

April 21, 2023

STATE OF SOUTH CAROLINA,
COUNTY OF Sumter

Michael J. Wallace
Plaintiff,

vs.

Kent N. Cunningham
Defendant.

RECEIVED

MAY 25 2023

SC Court of Appeals

) IN THE COURT OF COMMON PLEAS
) Notice of Intent to Appeal the
) granting of Defendant's Motion
) to Dismiss.
)
) FILE NO. 2022 -CP-43 - 01585
) Notice, to Judge, to Reconsider
) Judgment to Dismiss after re-
) ferring to my answer here-with.
)
) Notice to Amend - Immediately

This notice serves to inform you of my Intent to appeal to the S.C. Appellate Court the judgment by Judge George Mc Fadden granting Defendant's Motion to Dismiss with Prejudice the above listed case #. It will also be submitted during the Appeal Hearing should that event occur.

My reasons to appeal is to contest each of Judge Mc Fadden's findings as follows:

I. Concise Nature of Case

The Judge describes Mr. Cunningham as a Board-Certified physician. There was a

lawyer named Alex Murchough who was also Board Certified - so Board Certified doesn't guarantee Good Behavior.

The judge states that I have not filed a Notice of Intent and supporting experts' affidavit pursuant to S.C. Ann. § 15-79-125. I duly filed a Letter of Restitution/ Intent on Dec. 9, 2022 (see pages 4, 5, 6, 8, 9, 10 + 11). An Experts' affidavit is not required in this case as per Sec. 15-36-100, Sub. Sec. (c) 2, Contemporaneous Filing (page 14). If you don't agree, the Appellate Court will have to decide.

II. Applicable Law

A. Motion to Dismiss:

Re: S.C. Rule of Civil Procedure (12 (b)(6)), [page 7].
see Causes of Action, duly filed Oct. 7, 2022 (pages 1-3).

Sumter, South Carolina

Michael J. Wallace
Plaintiff/Attorney for Plaintiff

Dated: April 21, 2023

Address: 35 Edwards Rd.
Bishopville, S.C. 29010

1

Causes of Action

1.
"Breach of Contract." Defendant did not provide a local anesthesia pain killer during a colonoscopy procedure as I had requested. He then claimed that I was "not given anesthesia at my request."

 2.
"Personal Injury" Defendant performed said procedure in a fast, rough, painful, poke and jab manner which excited my metabolism (hormones, nerves, white blood cells, and blood pressure) so much that it first caused ^{what he claims was} a tortuous ^{sigmoid} colon after he went through it ^{in the above manner} with the colonoscope and second, bradycardia, so that it became necessary to halt the procedure mid-way to inject me with a possibly toxic medication that caused a allergic reaction. I feel that the above action was his unsuccessful attempt to perforate my intestine (which may require surgery).
- 1

2
Causes of Action contd.

3.
"Medical Malpractice" Defendant ignored the patient allergies notification in at least three pre-operative reports. This possibly toxic medication injected directly into one of my arteries while my body was already in a severe physical trauma from the above action triggered a chemical allergic reaction.

4.
"Fraud" I allege the defendant performed the colonoscopy in a perverse manner using it as a disguise for his primary or secondary intention of inflicting me with sufficient trauma, first physically, then chemically to cause

3
Causes of Action cont'd,

4. cont'd.
seemingly unrelated complications afterward
so that I would need additional medical care
at additional expense. To me, all of the above
was a pre-meditated scam in progress!

Reasons for Relief Entitlement

1. I placed my full faith and trust in the defendant, but was betrayed.
2. I didn't learn that I was deceived by the defendant until I read his Post Operative Report statement that I denied anesthesia (a lie).
For this and other discrepancies I demand a full refund of all costs to him and his associates.

December 9, 2022

Mr. Alexander W. Atkinson

126 N. Main St., Sumter, S.C. 29151

Re: Michael J. Wallace vs. Kent N. Cunningham

C/A # 2022 - CP - 43 - 01585

Your File No. 3700-0013

Dear Mr. Atkinson:

Enclosed you will find the following documents that have been filed today with the Sumter County Clerk of Courts office in the above-referenced matter which are hereby served upon you:

1. Notice of Rebuttals to each of Defendants Motion to Dismiss each of Plaintiffs complaints
2. Plaintiffs Memorandum in support of Rebuttals pertaining to Defendants Reference to S.C. Code Ann. § 15-79-125; S.C. Code Ann. § 15-36-100, and S.C. Rule 12(B)(6) S.C. Rules of Civil Procedure.
3. Copies of Plaintiffs Notice of Restitution Due letter dated April 12, 2022 and Mr. Atkinson's Letter of Response dated April 26, 2022

STATE OF SOUTH CAROLINA,)
)
 COUNTY OF Sumter)
Michael J. Wallace)
 Plaintiff,)
)
 vs.)
Kent N. Cunningham)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 Plaintiff's Notice of Rebuttals to
 each of Defendant's Motion to Dis-
 miss each of Plaintiff's complaints.
 FILE NO. 2022-CP-43-01585

To: Alexander W. Atkinson, Counsel for ~~Plaintiff~~^{M.W.} Defendant.

I, Plaintiff Michael J. Wallace submit the follow-
 ing Memorandum in support of my Rebuttals to
 Defendant's Motion to Dismiss. In this action I have
 not failed to comply with any of the substantive
 pre-litigation requirements of S.C. Code ^{Ann.} § 15-79-125,
 S.C. Code ^{Ann.} § 15-36-108 and S.C. Rule of Civil Procedure
 12(B)(6) as this memorandum will attest,
 (pages 12+13)
 (page 14)
 (pages 16+17)

1. Ref: S.C. Code Ann. § 15-79-125

It is ~~in~~ code states: "Notice of Intent to File
 Suit as pre-requisite to filing action etc.". As a
 Lay Attorney I was unaware of this code and, so,

was easy prey for any lawyer. As it turns out, however, I sent your client a Notice of Reconstitution Due Notice on April 12, 2022 and received a response from you confirming its arrival. This Notice essentially satisfies all the requirements of Code § 15-79-125 namely:

- a. It arrived prior to filing on Oct. 7, 2022. (See pg. 8)
- b. It satisfies my attempt at prelitigation mediation, however;
- c. By your response, it was obvious (See pg. 10) that a mediation was not viable and that an impasse existed, therefore;
- d. At the end of the last paragraph, I stated "I will proceed with a Civil Court Hearing on this matter" and, then, I filed the Civil Complaint.

2.

Ref: D.C. Code § 15-36-100

I submit ^{sub} Section (C) (2) of the above listed code: "The contemporaneous filing requirement of subsection (B) is not required" etc., "so that

no special learning is needed to evaluate the conduct of the defendant."

3. Ref: D.C. Rule of Civil Procedure 12(B)(6)

In my Causes for Action section of my complaint, (see pp. 1, 2, + 3)
I was as concise as possible. I say to the court:
I feel that my causes were descriptive and serious enough to stoke your interest to want to hear and learn more (at trial).

4.

Closing Comment

To: The Court,

In the Counsel's Notice of appearance and Response to Plaintiff's Complaint, he states "Defendant would deny each and every allegation contained in the Plaintiff's Complaint".

By this statement, and according to:

From: M. Wallace
35 Edwards Rd.
Bishopville, S.C.
Tel. (803) 428-8239

April 12, 2022

To: K. Cunningham
2740 Windmill Dr.
Sumter, S.C.
Tel. (803) 469-9520

Subject: Notice of restitution due for damages suffered as a result of a alleged premeditated gross malpractice during a colonoscopy performed on Sept. 29, 2021.

Amount due now. \$ 19,398.78

Mr. Cunningham,

The above amount is compensation for the following items beginning on Sept. 23, 2021 and ending on March 31, 2022. Succeeding costs will be addressed at a later date.

- | | |
|---|-------------|
| 1. all costs associated with your colonoscopy, | \$ 1,812.88 |
| 2. all costs submitted by other medical institutions, | 7,491.20 |
| 3. all costs, prescriptions and medical supplies, | 55.19 |
| 4. all travel costs pertinent to my health, | 795.00 |
| 5. all costs for time spent at appointments, procedures, and operations, \$10.00 to \$30.00 per hr. | 150.00 |
| 6. all costs, pain and suffering, | 4,540.00 |
| 7. all costs, emotional stress, | 1,000.00 |
| 8. all costs of reports furnished to agencies and individuals, | 1,535.09 |
| 9. Punitive damages now, \$2,000.00; in court \$4,000.00 or higher. | 2,000.00 |
| 10. all costs, telephone communications, | 19.42 |
| <u>Total \$ 19,398.78</u> | |

All above costs except for item #1 do not include interest. I included 15%/yr. interest on item #1 because I consider the payments I made were not for service rendered but, rather, for a forced loan that I had to make on your behalf for a faked procedure that nearly killed ~~killed~~ me, caused me great pain, long suffering, and financial loss for additional medical treatments to correct a symptom caused by blunt force trauma to my large intestine, and so was totally worthless to me.

Payment must be made within 30 days of the postmark date of this letter, after which I will assess a 15% per year interest on all uncompensated costs remaining retroactive to first date of issue, or event, and proceed with a civil court hearing on this matter, all with additional added costs.

M. Wallace

M. Wallace

SMITH ROBINSON

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Smith Robinson Holler DuBose and Morgan, LLC

COLUMBIA 2530 Devine Street, Columbia, SC 29205
P: 803.254.5445 F: 803.254.5007

SUMTER 126 N. Main Street, Sumter, SC 29151
P: 803.778.2471 F: 803.778.1643

CAMDEN 935 Broad Street, Camden, SC 29020
P: 803.432.1992 F: 803.432.0784

Reply to: Sumter
Alex W. Atkinson

April 26, 2022

VIA EMAIL and U.S. MAIL

Mr. Michael J. Wallace
35 Edwards Rd.
Bishopville, S.C.

Re: Dr. Kent Cunningham; Response to April 14, 2022, Demand Letter

Mr. Wallace,

Dr. Cunningham has notified me of the Demand Letter he received from you dated April 14, 2022, with the subject, "Notice of restitution due for damages suffered as a result of a alleged premeditated gross malpractice during a colonoscopy performed on Sept. 29, 2021." He has asked that I assist him in this matter and has retained my office as his legal counsel. In the interest of full, complete, and timely cooperation, please consider this letter his written response to your demand. Dr. Cunningham and I have personally reviewed your letter, as well as the medical records and other documentation relevant to this matter and understand that you have demanded a total of \$19,398.78 for partial compensation of damages sustained as a result of the September 29, 2021 colonoscopy. I also understand that you intend to supplement this demand with additional "uncompensated costs" and interest at a later date.

I would like to start off by saying that, after review of your demand letter and the medical documentation of the September 29, 2021, colonoscopy you received, we consider the care provided to you by Dr. Cunningham to have been appropriate and well within the standard of care for a gastroenterologist. Since the care you received was appropriate, we do not believe that Dr. Cunningham is liable to you for any financial compensation and decline to meet the terms of your demand.

In your letter, you have asserted that you consider the payments made to Dr. Cunningham's office to have been a "forced loan" rather than payments for services rendered, as you believe that he faked the procedure. The colonoscopy you received from Dr. Cunningham is well documented, and there are no indications that the September 29, 2021, procedure was faked. Additionally, apart from a brief period where your pulse decreased a minor amount, you tolerated the procedure well. I do not see any indications that the procedure almost caused your death. If you would like to review the pictures of the interior of your colon taken during the procedure, those are available to you in your medical records. If you have any records that show otherwise, I would be happy to review them.

Mr. Michael J. Wallace
April 26, 2022
Page 2

Though I and Dr. Cunningham are sorry to hear about the pain, suffering and financial loss you have endured, we do not believe them to have been the result of any deviations from the standard of care in the medical treatment you received.

We both wish you the best.



Alex Kimson

South Carolina Legislature

South Carolina Law > Code of Laws > Title 15

South Carolina Code of Laws Unannotated

Title 15 - Civil Remedies and Procedures

CHAPTER 79

Medical Malpractice Actions

SECTION 15-79-110. Definitions.

As used in this chapter:

- (1) "Ambulatory surgical facility" means a licensed, distinct, freestanding, self-contained entity that is organized, administered, equipped, and operated exclusively for the purpose of performing surgical procedures or related care, treatment, procedures, and/or services, by licensed health care providers, for which patients are scheduled to arrive, receive surgery or related care, treatment, procedures, and/or services, and be discharged on the same day. This term does not include abortion clinics.
- (2) "Health care institution" means an ambulatory surgical facility, a hospital, an institutional general infirmary, a nursing home, and a renal dialysis facility.
- (3) "Health care provider" means a physician, surgeon, osteopath, nurse, oral surgeon, dentist, pharmacist, chiropractor, optometrist, podiatrist, or any similar category of licensed health care provider, including a health care practice, association, partnership, or other legal entity.
- (4) "Hospital" means a licensed facility with an organized medical staff to maintain and operate organized facilities and services to accommodate two or more nonrelated persons for the diagnosis, treatment, and care of such persons over a period exceeding twenty-four hours and provides medical and surgical care of acute illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the State of South Carolina. This term includes a hospital that provides specialized service for one type of care, such as tuberculosis, maternity, or orthopedics.
- (5) "Institutional general infirmary" means a licensed facility which is established within the jurisdiction of a larger nonmedical institution and which maintains and operates organized facilities and services to accommodate two or more nonrelated students, residents, or inmates with illness, injury, or infirmity for a period exceeding twenty-four hours for the diagnosis, treatment, and care of such persons and which provides medical, surgical, and professional nursing care, and in which all diagnoses, treatment, or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the State of South Carolina.
- (6) "Medical malpractice" means doing that which the reasonably prudent health care provider or health care institution would not do or not doing that which the reasonably prudent health care provider or health care institution would do in the same or similar circumstances.
- (7) "Nursing home" means a licensed facility with an organized nursing staff to maintain and operate organized facilities and services to accommodate two or more unrelated persons over a period exceeding twenty-four hours which is operated either in connection with a hospital or as a freestanding facility for the express or implied purpose of providing skilled nursing services for persons who are not in need of hospital care. This term does not include assisted living, independent living, or community residential care facilities that do not provide skilled nursing services.
- (8) "Renal dialysis facility" means an outpatient facility which offers staff assisted dialysis or training and supported services for self-dialysis to end-stage renal disease patients.
- (9) "Skilled nursing services" means services that:
 - (a) are ordered by a physician;
 - (b) require the skills of technical or professional personnel such as registered nurses, licensed practical (vocational) nurses, physical therapists, occupational therapists, and speech pathologists or audiologists; and
 - (c) are furnished directly by, or under the supervision of such personnel.

HISTORY: 2005 Act No. 32, Section 5, eff July 1, 2005, for causes of action arising after that date.

SECTION 15-79-120. Mediation and arbitration.

At any time before a medical malpractice action is brought to trial, the parties shall participate in mediation governed by procedures established in the South Carolina Circuit Court Alternative Dispute Resolution Rules in effect at the time for the State or any portion of the State. Parties may also agree to participate in binding arbitration, nonbinding arbitration, early neutral evaluation, or other forms of alternative dispute resolution.

HISTORY: 2005 Act No. 32, Section 5, eff July 1, 2005, for causes of action arising after that date; 2006 Act No. 354, Section 3, eff June 9, 2006.

Effect of Amendment

The 2006 amendment in the second sentence added "nonbinding arbitration, early neutral evaluation, or other forms of alternative dispute resolution".

SECTION 15-79-125. Notice of Intent to File Suit as prerequisite to filing action; subpoena of medical records; depositions; mandatory prelitigation mediation; initiating action; ADR participation.

- (A) Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100, in a county in which venue would be proper for filing or initiating the civil action. The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure. Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations. The Notice of Intent to File Suit must be served upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure.
- (B) After the Notice of Intent to File Suit is filed and served, all named parties may subpoena medical records and other documents potentially related to the medical malpractice claim pursuant to the rules governing the service and enforcement of subpoenas outlined in the South Carolina Rules of Civil Procedure. Upon leave of court, the named parties also may take depositions pursuant to the rules governing discovery outlined in the South Carolina Rules of Civil Procedure.
- (C) Within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference

unless an extension for no more than sixty days is granted by the court based upon a finding of good cause. Unless inconsistent with this section, the Circuit Court Alternative Dispute Resolution Rules in effect at the time of the mediation conference for all or any part of the State shall govern the mediation process, including compensation of the mediator and payment of the fees and expenses of the mediation conference. The parties otherwise are responsible for their own expenses related to mediation pursuant to this section.

(D) The circuit court has jurisdiction to enforce the provisions of this section.

(E) If the matter cannot be resolved through mediation, the plaintiff may initiate the civil action by filing a summons and complaint pursuant to the South Carolina Rules of Civil Procedure. The action must be filed:

- (1) within sixty days after the mediator determines that the mediation is not viable, that an impasse exists, or that the mediation should end; or
- (2) prior to expiration of the statute of limitations, whichever is later.

(F) Participation in the prelitigation mediation pursuant to this section does not alter or eliminate any obligation of the parties to participate in alternative dispute resolution after the civil action is initiated. However, there is no requirement for participation in more than one alternative dispute resolution forum following the filing of a summons and complaint to initiate a civil action in the matter.

HISTORY: 2005 Act No. 32, Section 5, eff July 1, 2005, for causes of action arising after that date.

SECTION 15-79-130. Report to licensing entity of expert testimony or evidence offered in bad faith or without reasonable basis.

If a judge finds that an expert health care provider or health care institution in a medical malpractice action in this State has offered testimony or evidence in bad faith or without a reasonable basis in fact or otherwise acted unethically in conjunction with testifying as an expert in deposition or at trial, the judge must report the expert to the state entity that licenses and regulates the profession of the expert or the type of health care entity represented by the expert.

HISTORY: 2005 Act No. 32, Section 5, eff July 1, 2005, for causes of action arising after that date.

SECTION 15-36-100. Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission.

(A) As used in this section, "expert witness" means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:

(1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and

(2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or

(b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;

(ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or

(iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion;

(3) is an individual not covered by subsections (A)(1) or (2), that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both. However, an affidavit filed pursuant to subsection (B) by an expert qualified under this subsection must contain an explanation of the expert's credentials and why the expert is qualified to conduct the review required by subsection (B). The defendant is entitled to challenge the sufficiency of the expert's credentials pursuant to subsection (E).

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

(C)(1) The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. The filing of a motion to dismiss pursuant to this section, shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

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

The bounds or limits

(D) This section does not extend an applicable period of limitation, except that, if the affidavit is filed within the period specified in this section, the filing of the affidavit after the expiration of the statute of limitations is considered timely and provides no basis for a statute of limitations defense.

(E) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment within thirty days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing an amendment or response to the motion, or both, as the trial court determines justice requires. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(F) If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the

• applicable period of limitation unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(G) This section applies to the following professions:

- (1) architects;
- (2) attorneys at law;
- (3) certified public accountants;
- (4) chiropractors;
- (5) dentists;
- (6) land surveyors;
- (7) medical doctors;
- (8) marriage and family therapists;
- (9) nurses;
- (10) occupational therapists;
- (11) optometrists;
- (12) osteopathic physicians;
- (13) pharmacists;
- (14) physical therapists;
- (15) physicians' assistants;
- (16) professional counselors;
- (17) professional engineers;
- (18) podiatrists;
- (19) psychologists;
- (20) radiological technicians;
- (21) respiratory therapists; and
- (22) veterinarians.

Today, we'll be covering one of the most important topics in the subject: Federal Rules of Civil Procedure Rule 12(b)(6).

FRCP Rule 12(b) pertains to pretrial motions, and 12(b)(6) specifically deals with motions to dismiss for failure to state a claim upon which relief can be granted.

As a practical matter, Rule 12(b)(6) motions are rarely successful, and when they are, their success usually has more to do with the judge than the law. Nevertheless, they appear regularly in law school civil procedure exams (and bar exam civil procedure questions), so it's important to be aware of them.

"Failure to state a claim upon which relief can be granted" can mean a number of things, all of which have to do with what is stated in a complaint.

First, and most typically, this means that the complaint failed to properly allege one or more of the required elements of an action.

Here's what I mean by this: Suppose someone files a complaint for negligence. In that complaint, the plaintiff must allege all of the elements of negligence, and the elements must be applied to the defendant or defendants.

For example, in the above negligence lawsuit, let's say that the defendant hit the plaintiff with his car. The plaintiff would have to allege all of the elements of negligence and apply them to the defendant, such as the following:

1. Defendant owed to plaintiff a duty of care
2. Defendant breached that duty of care
3. Plaintiff suffered injuries
4. These injuries were the result of defendant's breach of duty

As mentioned earlier, Rule 12(b)(6) motions are rarely successful, in no small part because pleading requirements are generally quite liberal. In spite of these lax requirements, however, the above pleading example would be insufficient to defeat a 12(b)(6) motion.

The pleading is insufficient because all it does is, in court parlance, "merely recite bare legal conclusions."

The complaint must do much more than this. Specifically, a factual basis for the claim must be established by the complaint.

Using the same example as above, the complaint must also include details about *how* the defendant was negligent, and *how* this negligence caused the plaintiff's injuries.

Perhaps the defendant ran a red light and collided with the plaintiff's vehicle or the plaintiff herself. Perhaps the collision caused the plaintiff to break her leg or worse. Complaints must contain factual allegations such as these to be considered as having "stated a claim upon which relief can be granted."

Further, the more factual detail that can be included in the complaint, the better. One reason for this is to ensure that you have sufficiently pleaded the elements of the causes of action listed in your complaint. Another reason — and an important one at that — is the standard that is used to review 12(b)(6) motions. Specifically, when deciding such a motion, the court assumes all factual allegations contained in the complaint to be true, giving the plaintiff the full benefit of the doubt.

Recognizing this, it is vital to include every fact that could in any way be relevant to give the court as complete a picture as possible.

Even if you have perfectly pleaded the elements of a given cause of action and included a complete and detailed set of facts, the Rule 12(b)(6) motion could succeed nonetheless. Although less commonly the reason for the success of such a motion, the court could decide that the pleaded cause of action isn't recognized by the law.

Using our car accident example, if the plaintiff claimed assault and battery instead of negligence, but all of the facts remained the same (i.e. the car accident truly was an accident and there was no intent to cause injury to the plaintiff), then the 12(b)(6) motion, at least in regards to the assault and battery claims, would succeed.

Practically speaking, the judge would usually give the plaintiff leave to amend if a legal cause of action was apparent from the facts, but the 12(b)(6) motion would still *technically* be successful.

In any legal case, it's important to make sure that the facts alleged in the complaint are well-supported and accurate. Save yourself time and **find mistakes before they happen** with more efficient legal research tools from Thomson Reuters.

was placed in left lateral decubitus position. The colonoscope was introduced through rectum and advanced under direct visualization until cecum and terminal ileum was reached. The appendiceal orifice and the ileocecal valve were identified. The colonoscope was retroflexed within the rectum. Careful visualization was performed as the instrument was withdrawn. Patient tolerance to procedure was excellent. The procedure was Difficult requiring counterpressure. Digital exam was normal. Reason for procedure difficulty was tortuous sigmoid colon.

PROBABLE LIE

Limitations/Complications: There were no apparent limitations or complications

Findings:

Excavated lesions A few non-bleeding diverticula were seen in the sigmoid colon. Diverticulosis appeared to be of mild severity.

Protruding lesions A single sessile 10 mm polyp of benign appearance was found in the proximal ascending colon directly across from IC valve. A single-piece polypectomy was performed using a cold snare. The polyp was completely removed.

A single sessile 6 mm polyp of benign appearance was found in the distal sigmoid colon. A single-piece polypectomy was performed using a cold snare. The polyp was completely removed.

Grade/Stage I internal hemorrhoids were noted.

LIE

Additional findings

The patient was not given anesthesia at his request. He has a very tortuous sigmoid colon. During insertion, he developed bradycardia with pulse into the 50's. His blood pressure was good throughout. He was given Robinol 0.2 mg IV with correction of bradycardia..

Impressions:

- Polyp (10 mm) in the proximal ascending colon directly across from IC valve. (Polypectomy).
- Mild diverticulosis of the sigmoid colon.
- Polyp (6 mm) in the distal sigmoid colon. (Polypectomy).
- Grade/Stage I internal hemorrhoids.

PROBABLE LIE

The patient was not given anesthesia at his request. He has a very tortuous sigmoid colon. During insertion, he developed bradycardia with pulse into the 50's. His blood pressure was good throughout. He was given Robinol 0.2 mg IV with correction of bradycardia..

Plan: Someone will mail you the biopsy reports in the next 3 weeks. If you do not get these results, please call my office and get them.

You can resume all of your usual medicines today.

High fiber diet with lots of fruits and vegetables.

Colonoscopy in 1 year if the right colon polyp is an SSA, otherwise I will recommend repeating it in 5 years.

I would not recommend that he do this test without anesthesia in the future.

Specimens:

Jar # A:

Polypectomy in the colon

Findings: Polyp

Test(s) requested: Histology

Comments: right colon polyp

Jar # B:

Polypectomy in the sigmoid colon polyp

Test(s) requested: Histology

NAME: WALLACE, MICHAEL J
 ACT#: 44479 SEX: M
 DOB: 08/21/38 AGE: 83
 DR: CUNNINGHAM, KENT N MD
 DOS: 09/29/21

Service Codes:

Colonoscopy w/lesion removal

45385

Encounter for screening for malignant neoplasm of colon - Z12.11

Polyp of colon - K63.5

This Consent Form was in addition to the pre-op procedure notice

**Wesmark Ambulatory Surgery Center
Consent for Operation, Anesthetic and Other Medical Services**

I have explained the nature and purpose, the risks involved, possible associated complications or consequences and the likelihood of success of diagnostic and/or treatment procedures. I have discussed the prognosis if the procedure is not performed and alternative treatment available.

M.D. Signature: [Signature] Date: 9/29/21

Operation, Treatment or Other Procedure

I authorize Dr. Cunningham, Wesmark Ambulatory Surgery Center, and or such assistants as he/she may select to perform Colonoscopy with possible Biopsy and/or Polypectomy (Insert a lighted tube into the rectum to examine and biopsy or remove with wire snare of lesion, injection or heater probe therapy to control bleeding.) Risk/complications include infection, bleeding, perforation (which may require surgery), and death. To be performed on Name of Patient: Michael Wallace

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The proposed method of Deep Sedation/IV sedation anesthesia has been explained to me and I consent to the administration of such anesthetics and the substitution of those anesthetics as may be considered necessary or advisable by the person responsible for such services. I recognize that during the course of the operation, unforeseen conditions or complications may necessitate additional or different procedures or services than those that have been explained to me and I further authorize and request that the above-named surgeon and or his/her/associates, partners, assistants or designees perform such procedures and are, in his/her professional judgment, necessary and desirable. I consent to allow technical representatives (for medical products, equipment, etc.) requested by my surgeon to be present during my operation or procedure to provide support services including, but not limited to services involving their product. I understand such representatives will not perform any surgical procedure. I consent to allowing medical personnel and trainees to observe my operation or procedure for the purpose of advancing medical education, subject to consent and approval of my surgeon and only under such conditions and at such times as may be approved by my surgeon.

I consent to allowing appropriate personnel or technicians approved by my surgeon to photograph, film, and /or videotape (hereinafter referred to collectively as "photograph") some or all of my operation or procedure. I understand that the photographs may be used to assist in the development of my medical plan and care and may become part of my medical record. I further understand that any photographs may be used for educational purposes and the advancement of medical knowledge, which may include medical research, medical publications, training and education of medical personnel, and any other use my surgeon deems appropriate. I understand that my name and identity will be protected and shall remain confidential if the photographs are used for any such purposes. I waive any legal rights that I may claim for payment and royalties in connection with any publication, broadcast or other showing of photographs. I understand that photographs will be taken subject to consent and approval of my surgeon and only under such conditions and at such times approved by my surgeon.

I consent that any tissue, specimens, or organs removed in the course of any procedure may be tested or retained for diagnostic purposes and then disposed of within the discretion of the surgeon, facility or other health care provider.

I authorize the release of personal information concerning medical devices that are traceable under South Carolina state law to the manufacturer, and understand my consent is required under state law before personal information is released regarding tracking of medical devices. I understand this includes my name, address, date of birth, social security number, and date of insertion. I further understand this information will also include device receipt, device distributions, and date of life expectancy, which may be used by the manufacturer or my surgeon to ensure my protection against malfunctions.

The nature, purpose, and possible consequences of the operation or procedure, possible alternative methods of treatment, the risks involved and the possibility of complications have been explained to me by my surgeon. No guarantees have been made or given by anyone as to the results that may be obtained.

I understand, as described above, the nature of the proposed procedure(s), the attendant risks that are involved and the expected results. I, THE UNDERSIGNED, ACKNOWLEDGE THAT I HAVE READ THIS FORM, THAT ANY QUESTIONS I HAD, HAVE BEEN ANSWERED TO MY SATISFACTION AND THAT I FULLY UNDERSTAND THE CONTENTS AND THE PURPOSE OF THIS AUTHORIZATION.

X Michael Wallace
(Patient or Authorized Person)
[Signature]
(Witness)

NAME: WALLACE, MICHAEL J
ACT#: 44479 SEX: M
DOB: 08/21/38 AGE: 83
DR: CUNNINGHAM, KENT N MD
DOS: 09/29/21

patient
(Relationship)
9/29/21 @ 1030
(Date and Time)

Patient Allergies: acetaminophen, naprosyn, salty nuts, salty chips, strawberries, red fruit

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*

C. S. C.

WALLACE, Michael DOB: 08/21/1938 (83 yo M) Acc No. 146734 DOS: 10/13/2021

Progress Note

Patient: Wallace, Michael
Account Number: 146734
DOB: 08/21/1938 **Age:** 83 Y **Sex:** Male
Phone: 803-428-8239
Address: 35 Edwards Rd, Bishopville, SC-29010-7793

Provider: Mark William Sohner, MD
Date: 10/13/2021

Subjective:

Chief Complaints:

- 1. Follow up from 10/04/2021.

HPI:

Constitutional:

The patient is an 83-year-old male who returns for follow-up evaluation. He was seen for a nurse visit last week, following the previous colonoscopy. At that time, the patient was unable to void following the procedure, and we checked a urinalysis, showing evidence of an acute UTI. He completed a course of ciprofloxacin. He subsequently was referred directly from Dr. Cunningham, the colonoscopist, to a Urologist for further evaluation. It turns out the patient had been given Robinul during the procedure, for bradycardia that developed. This may have affected his urinary function following the procedure. The notes from Dr. Cunningham indicate that the patient chose to have the procedure without anesthesia, but the patient contests this at today's visit, indicating that he "never agreed to that". He is angry with Dr. Cunningham at this time, indicating that he "suffered a lot", in the wake of the colonoscopy, and he feels the G.I. records are "inaccurate".

At the present time, the patient has a Foley catheter inserted, to a leg bag, and is much more comfortable following drainage of his bladder. He is due to see the urologist next week for removal of the Foley. I explained that we would defer a repeat urinalysis due to the presence of the Foley catheter, but this could be repeated in follow-up with urologist, on removal of the Foley. The notes from the urologist indicate the patient had been using a coffee stirrer to drain his bladder, and we reviewed why this would not be a good idea in the future.

We will request copies of the pathology report on the two colon polyps that were found during the colonoscopy procedure, directly from Dr. Cunningham's office. The patient requested these records be forwarded to him, and I explained that he would need to request those directly from Dr. Cunningham's office.

At today's follow-up, the patient's BP is 126/71, and he otherwise has no additional new or different complaints at the present time.

CSC 2 Patient Identifier:

Patient Identification Checked
Nurse Name, DOB Lynnell Brown, LPN
Brown, Lynnell Elaine, LPN 10/13/2021 03:05:49 PM >.

ROS:

GENERAL/CONSTITUTIONAL:

Patient denies fever, chills, night sweats, weight loss, lightheadedness, change in appetite.

CARDIOVASCULAR:

Patient denies dizziness, chest pain, dyspnea on exertion, irregular heartbeat, palpitations.

RESPIRATORY:

Patient denies chronic cough, shortness of breath, wheezing, sputum production.

GASTROINTESTINAL:

Patient denies abdominal pain, change in bowel habits, diarrhea, nausea, vomiting, hematochezia, melena.

GENITOURINARY:

Patient denies blood in the urine, frequent urination, painful urination. Patient complains of difficulty urinating-significantly improved following placement of the Foley catheter and drainage bag by the urologist.

MUSCULOSKELETAL:

Patient denies arthritis / arthralgia, joint stiffness, swollen joints.

NEUROLOGIC:

Patient denies fainting, gait abnormality, headache.

Urology

OFFICE VISIT REPORT 11/23/2021

Michael J. Wallace

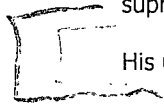
MRN: 12830
DOB: 08/21/1938, 83 year old Male
SSN: ***-**-5188

PRIMARY CARE: Mark Sohner
REFERRING: Mark Sohner
PROVIDER: Vijay P. Pinto, M.D.
SUPERVISING: Vijay P. Pinto, M.D.
TREATING: Brittney Hawkins, N.P.
LOCATION: The Urology Clinic, Inc. - 39279

CC: I have urinary retention.
HPI: Mr. Michael Wallace is a 83 year-old male established patient who is here for urinary retention.

Pt reports symptoms started after a colonoscopy on 9/29/21. He reports that he has Flomax and Proscar but has not been taking them nightly due to feeling like they are not helping. Explained and encouraged the need for Flomax and Proscar. He has had two unsuccessful voiding trials. Foley inserted. The need for foley insertion, UDS, and cystoscopy discussed in depth.

His urinary retention is being treated with flomax and proscar. Patient denies foley catheter, suprapubic tube, intermittent catheterization, hytrin, cardura, uroxatrol, rapaflo, and avodart.



His urine has shut off completely.

He has previously had an indwelling catheter in for more than two weeks at a time.

QOL SCORE: He would feel unhappy if he had to live with his urinary condition the way it is now for the rest of his life.

Calculated QOL Symptom Score: 5

ALLERGIES: Acetaminophen
Naproxen

MEDICATIONS: Flomax 0.4 mg capsule 1 capsule PO Q HS
Finasteride 5 mg tablet

GU PSH: None

NON-GU PSH: None

GU PMH: Other retention of urine - 10/20/2021, - 10/6/2021

NON-GU PMH: None

FAMILY HISTORY: Family History Unknown

SOCIAL HISTORY: Marital Status: Divorced
Preferred Language: English; Ethnicity: Not Hispanic Or Latino; Race: White
Current Smoking Status: Patient does not smoke anymore.
Tobacco Use Assessment Completed: Used Tobacco in last 30 days?
Does not use smokeless tobacco.
Has never drank.
Does not use drugs.
Has not had a blood transfusion.

GRIEVANCE POLICY

It is our goal that every patient feel that their experience at our surgery center is a good one. During your visit if you do not feel your needs have been met you may submit a grievance, either verbally or in writing. We take seriously any concerns about our center and are committed to addressing any complaint or grievance you may have within thirty days of its being filed with the Administrator of the surgery center. All information will be sent to you in writing.

GRIEVANCES

Complaints Against the Center:

DHEC
Division of Health Licensing
2600 Bull Street
Columbia, SC 29201
803-545-4370

Complaints Against the Doctor:

Board of Medical Examiners
Synergy Business Park
Kingstree Building
110 Centerview Drive, Suite 202
Columbia, SC 29210
803-896-4500

Complaints Against Nursing Staff:

Board of Nursing
Synergy Business Park
Kingstree Building
110 Centerview Drive, Suite 202
Columbia, SC 29210
803-896-4500

For Medicare complaints contact Medicare Ombudsman at 1-800-Medicare or visit their website
<http://www.medicare.gov/claims-and-appeals/medicare-rights/get-help/ombudsman.html>

ADVANCE DIRECTIVES

An Advance Directive speaks for you if you are unable to and helps to assure your religious and personal beliefs will be respected. It is useful document for an adult of any age to plan for future health care needs.

All patients have the right to participate in their own health care decisions and to make advance directives or to execute powers of attorney that authorize others to make decisions on their behalf based on the patient's expressed wishes when the patient is unable to make decisions or unable to communicate decisions. This surgery center respects and upholds those rights.

However, unlike in an acute care hospital setting, the surgery center does not routinely perform "high risk" procedures. Most procedures performed in this facility are considered to be of minimal risk. Of course, no surgery is without risk. You will discuss the specifics of your procedure with your physician who can answer your questions as to its risks, your expected recovery and care after your surgery.

Therefore, it is our policy, regardless of the contents of any advance directive or instructions from a health care surrogate attorney in fact, that if an adverse event occurs during your treatment at this facility, we will initiate resuscitation or other stabilizing measures and transfer you to an acute care hospital for further evaluation. At the acute care hospital, further treatment or withdrawal of treatment measures already begun will be ordered in accordance with your wishes, advance directive or health care power of attorney. Your agreement with this policy does not revoke or invalidate any current health care directive or health care power of attorney.

Upon request we will provide you with the contact information and forms to assist in writing an Advance Directive.

Information can also be obtained by:

- Requesting information from Wesmark Ambulatory Surgery Center
- Calling Caring Connections at 800-658-8898
- On the web at www.state.sc.us/dmh/804-97.htm

OWNERSHIP DISCLOSURE

The physician owners of Wesmark Ambulatory Surgery Center founded the center to provide an effective, low-cost, high quality alternative healthcare site for their patients. We are pleased that you have chosen us for your surgery needs.

Gastroenterologist

Floyd L. Angus, M.D.
Kent N. Cunningham, M.D.
Paul A. Evangelisti, M.D.
James A Goodson, III M.D.

David Lovice, M.D..
Gregory A. King, M.D.
Scott R. McDuffie, M.D.
Vijay P. Pinto, M.D.

Urologist

David Woodbury, M.D.

Ambulatory Surgical Centers of America

M.C. #1