.W.3d 853, 855 (Tenn. Ct. App. 2016). The plaintiff in *Redick*, prior to admission to the hospital, had suffered weakness and was "falling for two days." *Id*. at 860. Given that she had been falling before being admitted to the hospital, the plaintiff was placed on specified fall precautions upon her admission to the hospital. *Id.* at 860. The plaintiff alleged that the hospital, by placing the portable commode out of reach and failing to assist her in moving between the bed and commode, did not comply with its own fall precautions. *Id.* at 859. This court concluded that the common knowledge exception applied to the issue of a breach of duty and that no expert proof was required on that issue. *Id.* at 859. However, the court came to the opposite conclusion regarding proximate causation. *Id*. at 860. Because the complaint included allegations that the plaintiff had recently suffered numerous falls, the court concluded that "[e]xpert proof would be required to show that Plaintiff's alleged injuries were proximately caused by the particular fall at issue in this case." *Id.*

On the other hand, expert testimony regarding causation was determined to be unnecessary to determine proximate causation in *Zink v. Rural/Metro of Tennessee, L.P.*, wherein this court expressly distinguished its earlier decision in *Redick*. 531 S.W.3d 698, 708 (Tenn. Ct. App. 2017). In *Zink*, the plaintiff alleged that an EMT struck him in the face with his fist while the plaintiff was strapped to a gurney, and that he suffered permanent injuries, medical expenses, and loss of enjoyment of life. *Id.* at 700. This court determined that a layperson would be able to determine whether the EMT's act of striking a patient strapped to a gurney in the face fell below the standard of care. *Id.* at 707. The court also rejected the defendants' argument that the plaintiff could not establish the proximate cause of his injuries without expert testimony. *Id.* at 708. The court noted that, unlike *Redick*, there was nothing in the record to suggest that the plaintiff's "underlying injuries or medical condition that precipitated his contact with [the EMT] were in any way related or similar to the injuries he allegedly suffered from being struck in the face." *Id.* The critical distinction between the circumstances of *Redick* and *Zink* was that "the injuries

suffered by the plaintiff due to the defendant's alleged negligence [in *Redick*] could not be distinguished from her recent injuries suffered before the alleged negligent act occurred in the absence of medical proof." *Id.* Having determined that standard of care and breach fell within the common understanding exception,[5] the *Zink* court concluded that the allegations of the complaint in the case before it did "not unavoidably lead to the conclusion that Mr. Zink could not prove causation or damages without expert medical proof." *Id.* Given the applicable standard that "a complaint should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief" and that "all reasonable inferences" must be drawn in favor of the plaintiff, the *Zink* court concluded that the trial court erred in dismissing the plaintiff's case for failure to file a certificate of good faith. *Id.*

According to her complaint, Ms. Mears sat in a broken shower chair that rolled, and she fell out, landing on the floor. Ms. Mears alleges that she fell because the chair was broken, and as a result of the fall, she injured her back and buttocks, causing pain, suffering, a loss of enjoyment of life, and permanent impairment. Ms. Mears's complaint does not present the unusual complications of the complaint in *Redick* and instead is akin to *Zink*. There is no indication from the complaint that Ms. Mears, unlike the plaintiff in *Redick*, had experienced other recent corresponding injuries, creating complications in establishing proximate cause. Thus, based upon this court's prior precedent, this is not a case in which expert testimony would be required to establish proximate causation.

Furthermore, the imposition of the good faith requirement in the present case would be contrary to the framework of the THCLA and existing case law on the common knowledge exception. The THCLA anticipates that not all health care liability actions will require a certificate of good faith and that such certificates will only be required in "a health care liability action in which expert testimony is required by [Tennessee Code Annotated] § 29-26-115." Tenn. Code Ann. § 29-26-122(a)(1). Tennessee Code Annotated section 29-26-115(a) anticipates expert testimony in cases involving interconnected expert proof as to the standard of care, breach thereof, and proximate causation of injury stemming from this breach by requiring expert proof of "[t]he recognized standard of acceptable professional practice in the profession and the specialty thereof," "[t]hat the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard," and that "[a]s a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not have otherwise occurred." That interconnected whole does not hold together, however, in cases involving common understanding as to the basis for the standard of care and breach rather than expert medical testimony. The Tennessee Supreme Court has observed that there is a gap that exists between a certificate of good faith being required in all THCLA cases, which is something that the Act does not provide for, and a subset of THCLA cases, in which a certificate is actually required by statute. *Ellithorpe*, 479 S.W.3d at 829. As for what THCLA cases the

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[5] *See Zink*, 531 S.W.3d at 704-07.

certificate is not required in, the Tennessee Supreme Court has indicated that it is the common knowledge exception that stands in that gap: "[E]xpert proof is required to establish the recognized standard of acceptable professional practice in the profession, unless the claim falls within the 'common knowledge' exception . . . ." *Id*.

The nursing facility, nevertheless, asserts that expert testimony is necessary to establish that the injuries sustained by Ms. Mears to her back and buttocks were proximately caused by the fall. The certificate of good faith serves the purpose of weeding out frivolous lawsuits. *Est. of Blankenship v. Bradley Healthcare & Rehab. Ctr.*, 653 S.W.3d 709, 714 (Tenn. Ct. App. 2022). Through imposition of the good faith certificate requirement, there is a "goal of attempting to ensure that suits proceeding through litigation have some merit." *See*, *e.g.*, *Johnson v. Rutherford Cnty.*, No. M2017-00618-COA-R3-CV, 2018 WL 369774, at *9 (Tenn. Ct. App. Jan. 11, 2018); *Kerby v. Haws*, No. M2011-01943-COA-R3-CV, 2012 WL 6675097, at *4 (Tenn. Ct. App. Dec. 20, 2012) (quoting *Jenkins v. Marvel*, 683 F.Supp.2d 626, 639 (E.D. Tenn. 2010)).

Ms. Mears may struggle to establish the full extent of her claimed damages in connection with injury to her back and buttocks without expert testimony. As an illustration, her complaint alleges some damages, for example permanent impairment, the causation of which may require expert testimony. *See Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991) ("Medical causation and permanency of an injury must be established in most cases by expert medical testimony."); *Gurley v. Genessee Painting Co.*, No. 01S01-9203-CV-00041, 1992 WL 398345, at *2 (Tenn. Dec. 28, 1992) (noting that "in all but obvious cases permanent impairment must be established by expert testimony").

Ms. Mears, however, has asserted a negligence claim the elements of which, including proximate causation of injury, can be satisfied without need of expert testimony. As an illustration, expert testimony is not necessarily required for Ms. Mears to establish that the nursing facility provided a broken chair, which caused Ms. Mears to fall, thereby hurting her back and buttocks and causing pain and suffering as a result of injuring her back and buttocks. *See*, *e.g.*, *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 778 (Tenn. 1972) (noting that the "lay testimony of the claim[a]nt is of probative value in establishing simple matters such as existence of pain"); *Nashville, C. & St. L. Ry. Co. v. Jackson*, 213 S.W.2d 116, 120 (Tenn. 1948) (concluding the Court of Appeals erred in holding that only expert testimony could establish a causal connection, because testimony regarding pain and suffering, "though not expert testimony, became quite relevant, competent and important evidence upon the question of whether there is any causal connection between the collision and the hernia"); *Peete v. Shelby Cnty. Health Care Corp.*, 938 S.W.2d 693, 697 (Tenn. Ct. App. 1997) (when the hospitalized plaintiff began to suffer headaches after being struck in the head by a suspension bar that was being dismantled, summary judgment was inappropriate based on the hospital's affidavit denying causation because the plaintiff created a genuine issue of material fact by stating that her headaches began immediately

after the blow to the head); *Varner v. Perryman*, 969 S.W.2d 410, 412 (Tenn. Ct. App. 1997) (lay testimony was sufficient to establish causation when the plaintiff suffered a bruised stomach muscle in a collision); *see also Nelson v. Sims*, No. 1:19-CV-01047-JDB-JAY, 2020 WL 2616512, at *3 (W.D. Tenn. May 22, 2020) (lay testimony could establish that the defendant's driving a tractor into a culvert was the causation of the plaintiff's facial laceration, bruised eye, and cracked teeth); *Pellicano v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2003-00292-COA-R3-CV, 2004 WL 343951, at *9 (Tenn. Ct. App. Feb. 23, 2004) (lay testimony can establish causation of a simple injury but not injuries where causation requires specialized knowledge); *Hankins v. Chevco, Inc.*, 90 S.W.3d 254, 261 (Tenn. Ct. App. 2002) (reversing summary judgment when defendants submitted proof that plaintiff's TMJ pre-dated her biting a too-hard gumball but the plaintiff alleged that her TMJ only became symptomatic when she experienced pain on biting the gumball); *compare Washington Cnty. Bd. of Ed. v. Hartley*, 517 S.W.2d 749, 751 (Tenn. 1974) (lay testimony can establish causation and permanency only in obvious cases); *Pellicano*, 2004 WL 343951, at *9 n.4 (lay testimony could not establish that a collision was the cause of the plaintiff's back injury when he had previously stated in a worker's compensation claim that the injury was caused by his workplace).

Accordingly, Ms. Mears's negligence claim can be established by lay testimony alone. Like an electrical circuit sending current to illuminate a light, the bulb in Ms. Mears's case has turned on as a result of current flowing all the way through standard of care, breach, and proximate causation, without need of expert testimony. Though expert testimony in connection with damages may make the bulb burn brighter through increased damages, it has been illuminated already. It has been illuminated already through setting forth a claim which can be supported by lay testimony, thereby demonstrating her claim possesses some merit and is non-frivolous.

When the plaintiff's claim is not dependent on expert testimony to establish any of the essential elements set forth in Tennessee Code Annotated section 29-26-115, dismissal for failure to make a pre-suit showing regarding the availability of expert testimony is not appropriate. *See Zink*, 531 S.W.3d at 708 (concluding that "the fact that [the plaintiff] has no expert proof is not necessarily fatal to his claims" because a complaint should not be dismissed unless the plaintiff can prove no set of facts warranting relief). The pleadings here do not demonstrate that Ms. Mears "can prove no set of facts in support of the claim that would entitle [her] to relief." *Ellithorpe*, 479 S.W.3d at 824 (quoting *Webb*, 346 S.W.3d at 426). Because the standard of care, breach, and proximate causation for Ms. Mears's claim can be established by lay testimony in accordance with the common knowledge exception, Ms. Mears may proceed without need of a certificate of good faith.

The variance noted by this court in *Zink*, in distinguishing *Redick*, which is also applicable to the present case, is dispositive as to the *Redick*-based argument advanced by the nursing facility. Adopting the nursing facility's contrary understanding would largely swallow the common knowledge exception in Tennessee. Simply because Ms. Mears may

not be able to establish the full breadth of the damages she seeks without expert testimony does not provide a basis for dismissing her negligence claim, all essential elements of which can be maintained without expert testimony. A contrary understanding would result in a change in Tennessee law that has not been adequately supported by the nursing facility in its briefing in this case.

V.

For the reasons discussed above, we affirm the judgment of the Circuit Court for Davidson County. Costs of the appeal are taxed to the Appellant, Nashville Center for Rehabilitation and Healing, LLC, for which execution may issue if necessary. The case is remanded for such further proceedings as may be necessary and consistent with this opinion.

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JEFFREY USMAN, JUDGE