IN THE COURT OF APPEALS OF GEORGIA

Case No. A19A1613

TAMI CARTER,

Appellant,

v.

WALGREEN CO.,

Appellee.

APPEAL FROM THE SUPERIOR COURT OF CATOOSA COUNTY
CIVIL ACTION FILE NO. SUCV2015001027

BRIEF OF APPELLEE

JOHN E. HALL, JR.
Georgia Bar No. 319090
TERRENCE C. SULLIVAN
Georgia Bar No. 691725
PEARSON K. CUNNINGHAM
Georgia Bar No. 391024
HALL BOOTH SMITH, P.C.
191 Peachtree St. NE, Suite 2900
Atlanta, GA 30303

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

INTRODUCTION

The opioid epidemic has wreaked its havoc in the state of Tennessee, just as it has done so in Georgia and in many other states across the country. The Tennessee legislature responded to the public health crisis by tightening statutory controls on dispensing opioid prescriptions, which includes medications like hydrocodone. Pharmacists in Tennessee, for example, cannot dispense—even under a prescription—more than one month's supply of hydrocodone; it is simply against the law. Moreover, the Tennessee legislature has mandated that pharmacists report information to police when they have actual knowledge that an individual has attempted to obtain opioids illegally, like by passing off a forged or altered prescription. And to encourage pharmacists to comply with this mandatory reporting law, the Tennessee legislature has removed the sting of reprisal by litigation by conferring immunity on pharmacist and pharmacies who report information to police in good faith.

On August 8, 2014, Shannon Walraven, a Walgreens pharmacist, was handed a one-month prescription for 180 pills of hydrocodone. After realizing that the dosing instructions were not consistent with the total

pill amount, she then noticed that the prescription was originally written for 120 pills, but that the 2 had been scribbled into and 8. When she called the after-hours call line for the doctor's office where the prescription was written, Walraven was told by the on-call physician that no doctor in their practice would have written a prescription like that. So, consistent with the mandatory reporting law, Walraven called the police.

This appeal arises from the grant of summary judgment in favor of Walgreen Co. ("Walgreens"), for the claims that Tami Carter asserted against the company based on Walraven's conduct of notifying police. The gravamen of Carter's Complaint is that Walgreens is either vicariously liable through the acts of Walraven or directly liable for its own negligent supervision and training of Walraven. The trial court, however, correctly granted summary judgment to Walgreens because Carter's claims not only failed as a matter of law, but Carter failed to establish that a jury issue actually existed on any of the claims. In reaching this conclusion, the trial correctly court applied the substantive law of Tennessee, since alleged torts occurred in Tennessee. This Court should affirm the grant of summary judgment.

COUNTERSTATEMENT OF FACTS

A. The altered prescription

On the night of August 8, 2014, Tami Carter drove north across the Georgia border into Tennessee to fill a prescription of hydrocodone. [*See* R. 189] Carter's prescription was originally written for 120 pills, which were to be taken four times per day for thirty days; however, the "2" was later scribbled into an "8," so her prescription was actually for 180 pills and no longer matched up with the dosage instructions (i.e. four pills per day for thirty days). [*See* R. 189–90] No initials on the prescription, or any other markings, signified that the prescribing doctor altered the prescription. [*See* R. 189] And when the Walgreens employee who was tending the drive-thru window handed it to the pharmacist, the pharmacist became suspicious. [R. 190]

Shannon Walraven was the pharmacist on duty at the Walgreens in Tennessee that night. [R. 190] Walraven is a Tennessee pharmacist licensed to practice pharmacy in Tennessee. [*Id.*] Under Tennessee law, Walraven realized she could not fill Carter's prescription as written. [*Id.*] Not only did it appear that the "120" was altered into "180" without the permission of the prescribing doctor, but the dosage instructions were no longer consistent *and* it was illegal under Tennessee law to dispense this

amount of hydrocodone. [*See* R. 189-90] So Shannon Walraven phoned the after-hours number for the doctor's office where the prescription was drawn from to get to the bottom of the altered prescription. [R. 190]

Dr. William Cornwell of the TCFPA Family Medical Centers had written Carter's hydrocodone prescription earlier that day. [R. 189] When he originally wrote the prescription, it was for 120 pills, which were to be taken four times per day for thirty days. [*See id.*] This was Carter's typical prescription. Sometime shortly after Carter's appointment ended, Dr. Cornwell scribbled the "2" into an "8" instead of writing a new prescription or initialing the change. [*Id.*] This was not consistent with TCFPA's office policy. [*See* R. 189, 190] Unfortunately, Dr. Cornwell was not the on-call physician on the night of August 8, 2014 to explain the change, and instead Dr. Christopher Greene, another doctor in Cornwell's practice, received Walraven's call. [R. 190]

When Dr. Greene received Walraven's call, he agreed with her that Carter's prescription appeared suspicious. [R. 190-91] He confirmed to her that the prescription was not one that a doctor in their office would write. [*Id.*] And when Walraven asked Dr. Greene what she should do, he suggested calling the police since it appeared that Carter had altered the

prescription herself. [*See id.*] Walraven then phoned the sheriff's department in Hamilton, County, Tennessee. [R. 191]

Once the sheriff's department arrived, Walraven told them what Dr. Greene had relayed to her and handed the altered prescription to them. [R. 191] Walraven and other Walgreens employees had no further involvement. [*Id.*] The sheriff's department then interviewed Carter and arrested her for altering the prescription. [*Id.*] She spent the night in a jail in Hamilton County, Tennessee before she was eventually released. Sometime later, Dr. Cornwell executed an affidavit explaining the mix-up and Carter's charges in Hamilton County, Tennessee were eventually dropped. [*See* R. 192] Carter brought this lawsuit to recover damages for her arrest.

B. The proceedings below

Carter filed her Complaint on September 11, 2015. [*See* R. 4–14] In it she named as defendants: Dr. Cornwell, her prescribing physician; Dr. Cornwell's medical practice, the TCFPA Family Medical Center; and Walgreen Co. ("Walgreens"). [*See* R. 4] Counts One and Two of her Complaint were lodged against Cornwell and TCFPA, while Counts

Three and Four were brought against Walgreens. [R. 4-14][1] On October 12, 2015, Dr. Cornwell and TCFPA both moved to dismiss the claims against them for failure to file an expert affidavit under O.C.G.A. § 9-11-9.1. In response, Carter amended her complaint. Nevertheless, the trial court granted the motion to dismiss. Carter appealed that grant to this Court, which affirmed the trial court as to Count One, but reversed as to Count Two. *See Carter v. Cornwell*, 338 Ga. App. 662 (2016).

On October 10, 2017, Walgreens filed a motion for summary judgment. [R. 174–87] In its motion, Walgreens asserted that the Tennessee Health Care Liability Act applied to Carter's claims against it because the alleged torts occurred in Tennessee, and under Georgia's conflict of law doctrine the substantive law of the state where the tort occurred governs. [*See* R. 188–92, 193]] Additionally, Walgreens argued that under Tenn. Code Ann. § 53-11-309(d) it was entitled to immunity. [R. 198] Finally, Walgreens also argued that there was no evidence establishing that Walraven, the Walgreens pharmacist, or Walgreens breached any duty of ordinary care. [R. 199–201]

[1] A typographical error in Carter's Complaint has persisted throughout the course of these proceedings. Carter has alleged Four Counts; however, the last two counts are both styled as Count Three. In this brief, Walgreens refers to the *second* Count Three as "Count Four."

On November 11, 2017, Walgreens filed a second motion for summary judgment. [R. 580–81] In addition to the arguments presented in the first motion, Walgreens argued that Carter's claims against failed as a matter of law for a variety of reasons. [R. 587–94] First, Count Four failed, inasmuch as it alleged a negligent supervision claim, because Carter did not establish that Walgreens had knowledge that any of its employees were unfit for the job, which is a required element under Tennessee law; and to the extent that Count Four alleged a claim for negligent training, Walgreens argued that Carter did not establish that any training was actually negligent, much less that it caused Carter's injury. [R. 587–89] Finally, the claims failed because Walgreens was not the proximate cause of Carter's arrest.

Carter responded to Walgreens' first motion for summary judgment, but did not respond to its second motion. [R. 604–13] Instead, Carter filed her own motion for summary judgment. [R. 730–45] The trial court conducted two hearings on the matter, one in September of 2018 and another that November. [R. 980] On January 16, 2019, the trial court entered an Oder granting summary judgment in favor of Walgreens. [*Id.*]

The claim against TCFPA, however, is scheduled to go to trial on the issue of negligence.

ARGUMENT AND CITATION OF AUTHORITY

STANDARD OF REVIEW

Walgreens moved for summary judgment below demonstrating that Carter's claims failed as a matter of law, and that, in any event, there was no genuine dispute of material fact. Walgreens did so by (1) negating essential elements of Carter's claim, and (2) pointing out that there was also an absence of evidence to support essential elements of Carter's claims. *See Meadow Springs, LLC v. Riverdale, LLC*, 323 Ga. App. 478, 479–80 (2013) (affirming grant of summary judgment). Therefore, in response to Walgreens's motion for summary judgment, Carter was no longer entitled to rest on her pleadings; she was instead required to rise to the occasion and point to specific evidence creating a triable issue. *Id.* at 480. Carter failed to do so and the trial court correctly granted summary judgment. On appeal, this Court reviews that grant de novo, and it construes the evidence and inferences drawn in Carter's favor; however, this Court will affirm the grant of summary judgement so long as it was right for any reason. *Id.* ("a grant of summary judgment must be affirmed if right for any reason, whether stated or unstated. It is the

grant itself that is to be reviewed for error, and not the analysis employed." *Id.* (quotation omitted).

ARGUMENT

I. The trial court correctly held that the substantive law of Tennessee governed Carter's claims under the doctrine of lex loci delicti.

The trial court did not err when it applied Tennessee's substantive law, including the Tennessee Health Care Liability Act (the "THCLA"), because the alleged torts Carter asserted against Walgreens occurred in Tennessee. Tennessee statutory law confers immunity on pharmacists and pharmacies on the type of claims Carter asserts. Moreover, claims against health care providers in Tennessee, like the claims Carter asserts here, are statutory claims that must be brought under *and* comply with the THCLA. Since both the statutory immunity and the pre-suit provisions of the THCLA are part of the substantive law of Tennessee, the trial court correctly held that they applied under doctrine of lex loci delicti.

Carter does not dispute that Georgia follows the doctrine of lex loci delicti and thereby adheres to "traditional approach" to conflicts of law analysis. [*See* Appellant's Brief, at 5] She instead focusses her first

enumeration of error on the trial court's application of the doctrine. Her attack is twofold. First, she argues that the trial court wrongly concluded that the alleged torts occurred in Tennessee. Second, she argues that even if the alleged torts did occurr in Tennessee, the pre-suit provisions of the THCLA are procedural, and therefore, they do not apply under the doctrine of lex fori. She is wrong on both fronts.

Georgia has followed the traditional approach to conflict of laws analysis for over 100 years. *Dowis v. Mud Slingers, Inc.*, 279 Ga. 808, 811 (2005).[2] Under this approach "a tripartite set of rules" governs situations where the laws of two different states potentially apply in a single case (but only two of the rules are relevant for this purpose of this appeal: lex loci delicti and lex fori). *Federal Ins. Co. v. Nat. Distrub. Co.*, 203 Ga. App. 763, 765 (1992).

Under lex loci delicti, "a tort action is governed by the substantive law of the state where the tort was committed" rather than the state

[2] The traditional approach is known as the "vested rights" approach to conflict analysis and was set forth in the RESTATEMENT (FIRST) OF CONFLICT OF LAWS. *Dowis*, 279 Ga. at 810. Georgia follows the RESTATEMENT (FIRST) OF CONFLICT OF LAWS as persuasive. *See id.* (citing to the Restatement); *Fain v. Nix*, 189 Ga. 772, 736 (1940) (citing the Restatement (First) of Conflict of Laws); *see also Intern. Bus. Mach. V. Kemp*, 244 Ga. App. 638, 641 (2000) (same); *Hall v. Slaton*, 40 Ga. App. 288, 306 (1929) (same).

where the suit is filed *Id.* at 808. The locus delicti (or "the place of the wrong") is typically "the place where the injury sustained was suffered . . . or, as it is sometimes more generally put, it is the place where the last event necessary to make an actor liable for an alleged tort takes place." *Risdon Enterp., Inc. v. Colemill Enterp., Inc.*, 172 Ga. App. 902, 903 (1984). Under lex fori (or "the law of the forum"), though, the forum state still applies its own procedural law in its application of the other state's substantive law.

Thus, these two rules operate in tandem such that if a tort occurs in Tennessee and suit is filed in Georgia, a court in Georgia applies Tennessee *substantive* law, but nevertheless applies Georgia *procedural* law. *CSX Trasnport., Inc. v. Franklin Indus., Inc.*, 213 Ga. App. 778, 779 (1994) (recognizing that because the tort occurred in Tennessee, the substantive law of Tennessee controlled the cause of action, but the procedural law of Georgia applied).[3] The trial court correctly determined

[3] The distinction between substantive versus procedural law can sometimes become hazy. *Cf Hanna v. Plumer*, 380 U.S. 460 (1965) (explaining the distinction in the context of *Erie* doctrine analysis). Generally, though, "[s]ubstantive law is that law which *creates* rights, duties, and obligations, [while] [p]rocedural law is that law which *prescribes the methods* of enforcement of rights, duties, and obligations." *Polito v. Holland*, 258 Ga. 54, 55 (1988) (discussing this distinction in the context of retroactive versus prospective application of statutes) (emphasis added); *see Bagnell v. Ford Motor Co.*, 297 Ga. App. 835, 836 (2009) (explaining that the "substantive

that Tennessee was the place of the wrong under lex loci delicti and accordingly applied Tennessee substantive law.

A. Under lex loci delicti, Tennessee is the place of the wrong because the alleged tort occurred there.

Carter argues that the trial court erred when it concluded the alleged torts occurred in Tennessee instead of Georgia. [Appellant Brief, at 6–8] As a practical matter though, Carter should be estopped from making such an argument. *See* O.C.G.A. § 24-4-12. Paragraph one of her Complaint states that "the events giving rise to this action occurred in Hamilton County, Tennessee." [R. 4; R. 276] And throughout the Complaint, there are more references to Tennessee than there are to Georgia. [*See, e.g.* R. 4, 5–6; R. 450, 451–52] Carter "certainly should be bound by whatever she [chose] to allege [in her pleadings]." *Bell v. State*, 234 Ga. App. 693, 695 (1998). (discussing doctrine of estoppel). There is "[n]o sensible reason" for her "to dispute this now." *Id.*

Carter argues that the Walgreens location was "only tangential to the commission of the tortious act." [Appellant Brief, at 8] But it was

---

versus procedural/remedial analysis" used in the context of retroactive application of statutes carries over into the conflict of law analysis quite well).

Carter who drove to a "tangentially" located Tennessee-pharmacy. And it was Carter who alleges that a Tennessee pharmacist practicing under a Tennessee license "negligently" called the Tennessee police causing her to spend the night in a Tennessee jail. There is no merit to the assertion that Georgia instead of Tennessee is the place of the alleged tort and injury, and the trial court properly rejected these arguments. Under the doctrine of lex loci delicti, Tennessee was the place of the wrong; therefore, Tennessee's substantive law governs Carter's claims.

B. The trial court applied Tennessee substantive law, not procedural law

Carter disputes that the trial court actually applied Tennessee substantive law. She instead argues the pre-suit provisions of the THCLA are really procedural rules which would not apply under lex fori. [*See* Appellant Brief, 8-9] But the trial court did not err on this point. The pre-suit requirements of the THCLA and the good faith immunity doctrine codified in Tenn. Code Ann. § 53-11-309 are substantive provisions of Tennessee law.

1. The pre-suit requirements of the THCLA are substantive elements of the statutory cause of action

A healthcare liability claim in Tennessee is a distinct species of claim that the Tennessee legislature completely unmoored from any similar common law claim. *See Ellithorpe v. Weismark*, 479 S.W.3d 818, 824–26 (Tenn. 2015) (explaining history of healthcare liability claims in Tennessee as a separate, new cause of action based in statute and different than medical malpractice claims and negligence claims). It is a statutory claim encompassing nearly every cause of action against a health care provider as long as the claim relates to the provision of health care services. *See id.*, at 825–27.[4] And to recover under the statute, a plaintiff must comply with two particular provisions.

Under Tenn. Code Ann. § 29-26-121, any person asserting a potential claim for health care liability must give written notice of the claim to a potential defendant 60 days before filing suit. This is known as the pre-suit notice provision. Under Tenn. Code Ann. § 29-26-122, in any

[4] Thus "*all* civil actions alleging that a covered health care provider . . . caused an injury related to the provision of, or failure to provide, heath care services [are] subject to the pre-suit and certificate of good faith requirements, regardless of *any other claims*, *causes of action*, *or theories of liability* alleged in the complaint." *Id.* at 827 (first emphasis original, second emphasis supplied).

health care liability action in which expert testimony is required, the plaintiff must a certificate of good faith with the complaint. This is known as the certificate of good faith provision.[5]

These pre-suit requirements may seem like procedural rules similar to O.C.G.A. § 9-11-9.1, but they are not. As the Supreme Court of Tennessee has held, these requirements are substantive, mandatory elements of the claim. *See Myers v. AMISUB (SFH), INC*, 382 S.W.3d 300, 310 (Tenn. 2012) ("The requirements of pre-suit notice of a potential claim . . . and the filing of a certificate of good faith . . . are fundamental to the validity of the respective statutes and . . . . [must be] construe[d] as mandatory."). Thus, they are substantive law under lex loci delicti rather than procedural rules under lex fori.

Following the Supreme Court of Tennessee's guidance, federal courts in Tennessee have also recognized that the requirements are part of the substantive elements of the health care liability claim. *Eiswert v. U.S.*, 322 F.Supp.3d 864, 875 (E.D. Tenn. 2018) ("The Tennessee Supreme Court in *Myers* held that the requirements of sections 29-26-

[5] The certificate must state essentially that an expert, competent to testify in Tennessee, has been consulted and that the expert believes there is a good faith basis for maintaining the claim based on the information provided to the expert. Tenn. Code Ann. § 29-26-122.

121 and -122 are *substantive and mandatory*, not procedural and directory."); *Williams v. U.S.* 754 F.Supp.2d 942 (W.D. Tenn. 2010) (referring to the certificate of good faith provisions and nothing that "because the Act is bound up with the rights and obligations created by the State of Tennessee, the Act is substantive").[6]

In this respect, the pre-suit requirements are conditions imposed on the claim "by the power creating the right [of action]," and when those conditions are not met, no cause of action arises. *See Taylor v. Murray*, 231 Ga. 852, 853 (1974) (discussing the subtle distinction in the context of statutes of limitations which are ordinarily considered *procedural* under lex fori, but sometimes will be considered substantive under lex loci). The Tennessee legislature has, by enacting this statutory claim, imposed the pre-suit conditions on the claim, and they are entitled to respect in our State's courts because it is the Tennessee legislature which

[6] Carter takes issue with Walgreens' cite to *Williams*, but as this Court has noted "a state court's determination of whether an issue is substantive or procedural, for choice-of-law purposes, is binding on a federal court [sitting in diversity]." *Cost Mgmt. Group, Inc. v. Bommer*, 327 Ga. App. 398, 400 (2014). And though neither *Williams* or *Eiswert* were diversity cases, they were cases under the Federal Tort Claims Act which requires federal court's to apply the *substantive* law of the state wherein the tort occurred—which requires federal courts to make "the same distinction" (*i.e.* choice of law analysis) as made under the *Erie* doctrine "between procedural and substantive law to determine what law governs." *Williams*, 754 F.Supp.2d at 948.

has conferred the right upon which the right of action is based. *See Coon v. Medical Center, Inc.*, 300 Ga. 722, 729 (2017).

> From the beginning, this Court has distinguished between statutory law and common law when the law of another state provides the rule of decision in a lawsuit filed in a Georgia court. As a matter of comity, a Georgia court will defer to another state's statutes, as well as its judicial decisions interpreting those states, in determining the law of that state.[7]

Id.

Here, Tennessee statutory law, "[t]he law of the place of the wrong, [has] impose[d] the doing of a particular act . . . as a condition without the satisfaction of which there [can be] no liability." RESTATEMENT (FIRST) OF CONFLICT OF LAWS, § 383 (1934). And since these conditions were not met, no cause of action arises—in Tennessee or in Georgia. *See* RESTATEMENT (FIRST) OF CONFLICTS, § 381 (1934), Comment A ("So too, if by the law of the place of the wrong, a person who has sustained bodily harm must give notice thereof to the person who has caused the harm as a condition precedent to any right of action, no recovery may be had in any state for harm negligently caused to the plaintiff if no such notice was given.").

[7] Justice Nahmias, writing for a unanimous court cites to *Cox v. Adams*, 2 Ga. 158, 159–161, 164–66 (1847). *Cox* deals with lex fori's interaction with lex loci contractus, as opposed to its interaction with lex loci delicti, but the principle is the same.

The trial court correctly recognized the pre-suit provisions were substantive, rather than procedural.

2. The immunity provided to pharmacist in Tennessee is also part of the substantive law

Carter does not really bother arguing that the good faith immunity statute is not a part of Tennessee's substantive law. She instead cites marginally relevant code provisions and explains why they do not apply here. [Appellant Brief, at 12 (point heading and following analysis)].[8] Nonetheless, the trial court correctly concluded that immunity was a matter of Tennessee substantive law. *See* RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 382 (1934) ("A person who acts pursuant to a privilege conferred by the law of the place of acting will not be held liable for the results of his act in another state.").

Here, Walraven had a statutory privilege to furnish the information she did to law enforcement *in good faith* and be immune from liability by doing so. *See* Tenn. Code Ann. § 53-11-309. Indeed, she would have had the same privilege and immunity in this State had she been a practicing

[8] Carter's assertion that Walgreens did not raise Tenn. Code Ann. § 53-11-309(d) or somehow contended other Code sections applied is meritless. The statute was referenced in Point Heading D on page of 11 of the Brief in Support of Summary Judgment. It also received a block quote four lines down. [R. 198]

pharmacist in Georgia instead of Tennessee. *See* O.C.G.A. § 16-13-63(a)(1) ("A [pharmacist] shall not have a duty and shall not be held civilly liable for damages to any person in any civil or administrative action . . . for injury, death, or loss to person or property on the basis that the dispenser did or did not seek or obtain information from the [prescription drug monitoring program database]."), The trial court did not err in its application of the lex loci delicti doctrine. Carter's alleged torts occurred in Tennessee, and the substantive law of Tennessee governs her claims.

II. The trial court correctly granted summary judgment because Carter's claims failed as a matter of law under the substantive law of Tennessee.

The good faith immunity statute precludes Carter's claims. And it is undisputed that Carter did not comply with the pre-suit requirements of the THCLA. The trial court, therefore, properly granted summary judgment.

Carter seeks to avoid this inevitable conclusion in her second enumeration of error by arguing that the trial court misapplied the substantive law of Tennessee. But Carter's argument on the good-faith

immunity statute here is a mere shell game. And her after-the-fact characterization of Count Four does not pass muster.

A. Walgreens has immunity for the claims Carter has asserted

Carter argues that Walgreens does not have immunity for the claims she has asserted because Tenn. Code Ann. § 53-10-112 does not apply here. [Appellant Brief, at 12–14, 19–20] It is no surprise that Carter struggles to glean the relevance of this particular provision because it is not the immunity provision Walgreens asserted below. [R. 198] Code section 53-11-309(d) is the source of immunity here, not Tenn. Code Ann. § 53-10-112(c). This provision states:

> A health care provider,[9] or any person under the direction of the health care provider *or any entity* that assumes the responsibility of reporting for the provider who furnishes *any information* in good faith is immune from liability if a complaint, report, information, or record is furnished to a law enforcement agency.
>
> Tenn. Code Ann. § 53-11-309(d) (emphasis added).

Contrary to Carter's argument, "the plain language of the Tennessee Code section relied upon by Walgreens *does* [ ] apply to the case at bar." [*See* Appellant Brief, at 12 (emphasis added)] Carter has never cogently

[9] The statute defines "health care provider" to include pharmacists. Tenn. Code Ann. § 53-11-309(a).

addressed this argument and instead retreats to the position that she never sued the pharmacist, therefore, Walgreens is not protected by the immunity. But, no matter how inartful Carter pled Count Three, she asserted a vicarious liability claim against Walgreens and continues to argue that Walraven's negligent conduct makes Walgreen's liable to her. [*See, e.g.*, Appellant Brief, at 13–14; R. 4, 11–12; R. 450, 457–59]

Carter did not allege that Walraven acted in bad faith when she notified the police. So Walraven is entitled to immunity under the plain terms of the statute. Therefore, to the extent Count Three is a respondeat superior claim, the statute precludes it. Carter cannot "avoid the forbidden frontal attack [against the agent] by an encircling movement against the principal . . . ." *Johnson v. LeBonheur Children's Med. Ctr.*, 74 S.W.3d 338, 345 (Tenn. 2002) (discussing traditional agency rule that principal cannot be held liable if agent is immune from liability) (brackets in original removed). Moreover, since Carter is seeking to hold Walgreens directly liable under Count Four, it too has immunity under the plain terms of the statute as "an entity that assumes the responsibility of reporting for the provider." Tenn. Code Ann. § 53-11-309(d). The trial

court correctly held that the good faith immunity provision precluded Carter's claims as a matter of law.

B. Carter's claims are health care liability claims under the Tennessee Health Care Liability Act.

Carter clamors that her claims against Walgreens are not health care liability claims under the THCLA, but they are. In Tennessee, a health care liability action means "*any civil action* . . . alleging that a health care provider . . . ha[s] 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." Tenn. Code Ann. § 29-26-101(a)(1). Pharmacists, pharmacy technicians, and pharmacies are all considered "health care providers" under the statute.[10] And whether the claim is a health care liability claim depends on whether the claim relates to the provision of, or failure to provide, health care services, which the act defines as "care by health care providers . . . include[ing] care . . . by

[10] *See* Tenn. Code Ann. § 29-26-101(a)(2)(A) (defining health care provider as a "health care practitioner licensed . . . under any chapter of title 63); Tenn. Code Ann. § 63-10-204(34) (defining a pharmacist as an individual health care provider licensed by the state pursuant to parts 4-6 of this chapter); *see also* Tenn. Code Ann. § 29-26-101(a)(2)(D)(defining health care provider to include pharmacy technicians); Tenn. Code Ann. § 29-26-101(a)(2)(E) (defining health care provider as a "any legal entity that is not itself required to be licensed but which employs one or more health care practitioners licensed . . . under any chapter of title 63).

pharmacists, pharmacy interns or pharmacy technicians . . . [which] also includes staffing, custodial or basic care . . . ." Tenn. Code Ann. § 29-26-101(c).[11]

1. Count Three is a health care liability claim because it is related to the dispensing of narcotics

Carter argues that she has not asserted a health care liability claim against a pharmacist, but Count Three suggests otherwise. To be sure, Count Three is a respondeat superior count where Carter has alleged that Walgreens committed all the negligent acts instead of Walraven, the actual pharmacist. But it is a health care liability claim nonetheless.

For example, take the following allegations:

- "As her pharmacist, Walgreens owed a duty of care to Ms. Carter to fill her prescription responsible."
- "Walgreens did not make any attempt to talk to Dr. Cornwell . . . to verify that he was the person who changed the prescription"
- "If Walgreens thought Ms. Carter had altered the prescription herself, Walgreens should have notified Ms. Carter that they . . . could not fill the prescription "

[R. 11–12, 450, 457–59]

[11] *See also* Tenn. Op. Atty. Gen. No. 16-32 (2016), 2016 WL 4567096, (explaining that "Tennessee law is well-settled that . . . pharmacists may be sued . . . [but] [s]uch suits are now generally governed by the Health Care Liability Act").

Each one of these allegations relates to the provision of health care services by a pharmacist, despite that Carter lodged them against an artificial person, rather than the pharmacist, an actual person. Walraven's medical training alerted her to the fact that the prescription Carter presented was illegal under Tennessee law. *See* Tenn. Code Ann. § 53-11-308(e). This required her to analyze that "q.i.d. p.r.n. #180" meant the prescription was for more than one month's worth of drugs.[*See* R. 190, 219][12] Because of her training, she recognized that hydrocodone is a highly addictive controlled substance and that she had to refuse to fill it or break the law. She also recognized that laws governing the dispensing of narcotics required that she furnish this information to police within five days, which she did. *See* Tenn. Code Ann. § 53-11-309(a). This claim relates to the provision of helath care services, and therefore, is governed by the THCLA.

[12] "q.i.d." means four times per day. "p.r.n." means as needed. Thus, (4pills per day) x (30 days per month) = 120pills. But, the prescription was for a total of 180 pills. This cued Walraven into the fact that the "2" had been scribbled into an "8." [R. 190; R. 584]

2. Count Four is a health care liability claim because it is related to staffing which is a type of "health care service"

Carter devotes the bulk of her attention explaining that the negligent training and supervision claim is not a health care liability claim. First, Carter posits that negligent training and supervision claim does not relate to the provision of health care services. Second, Carter reasons that even if it was subject to the THCLA, no expert testimony is necessary, so the certificate of good faith requirement is not triggered. Finally, Carter argues that no authority has applied the pre-suit notice provisions to negligent training and supervision claims. Carter is wrong on all points.

First, Carter's negligent training and supervision claim relates to staffing, which under the act constitute a health care service. *See* Tenn. Code Ann. § 29-26-101(b). Thus, it is a health care liability claim. Tenn. Code. Ann. §§ 29-26-101(a)(1), -101(b); *C.D. v. Keystone Continuum, LLC*, 2018 WL 503536 *1, at *6 (Tenn. Ct. App. Jan. 22, 2018) (slip opinion) (holding "claims of negligent supervision and training fall within the definition of healthcare services" and are thus health care liability claims).

Second, Carter's claim does indeed require expert testimony, and therefore, she was required to attach a certificate of good faith. Although "a determination that a claim falls within the THCLA does not automatically trigger" the certificate of good faith requirement, the only exception is where a plaintiff establishes that the alleged negligence falls within the "common knowledge of a layperson." *Keystone Continuum, LLC*, 2018 WL 503536 at *6 (quoting *Zink v. Rural/Metro of Tenn., L.P.*, 531 S.W.3d 698, 706 (Tenn. Ct. App. 2017)). Practically speaking though, Carter has not argued, in either the lower court or this Court, that the common knowledge exception applies here; therefore, she has waived this argument. *See See Jackson v. Burrell*, No. W2018-00057-COA-R3-CV, (Tenn. Ct. App. Jan. 16, 2019) 2019 WL 237347 *1, at *4 (noting that plaintiff waived the argument that negligent training and supervision claim was within the common knowledge exception since it was not raised in either the trial court or the court of appeals). Carter thwarts "the purpose" of summary judgment by suggesting this argument at this late stage. *Pfeiffer v. Georgia Dept. of Transport.*, 275 Ga. 827, 828 (2002). "Fairness to the trial court and to the parties demand[ed] that [this] legal issue[ ] be asserted in the trial court." *Id.*[13]

Even if Carter had not waived this argument, though, Carter cannot point to facts in the record to support it. *See Jackson*, 2019 WL 237347 at *4 (holding that despite plaintiff's waiver of common knowledge argument on negligent training and supervision claim against massage parlor, plaintiff failed to dispel notion by record evidence that expert testimony was not required). Regardless, the common knowledge exception does not apply here.

The common knowledge exception is applicable only in the most obvious cases of negligence. *See Newman v. State*, 2019 WL 644000 (Ten Ct. App. Feb. 15, 2019). For example, the Tennessee courts have found the common knowledge exception to apply where an EMT either negligently, recklessly, or intentionally struck a plaintiff in the face with his fist while the plaintiff was completely defenseless and strapped to a gurney. *Zink v. Rural/Metro of Tennessee, L.P.*, 531 S.W.3d 698, 703–07 (Tenn. Ct. App. 2017) (surveying common knowledge cases). And in the context of a negligent training and supervision claim, a plaintiff's allegations that an employer did not adequately ensure that its

[13] "If the rule were otherwise, a party opposing a motion for summary judgment need not raise any legal issue, spend the next year thinking up and researching additional issues for the appellate court to address, and require the opposing party to address those issues within the time frame of appellate practice rules." *Id.*

employees would not sexually assault patients has been found to fall within the common knowledge exception. *Keystone Continuum, LLC*, 2018 WL 503536 at *6–*7. But similar allegations in the context of a massage therapy spa, did require expert testimony because the plaintiff only proved that the employer had received two prior complaints alerting it to the possibility that the employee made patients feel uncomfortable; thus, the Tennessee Court of Appeals held this would require expert testimony to establish that the employer breached massage industry standards in retaining and supervising the employee. *Jackson*, 2019 WL 237347 at *4.

Here, Carter argues that no expert testimony is required to prove the negligence of Walgreens because she simply alleges that Walgreens "failed to properly train its pharmacy employees in the methods of handling an issue regarding an altered prescription so that it does not have innocent customers wrongfully arrested." [*See, e.g.*, R. 4, 13; R. 450, 459]. The essence of her argument is that it is within the realm of a layperson to understand what the proper procedures and protocols are when a pharmacy is presented with a prescription for narcotic drugs—an *altered* prescription at that. But if no expert testimony were required to

prove how a pharmacy should properly train and supervise its pharmacists when they are presented with an altered prescription of narcotics, then pharmacies would be reduced to nothing more than pill mills with mindless machines dispensing opioids upon request

Lastly, Carter's third argument that the pre-suit notice requirements do not apply to negligent training and supervision claim lacks merit. *Keystone Continuum, LLC*, 2018 WL 503536 at *6–*7 (negligent training and supervision claim requires pre-suit notice). Since Carter did not comply with the THCLA, the trial court correctly held that Carter's claims failed as a matter of Tennessee law.

III. Summary judgment was nonetheless proper for reasons Carter does not enumerate as error

In her brief, Carter's enumerations of error attack the trial court's grant of summary judgment through the trial court's application of the Tennessee Health Care Liability Act and the good faith immunity statute. But she ignores that her claims against Walgreens failed under basic principles of negligence as well.

A. Count Three fails as a matter of law

Carter has not presented evidence that Walraven breached the duty of ordinary care. "The mere occurrence of an unfortunate event is not sufficient to authorize an inference of negligence." *Davis v. Blockbuster, Inc.* 258 Ga. App. 677, 679 (2002). Carter must present "specific facts establishing a breach of duty . . . and may not rest upon generalized allegations." *Shortnacy v. N. Atlanta Intern. Med., P.C.*, 252 Ga. App. 321, 325 (2001). Carter argues that Walraven should not have called the police, but Carter does not dispute that under Tenn. Code Ann. § 53-11-309(a) pharmacists in Tennessee *shall cause* a report to be submitted to law enforcement when an individual has attempted to illegally obtain a controlled substance. And in any event, Carter has not pointed to any evidence showing that Walraven acted unreasonably.

Moreover, in Georgia *and* in Tennessee, "[s]tatements made in good faith to police officers or others investigating criminal activity cannot be the basis of a tort action." *Begget v. Nat. Bank & Trust Co.*, 174 Ga. App. 346, 348 (1985) (holding company entitled to summary judgment on negligence claim alleging that employee's act of calling police constituted negligence); *see Hertzka v. Ellison*, 8 Tenn. App. 667, 674 (1928) ("Merely

furnishing the arresting officer with the facts will not render one liabile.").

Carter also argues that Walraven could have done more; simply speaking with Dr. Greene was not enough. Walraven should have instead demanded to speak with Dr. Cornwell. But, Carter does not point to any evidence showing that Walraven was required to hear it from the horse's mouth, or that Walraven's conduct was anything less than reasonable. *See Kroger Co. v. Briggs*, 323 Ga. App. 256, 262 (2013) (summary judgment properly denied where *evidence showed* employee did not follow company policy and did not make any effort to confirm counterfeit bill was actually counterfeit).

B. Count Four fails as a matter of law

Even assuming Walraven's conduct somehow constitutes negligence, Carter still failed to present evidence that Walgreens "reasonably knew or should have known" that Walraven, or the other employees that night, had tendencies to engage in the behavior alleged to have caused Carter's injuries. Thus, Carter cannot, as a matter of law, establish a negligent supervision/retention claim under either Georgia or Tennessee law. *See Leo v. Waffle House, Inc.*, 298 Ga. App. 838, 841

(2009); *Alexander v. A. Atlanta Autosave, Inc.*, 272 Ga. App. 73 (2005) (holding summary judgment appropriate on negligent supervision/retention claim because plaintiff failed to offer evidence that company knew or reasonably should have known employee would engage in particular behavior causing injury); *Brown v. Christian Bros. Univ.*, 428 S.W.3d 38, 56 (Tenn. Ct. App. 2013) ("A plaintiff in Tennessee may recover for negligent hiring, supervision, or retention of an employee if he or she establishes, in addition to the elements of a negligence claim, that the employer had knowledge of the employee's unfitness for the job.").

Carter also failed to create a genuine issue of fact that Walgreens' *training* somehow caused the injury in question. Carter never offered evidence of a "causal link between the alleged breach of duty and the injury caused." *La Petite Academy, Inc. v. Turner*, 247 Ga. App. 360, 396 (2000); *Doe I v. Young Women's Christian Ass'n of Greater Atlanta, Inc.*, 321 Ga. App. 403, 406–08 (2013) (affirming grant of summary judgment on negligent training and supervision claims). Carter points to no specific training of Walgreens, or defect in its training, that *caused* the injury she alleges.

Finally, contrary to Carter's protestations, her claims against Walgreens are certainly capable of summary adjudication. *Compare Edwards v. Campbell*, 338 Ga. App. 876, 880–85 (21016) ("[O]ne is bound to anticipate and provide against what *usually* happens and what is *likely* to happen; but it *would impose too heavy a responsibility* to hold him bound in like manner to guard against what is unusual and unlikely to happen or what, as it is sometimes said, is only remotely and slightly probable.") (quoting *Atlanta Gas Light Co. v. Gresham*, 260 Ga 391, 392–93 (1990) (last emphasis in original). It is undisputed that (1) Shannon Walraven was presented with an altered prescription, (2) she called the doctor's office to verify whether in fact the alteration was by the doctor, (3) she was told by a doctor that no doctor in the office would alter a prescription like that because it was against office policy (4) the prescription, as written, was illegal to dispense under Tennessee law, (5) she had a duty to report as much to police, and (6) she had no other involvement with the police upon their arrival, other than to hand over the prescription. [R. 615–622]. It is unfortunate that Carter was arrested, but Shannon Walraven was not the proximate cause of her arrest, and therefore Walgreens cannot be liable on her claims.

CONCLUSION

For these reasons, the Court should AFFIRM the trial court's grant of summary judgment in favor of Appellee, Walgreen, Co.

Respectfully submitted, this 23rd day of April, 2019.

This submission does not exceed the word count limit imposed by Rule 24.

HALL BOOTH SMITH, P.C.

/s/ John E. Hall, Jr.
JOHN E. HALL, JR.
Georgia Bar No. 319090
TERRENCE C. SULLIVAN
Georgia Bar No. 691725
PEARSON K. CUNNINGHAM
Georgia Bar No. 391024
Counsel for Appellees.

191 Peachtree Street, N.E.
Suite 2900
Atlanta, GA 30303-1775
Tel: 404-954-5000
Fax: 404-954-5020

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was served upon the following via email[14] and by placing same in the U.S. mail in a properly addressed envelope with adequate postage affixed thereto.

Stuart F. James, Esq.
THE JAMES FIRM
735 Broad St., Suite 403
Chattanooga, TN 37402
sfj@thejamesfirm.org

Respectfully submitted, this 23rd day of April, 2019.

HALL BOOTH SMITH, P.C.

/s/ John E. Hall, Jr.
JOHN E. HALL, JR.
Georgia Bar No. 319090
TERRENCE C. SULLIVAN
Georgia Bar No. 691725
PEARSON K. CUNNINGHAM
Georgia Bar No. 391024
Counsel for Appellees.

191 Peachtree Street, N.E.
Suite 2900
Atlanta, GA 30303-1775
Tel: 404-954-5000
Fax: 404-954-5020

[14] Pursuant to Rule 6(d) there is a prior agreement with Stuart James of The James Firm to allow documents in .pdf format sent via email to suffice for service.