THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2011-CP-44-00074

Sarah Dawkins, ... Appellant,

v.

Union Hospital District
(aka) Wallace Thomson Hospital, ... Respondent.

RECORD ON APPEAL

John S. Nichols, SC Bar # 4210
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(803) 779-8995 (facsimile)
jsnichols@bntdlaw.com

Donald Gist, SC Bar # 13098
Gist Law Firm
4400 North main Street
Columbia, South Carolina 29230
(803) 771-8007

Attorneys for Appellant

William U. Gunn, SC Bar # 2362
Joshua T. Thompson, SC Bar # 79137
HOLCOMBE BOMAR, P.A.
Post Office Drawer 1897
Spartanburg, South Carolina 29304
(864) 594-5300
(864) 585-4273 (facsimile)
bgunn@holcombebomar.com
jthompson@holcomebomar.com

Attorneys for Respondent

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Gist Law Firm
4400 North main Street
Columbia, South Carolina 29230
(803) 771-8007

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William U. Gunn, SC Bar # 2362
Joshua T. Thompson, SC Bar # 79137
HOLCOMBE BOMAR, P.A.
Post Office Drawer 1897
Spartanburg, South Carolina 29304
(864) 594-5300
(864) 585-4273 (facsimile)
bgunn@holcombebomar.com
jthompson@holcomebomar.com

Attorneys for Respondent

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF UNION
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 -CP- 44 - 74

Sarah Dewitt

PLAINTIFF(S)

Union Hospital District
(aka) Wallace Thompson Hospital

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____.

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____.

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☑ See attached order (~~formal order to follow~~) ☐ Statement of Judgment by the Court: _____

ORDER INFORMATION

This order ☑ ends ☐ does not end the case.

Additional Information for the Clerk : Plaintiff has 10 days from Service of Order to file motion to Reconsider.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

_____

_____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

John C Hayes | 2049 | 2/13/12

Circuit Court Judge | Judge Code | Date

SCRCP Form 4C (12/2011)

This judgment was entered on **22nd day of February, 2012**, and a copy mailed first class or placed in the appropriate attorney's box on **23rd day of February, 2012**, to attorneys of record or to parties (when appearing pro se) as follows:

Donald Gist Gist Law Firm, PA P.O. Box 30007 Columbia, SC 29230

ATTORNEY(S) FOR THE PLAINTIFF(S)

William U. Gunn Holcombe Bomar, PA P.O. Box 1897 Spartanburg, SC 29304
Union Hospital District ,

ATTORNEY(S) FOR THE DEFENDANT(S)

William F. Gault/D

William F. Gault - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA COUNTY OF UNION	IN THE COURT OF COMMON PLEAS FOR THE 16th JUDICIAL CIRCUIT
Sarah Dawkins, Plaintiffs, v. Union Hospital District (aka) Wallace Thompson Hospital, Defendant.	Case No. 2011-CP-44-00074 AMENDED ORDER

It has been brought to the Court's attention that the previous Order in this matter contained a technical error in that it reversed the parties in the final line of the Order. The Order should read "Therefore, Defendant's Motion to Dismiss is GRANTED." This Amended Order has corrected the error.

ORDER

This matter concerns a Motion to Dismiss in the above-referenced case that was heard on January 17, 2012. Plaintiff Sarah Dawkins was represented by Donald Gist, Esquire. Defendant Union Hospital District, also known as Wallace Thompson Hospital, was represented by Joshua T. Thompson, Esquire.

Defendant contends that Plaintiff's claims are medical malpractice claims, and therefore subject to the requirements of S.C. Code § 15-79-125 and § 15-36-100. Defendant moves the Court to dismiss this action on the basis that Plaintiff failed to file a notice of intent to file suit and an affidavit of an expert witness, as required by S.C. Code § 15-79-125 and §15-36-100.

Plaintiff asserts that its claims are not "medical malpractice" claims as defined by § 15-79-100, and, therefore, are not subject to the notice of intent and expert affidavit requirements of S.C. Code § 15-79-125 and §15-36-100. Plaintiff claims that "this matter does not originate

from the Defendant's professional negligence or malpractice but from Defendant's failure to supervise and monitor Plaintiff and adhere to its own Policies and Procedures." Specifically, Plaintiff contends that §15-36-100 is inapplicable because Plaintiff's injury "did not stem from the Defendant's professional negligence per se, but rather from its negligent supervision and failure to keep a watchful eye on Plaintiff ." However, these assertions cannot be reconciled with the specific allegations made in Plaintiff's Amended Complaint. In the Amended Complaint, Plaintiff asserts:

1. "Plaintiff checked into the Defendant's Hospital for the expressed purpose of receiving medical attention for headaches and the inability to maintain balance or walk." (Amended Complaint, Paragraph 3).

2. "At the time of admission, the Plaintiff asserts that the intake nurses were informed of the conditions surrounding here admittance. In response to the noted ailments, the Plaintiff should not have been left unattended and unmonitored until proper tests could be performed or at the very least until the appropriate fall Hospital procedures were put in place." (Amended Complaint, Paragraph 5).

3. **"Defendant had every obligation to the Plaintiff to ensure her safety with regard to her original complaints, as well as the side effects of the medications that were being administered by Defendant."** [emphasis added]. (Amended Complaint, Paragraph 11)

Any obligation or duty owed to Plaintiff as a result of Plaintiff's initial medical complaints and the disclosure of her current medications to the intake nurses could arise only from a professional medical analysis or diagnosis. It is axiomatic that any such medical analysis or diagnosis would constitute the practice of medicine. Furthermore, "medical malpractice" is broadly defined under S.C. Code § 15-79-100(6) as "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." Accordingly, this Court finds that Plaintiff's claims fall within the statutory

definition of medical malpractice, thereby triggering the NOI and Expert Affidavit requirements of § 15-79-125.

South Carolina Code § 15-79-125(C)(1) provides that where the required Expert Affidavit is not filed and the Defendant moves the Court to dismiss, the complaint is subject to dismissal for failure to state a claim.

Therefore, Defendant's Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

John C. Hayes, III #3
Presiding Judge

~~January~~ February 2nd, 2012
Union, South Carolina.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF UNION
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP4400074

FILED
APR - 4 2012
TIME 9:52 AM
WILLIAM E. GAULT, C.C.C.P. & G.S.

Sarah Dawkins

PLAINTIFF(S)

Wallace Thomson Hospital

Union Hospital District

DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

_____

_____

CPFORM4M
SCCA SCRCP Form 4C (Revised 10/2011)

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

s/ John C. Hayes III	2049	3/20/12
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

CPFORM4M
SCCA SCRCP Form 4C (Revised 10/2011)

This judgment was entered on 4th day of April, 2012, and a copy mailed first class or placed in the appropriate attorney's box on 4th day of April, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

Donald Gist Gist Law Firm, PA P.O. Box 30007 Columbia, SC 29230

ATTORNEY(S) FOR THE PLAINTIFF(S)

William U. Gunn Holcombe Bomar, PA P.O. Box 1897 Spartanburg, SC 29304
Union Hospital District

ATTORNEY(S) FOR THE DEFENDANT(S)

William F. Gault/P

William F. Gault - Clerk of Court

Court Reporter

CPFORM4M
SCCA SCRCP Form 4C (Revised 10/2011)

JUDGEMENT ROLL NO. 2011CP4400074

STATE OF SOUTH CAROLINA)
COUNTY OF UNION)

Sarah Dawkins,

Plaintiffs,

v.

Union Hospital District
(aka) Wallace Thomson Hospital,
Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE 16th JUDICIAL CIRCUIT

Case No. 2011-CP-44-00074

ORDER

FILED
APR - 4 2012
TIME 9:52 AM
WILLIAM F. GAULT, C.C.C.P. & G.S.

This matter concerns a motion by Plaintiff requesting this Court to reconsider and alter or amend its Order dated February 13, 2012 granting Defendant's Motion to Dismiss in the above-captioned case.

As a preliminary matter, the court does not see this as a pleading issue, as Plaintiff seems to place some focus in her Motion to Reconsider. This is a fundamental issue; that is, compliance with a statute with specific requirements and specific remedies.

In her Motion to Reconsider, Plaintiff alleges that this Court erred in granting Defendant's Motion to Dismiss. Plaintiff contends that she has sufficiently alleged a premises liability action in her amended complaint, asserting that "Plaintiff went to the Defendant for medical treatment and medical treatment is what the Defendant is in the business of providing." As such, Plaintiff contends the NOI requirements are not applicable to her claim. Plaintiff further alleges that even if Plaintiff's claims did amount to a claim of professional negligence, Plaintiff was not required to provide a medical affidavit because Plaintiff's claims fall under §15-36-100(C)(2), which provides for an exception to the NOI requirements where the subject matter of a negligence claim lies within the ambit of common knowledge and experience, such that no special learning is needed to evaluate the conduct of the defendant.

Essentially, Plaintiff iterates the same allegations made in her Amended Complaint. As the Court stated in its previous Order, Plaintiff's assertions that her claims are not "medical malpractice" cannot be reconciled with the specific allegations made in Plaintiff's Amended Complaint. "Medical malpractice" is broadly defined under S.C. Code § 15-79-110(6) as "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." The premise of Plaintiff's allegations is based on an event that happened in a medical facility due to a medical condition. Any duty in this case arose from the fact that the Plaintiff was seeking medical treatment at a medical facility. Had the events alleged to have occurred at the hospital taken place at a restaurant, grocery store, or any other place of business, none would be liable based on the allegations in the amended complaint. Therefore, this is not a premises liability case, as there is no allegation that any dangerous conditions at the hospital caused Plaintiff to fall.

Accordingly, Plaintiff's claims fall within the statutory definition of medical malpractice, thereby triggering the NOI and Expert Affidavit requirements of § 15-79-125 and § 15-36-100(C)(1). South Carolina Code § 15-36-100(C)(1) provides that where the required Expert Affidavit is not filed and the Defendant moves the Court to dismiss, the complaint is subject to dismissal for failure to state a claim.

Therefore, Plaintiff's Motion to Reconsider is DENIED.

As an aside, it has been brought to the Court's attention that there are two clerical errors in the Court's previous amended order. In the first full paragraph on page two (2) of the Amended Order, the Court cites to "S.C. Code § 15-79-100(6)" in error to define "medical malpractice." The correct citation is S.C. Code § 15-79-110(6). In addition, in the last full

paragraph on page three (3) of the order, the Court cites to S.C. Code § 15-79-125(C)(1), where it intended to cite to §15-36-100(C)(1). These changes are hereby incorporated into the Amended Order.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge

March 20th, 2012
Union, South Carolina.

FILE FOR RECORD

2011 MAY -3 P

STATE OF SOUTH CAROLINA	IN THE COUNTY OF UNION
COUNTY OF UNION	COURT OF COMMON PLEAS
	Case No. 2011-CP-44-0074
SARAH DAWKINS Plaintiff	AMENDED COMPLAINT
vs. WALLACE THOMSON HOSPITAL (aka UNION HOSPITAL DISTRICT) Defendant	(Negligence) (Jury Trial Demanded)

The Plaintiff(s), above-named, complaining of the Defendant(s) herein, would allege:

VENUE AND JURISDICTION

That Venue is proper in Union, South Carolina as this is where the events complained of in this matter occurred and this is where the Defendant conducts it business.

PARTIES

1. That the Plaintiff, Sarah Dawkins, is a citizen and resident of the County of Richland, State of South Carolina, and at the time of the occurrence herein mentioned was a patient within the Defendant's hospital.

2. That upon information and belief, the Defendant, Wallace Thomson Hospital, (hereinafter referred to as Defendant) is a part of the Union Hospital District, an entity that was created by state law doing business within the State of South Carolina in the County of Union.

STATEMENT OF CLAIM

3. That on or about February 22, 2009 the Plaintiff checked into the Defendant's Hospital for the expressed purpose of receiving medical attention for headaches and the inability to maintain balance or walk. Ms. Dawkins arrived at the hospital via

ambulance as her daughter-in-law thought she could have been having a stroke. She was placed in the emergency room and her family was told they could not accompany her into that area.

4. Upon her son Tim arriving at the hospital, he was requested to enter the room and was informed that his mother had fell while left unattended in the restroom, and suffered a hair-line fracture to her right foot.

5. At the time of admission, the Plaintiff asserts that the intake nurses were informed of the conditions surrounding her admittance. In response to the noted ailments, the Plaintiff should not have been left unattended and unmonitored until proper tests could be performed or at the very least until the appropriate fall Hospital procedures were put in place.

6. In addition, her daughter-in-law had also disclosed to the staff that Ms. Dawkins was experiencing instability and possible symptoms of stroke.

7. The Plaintiff asserts that on the morning of February 22, 2009 while attempting to use the restroom she fell. The Plaintiff states that she suffered severe pain and was unable to pull herself up or reach the call button for assistance.

8. The Plaintiff remained on the floor until staff assisted her. She was in excruciating pain and could not believe that any staff members had not come in to check on her condition.

9. The Plaintiff asserts that she was only rendered assistance after someone heard her repeated pleas for help.

10. It is Plaintiff's belief that had the Defendant's staff performed their duties in compliance with the Hospital Policies, she would not have suffered the injuries that exasperated her original reason for being in the hospital.

11. The Defendant's staff was fully aware of the Plaintiff's complaints, as well as the medications that were to be administered to Plaintiff. In addition, the Defendant had every obligation to the Plaintiff to ensure her safety with regard to her original complaints, as well as the side effects of the medications that were being administered by Defendant.

12. The Plaintiff contends at the time and place mentioned above, the Defendant was grossly negligent, reckless, willful and wanton, in one or more of the following particulars, to wit:

a. In failing to adhere to the Defendant's policies and procedures and assuring that the Plaintiff was monitored;

b. In failing to keep a watchful eye on a person who had originally complained of dizziness, headaches and instability, which were the precursors of her admittance; and

c. In failing to take any precautionary actions, by any means, to insure the Plaintiff's safety.

PRAYER FOR RELIEF

13. That as a direct and proximate result of the Defendant's gross negligence, recklessness, willfulness and wantonness, as aforesaid, Plaintiff,

a) Suffered a fractured foot, and ankle as well as other bodily injury, which caused Plaintiff, and will cause Plaintiff in the future, to incur medical expense, to suffer

tremendous pain and suffering and to lose time from work and lost wages.

b) Will have to use the aid of a walking apparatus for the rest of her life, which will hinder her future mobility and independence.

14. The Plaintiff is informed and does believe that she is entitled to judgment against the Defendant, in actual and compensatory damages, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED

Donald Gist
GIST LAW FIRM, PA
4400 North Main Street
P.O. Box 30007 (29230)
Columbia, SC 29203
803-771-8007
803-771-0063 (fax)

May 9, 2011
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF UNION	)	
SARAH DAWKINS,	)	
	)	
PLAINTIFF,	)	NOTICE OF AND MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT
	)	
VS.	)	
	)	
UNION HOSPITAL DISTRICT (aka WALLACE THOMSON HOSPITAL),	)	C.A. NO.: 2011-CP-33-0074
	)	
DEFENDANT.	)	

FILED FOR RECORD

TO: **PLAINTIFF AND HER ATTORNEY DONALD GIST OF GIST LAW FIRM, PA**

YOU WILL PLEASE TAKE NOTICE THAT Union Hospital District d/b/a Wallace Thomson Hospital ("Defendant"), identified by Plaintiff as Union Hospital District (aka Wallace Thomson Hospital), through its undersigned attorneys, will move, on the tenth day after service hereof, at 10:00 a.m., or as soon thereafter as counsel can be heard, before the presiding Judge of the Court of Common Pleas for Union County, for an Order dismissing the Plaintiff's Amended Complaint. This Motion is made pursuant to SCRCP Rules 12(b)(1) and 12(b)(6), and all other applicable authority on the grounds that the Amended Complaint fails to state facts sufficient to constitute a cause of action, and that this Court presently does not have subject matter jurisdiction. More particularly, the Plaintiff has presented a claim based upon medical negligence and has failed to comply with the proper pre-suit procedures in accordance with S.C. Code Ann. § 15-79-125, commonly referred to as the "notice of intent to file suit" procedures.

This Motion to Dismiss may be further supplemented with a Memorandum of Law, Affidavits or other supporting materials as permitted under the South Carolina Rules of Civil Procedure.

HOLCOMBE BOMAR, P. A.

By: _____ SC Bar No. 79137

William U. Gunn
Joshua T. Thompson
Post Office Box 1897
Spartanburg, SC 29304
(864) 594-5300

Attorneys for Wallace Thomson Hospital

May 27, 2011

Spartanburg, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF UNION	)	
Sarah Dawkins,	)	
	)	**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**
Plaintiff,	)	
	)	
vs.	)	
	)	
Wallace Thomson Hospital,	)	C.A. No. 2011-CP-44-00074
	)	
Defendant.	)	

Defendant Union Hospital District d/b/a Wallace Thomson Hospital ("Wallace Thomson") offers the following Memorandum in Support of its Motion to Dismiss Plaintiff's Amended Complaint.

BACKGROUND

Wallace Thomson is a hospital district created by state law. See Complaint, ¶ 2 (attached as Exhibit A). Plaintiff Sarah Dawkins ("Plaintiff") alleges that on or about February 22, 2009, she presented at Wallace Thomson to obtain **medical treatment** for "headaches and the inability to maintain balance or walk." See Exhibit A, ¶ 3 (emphasis added). Plaintiff further alleges that after she was admitted to a patient room at Wallace Thomson, she fell while attempting to use the restroom. See Exhibit A, ¶ 3, 4. Plaintiff claims that her fall was caused by Wallace Thomson's negligence in failing to properly assess her medical condition and put into place fall risk and safety precautions in light of her condition and the medications that she was taking. See Exhibit A, ¶ 5, 10, 11, 12(a).

After filing her initial complaint in this matter on February 18, 2011, Plaintiff filed an Amended Complaint on May 9, 2011 alleging the above-stated medical malpractice claims

on behalf of Wallace Thomson and its nursing staff. Prior to filing her Summons and Complaint and her Amended Complaint, Plaintiff did not comply with S.C. Code Ann. § 15-79-110, et seq. and S.C. Code Ann. § 15-36-100, South Carolina's Notice of Intent to File Suit and expert affidavit procedures required in medical malpractice actions (the "NOI Requirements").

Because Plaintiff did not comply with the NOI Requirements, this Court lacks subject matter jurisdiction to consider the claims raised in Plaintiff's Amended Complaint and Plaintiff cannot maintain the current action filed against Wallace Thomson. Instead, her Amended Complaint must be dismissed.

ARGUMENT

Prior to filing or initiating a civil action alleging medical malpractice, the NOI requirements mandate that a plaintiff must file a Notice of Intent to File Suit ("NOI") accompanied by an affidavit of a qualified expert witness. S.C. Code Ann. § 15-79-125(A). The Notice of Intent to File Suit must, among other things, "contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief." Id. The accompanying expert witness affidavit "must specify at least one negligent act or omission claimed to exist and the factual basis for each claim." S.C. Code Ann. § 15-36-100(B).

For purposes of the NOI Requirements, "medical malpractice" is defined as "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." S.C. Code Ann. § 15-79-110(6). "Health care provider" is defined to include nurses as well as any similar category of licensed health care provider. S.C. Code Ann. § 15-79-110(3). "Health care institution" is

defined to include a hospital. S.C. Code Ann. § 15-79-110(2).

Where a plaintiff fails to file the required affidavit, the defendant may raise such issue by filing a motion to dismiss. S.C. Code Ann. § 15-36-100(F). Upon the filing of a motion to dismiss, "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." S.C. Code Ann. § 15-36-100(F).

In addition to the definition of "medical malpractice" provided by S.C. Code Ann. § 15-79-110(6), South Carolina case law distinguishes ordinary negligence from medical malpractice at the point at which the plaintiff's allegations concern matters of proper diagnosis or treatment involving technical knowledge outside of the knowledge of laymen. See, e.g., Botehlo v. Bycura, 282 S.C. 578, 583, 320 S.E.2d 59, 63 (Ct.App. 1984) ("The reason for requiring expert testimony [in medical malpractice actions] is that matters of proper diagnosis and treatment ordinarily involve technical knowledge beyond the ken of laymen.").

There is no question that, pursuant to the NOI Requirements, Wallace Thomson is a "health care institution" as Plaintiff alleges throughout her Amended Complaint that it is a hospital. There is also no question that Plaintiff's allegations concern "health care providers" as Plaintiff alleges that it was Wallace Thomson's "intake nurses" that assessed her condition and failed to put safety and fall precautions into place. See Exhibit A, ¶ 5.

As such, for purposes of the NOI Requirements, Plaintiff's Amended Complaint alleges numerous claims of medical malpractice on the part of Wallace Thomson and its nursing staff. Plaintiff alleges that the nursing staff failed to put into place fall risk

precautions in accordance with hospital policy after assessing her condition. See Exhibit A, ¶ 5, 10, 11, 12(a). Plaintiff also alleges that Wallace Thomson failed to take additional precautions for her safety based upon the nursing staff's knowledge of the medications administered to her as well as the side effects of those medications. See Exhibit A, ¶ 11.

Patient assessments, fall risk precautions based on those assessments, and ensuring patient safety based on knowledge of medications and their side effects are all aspects of skilled and technical medical treatment rising above the knowledge of laypersons. Simply put, only health care providers within a health care institution conduct patient assessments and fall risk assessments, and they do so based upon their medical knowledge and expertise in reviewing a patient's medical condition. Through her allegations, Plaintiff has questioned whether Wallace Thomson and its nursing staff provided medical treatment to Plaintiff as would a reasonably prudent institution and provider in the same or similar circumstances. Because Plaintiff alleges negligent medical treatment in failing to properly assess her and put into place fall risk precautions, she is alleging claims of medical malpractice. As a result of Plaintiff's failure to comply with the NOI Requirements, she is not entitled to maintain an action against Wallace Thomson, and her claim is subject to dismissal pursuant to S.C. Code Ann. § 15-79-125 and S.C. Code Ann. § 15-36-100(F).

In addition to the above-described right of dismissal, Wallace Thomson is entitled to have this action dismissed with prejudice pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure. Section 15-79-125(D) provides that a circuit court has jurisdiction to enforce S.C. Code Ann. § 15-79-125. The negative implication of said grant of jurisdiction is that where a plaintiff fails to comply with the NOI Requirements, the circuit

court does not have jurisdiction over the plaintiff's case. Plaintiff's failure to comply with the NOI Requirements deprives this Court of subject matter jurisdiction to consider her claims asserted in the Amended Complaint. Pursuant to S.C. Code Ann. § 15-79-125(D), this Court only retains subject matter jurisdiction to enforce the NOI Requirements and dismiss this action for failure to comply therewith.

Finally, by failing to comply with the NOI Requirements, Plaintiff cannot maintain the present action because it is filed improperly. Section 15-79-125(E) of the South Carolina Code provides that a plaintiff may institute a civil action in a medical malpractice case by filing a summons and complaint *only after* it is determined that the matter cannot be resolved in pre-suit mediation pursuant to the NOI Requirements. By failing to comply with the NOI Requirements, Plaintiff has improperly filed her Amended Complaint when she has no legal right do so. As such, her Amended Complaint fails to state a cause of action upon which relief can be granted, and her Amended Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

CONCLUSION

For the reasons set forth above, Defendant Wallace Thomson respectfully requests that this Court grant its Motion to Dismiss, and dismiss Plaintiff's Amended Complaint with prejudice.

[Signature block on next page.]

HOLCOMBE BOMAR, P. A.

By: Joshua T Thompson / SC Bar # 79137
William U. Gunn
Joshua T. Thompson
Post Office Box 1897
Spartanburg, SC 29304
(864) 594-5300

Attorneys for Defendant

January 12, 2012

Spartanburg, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF UNION	)	IN THE COUNTY OF UNION COURT OF COMMON PLEAS
	)	
	)	Case No. 2011-CP-44-00074
SARAH DAWKINS, Plaintiff	)	
vs.	)	
UNION HOSPITAL DISTRICT (aka) WALLACE THOMSON HOSPITAL, Defendant	)	

PLAINTIFF'S OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Plaintiff Sarah Dawkins hereby submits this reply in response to Defendant's, Wallace Thomson Hospital aka Union Hospital District (hereinafter Hospital), Motion to Dismiss. For the reasons set forth herein, Plaintiff asks this Court to deny Defendant's Motion on all grounds pursuant to South Carolina Rules of Civil Procedure and relevant state law.

II. STATEMENT OF FACTS

On February 22, 2009, Plaintiff's daughter-in-law noticed that Plaintiff was having great difficulty walking and balancing in general. Plaintiff was also complaining of a severe headache. Fearing that her mother-in-law was having a stroke, Plaintiff's daughter-in-law called an ambulance. Upon arrival at the hospital, the emergency room front desk staff was apprised of Plaintiff's symptoms, and Plaintiff was taken in the emergency room area while her family was required to wait in the waiting area. Plaintiff's son arrived a few hours later and requested to see his mother. It was not until his arrival that the family was notified that Plaintiff had fallen in the bathroom and fractured her foot.

Plaintiff contends that she fell while attempting to use the bathroom with no assistance from any hospital staff. Unable to reach the call button, she was forced to lie on the floor in agony and scream for help. However, it was not until sometime later that someone arrived to help Plaintiff. Plaintiff contends that the Defendant was grossly negligent in failing to perform its duties in compliance with its own policies and procedures, failing to secure her safety and well-being before leaving her unattended, and failing to check on Plaintiff. Plaintiff brought this action in that the circumstances are akin to premises liability alleging that Defendant was negligent in its supervision and failure to keep a watchful eye on Plaintiff in the bathroom where the fall occurred.

III. STANDARD OF REVIEW

Pursuant to Rule 12(b)(1) and (b)(6), SCRCP, the movant challenges the power of the court over the subject matter. "The question of subject matter jurisdiction is a question of law for the court." *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631 (Ct.App.1993) (citing *Bargesser v. Coleman Co.*, 230 S.C. 562, 96 S.E.2d 825 (1957)). "The concept of jurisdiction refers to the authority of a court over a particular person (personal jurisdiction) or the authority of a court to entertain a particular action (subject matter jurisdiction), but the concept does not refer to the validity of the claim on which an action against a person is based." *Boan v. Jacobs*, 296 S.C. 419, 421, 373 S.E.2d 697, 698 (Ct.App.1988). In the present case, the Defendant contends that the Court does not have subject matter jurisdiction.

Subject matter jurisdiction is "the power to hear and determine cases of the general class to which the proceedings in question belong." *Bank of Babylon v. Quirk*, 192 Conn. 447, 472 A.2d 21, 22 (1984); *Balcon, Inc. v. Sadler*, 36 N.C.App. 322, 244 S.E.2d 164 (1978) (citing 21 C.J.S. Courts § 23, pp. 36-37). A court lacking subject matter jurisdiction, however, has no

authority to act regardless of the geographical location or consent of the litigants. *Nix v. Mercury Motor Express, Inc.*, 270 S.C. 477, 242 S.E.2d 683 (1978).

Plaintiff disagrees and argues that in the present case the Court has subject matter jurisdiction over this matter, as this is an action in tort, and there is but one Circuit Court in South Carolina, with uniform subject matter jurisdiction "throughout the State." *State ex rel. Riley v. Martin*, 274 S.C. 106, 111, 262 S.E.2d 404, 406 (1980); *see also* S.C.Const. art. V, § 1. Accordingly, the court has jurisdiction to hear this matter.

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). The decision to grant a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. *Id.; Clearwater Trust v. Bunting*, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006). In deciding to grant the motion to dismiss, the court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Spence*, at 116, 628 S.E.2d at 874 (2006). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. *Id.; Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Spence*, at 116-17, 628 S.E.2d at 874. Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

Rule 8, SCRCP, mandates that a pleading contain "ultimate facts" rather than "evidentiary facts" to state a cause of action. "Ultimate facts fall somewhere between the verbosity of 'evidentiary facts' and the sparsity of 'legal conclusions'." *Watts v. Metro Security Agency*, 346 S.C. 235, 239, 550 S.E.2d 869, 871 (Ct. App. 2001). Further, a complaint must contain a 'short and plain statement of the facts showing the pleader is entitled to relief.' Rule 8(a)(2), SCRCP. This requires a litigant to plead the ultimate facts which will be proven at trial, not evidence which will be used to prove those facts. *Clark v. Clark*, 293 S.C. 415, 416, 361 S.E.2d 328 (1987) (emphasis added).

Where allegations of the complaint give rise to competing inferences on a question of material fact, dismissal under Rule 12(b)(6) is not appropriate. *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 306 (1993). The Ruling on a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. Moreover, a 12(b)(6) motion should not be granted if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. The question to be considered is whether, when viewed in the light most favorable to the plaintiff, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail. *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752 (Ct. App. 2004) (emphasis added).

Plaintiff's Amended Complaint recites the ultimate facts, which upon further litigation, will show the evidence which will be used to prove those ultimate facts. As such, the Defendant's Rule 12(b)(6) motion to dismiss must be denied.

IV. LEGAL ARGUMENTS

On April 18, 2011, the Hospital filed a motion to dismiss pursuant to the South Carolina Rules of Civil Procedure 12(b)(1), 12 (b)(2) and 12(b)(6). The Hospital contends that Plaintiff did not comply with South Carolina Code Annotated § 15-79-125, and as such her claims should be dismissed accordingly. Plaintiff disagrees for the below stated reasons.

Pursuant to Rule 7 of the South Carolina Rules of Civil Procedure Plaintiff opposes Defendant's motion to dismiss and asserts that the complaint does not allege professional negligence and that an expert affidavit is not required under the law.

S.C. Code Ann. § 15-36-100, amended effective July 1, 2005, for causes of action arising after that date, provides that in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in the statute (including health-care professionals, attorneys, architects, professional engineers, certified public accountants, and others), the plaintiff must file as part of the complaint an affidavit of an "expert witness" (as statutorily defined) specifying 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. Defendant contends that because Plaintiff did not file an affidavit of an expert witness that Plaintiff's claims should be dismissed pursuant to Rule 12(b)(1) and 12(b)(6) for failure to state a claim. Plaintiff disagrees.

Plaintiff contends that while a health care facility is covered under S.C. Code Ann. §15-36-100, it is not applicable in this matter. As derived from Plaintiff's Statement of Facts above, this matter does not originate from the Defendant's professional negligence or malpractice but from Defendant's failure to supervise and monitor Plaintiff and adhere to its own Policies and Procedures. There is no evidence that any diagnostic (medical) services were rendered prior to the fall. Plaintiff contends that a Rule 12(b) motion is premature at this time, absent discovery to

determine who and what medical services, if any, were ever rendered. There are disputed facts regarding whether the intake staff was nurses, administrative assistants, and even if so, no medical services, according to Plaintiff, were rendered prior to the fall, Plaintiff simply checked into the emergency room, complained of having difficulty in keeping her balance. The emergency room staff of Defendant was aware that Plaintiff was having great difficulty in walking and keeping her balance, yet they left her unattended and did not permit her family to wait with her. As a result, Plaintiff was forced to attempt to use the bathroom by herself. To make matters worse, the Defendant failed to check on Plaintiff in a timely manner, and she was forced to lie on the floor and scream in agony until someone heard her. The Defendant also failed to inform Plaintiff's family of the incident in a timely manner. The resulting injury to Plaintiff did not stem from the Defendant's professional negligence per se, but rather from its negligent supervision and failure to keep a watchful eye on Plaintiff, thus making § 15-36-100 inapplicable.

Additionally, the courts and the legislature provide that where professional negligence is alleged, expert testimony will usually be necessary to establish both the standard of care and the defendant's departure therefrom, ***unless*** the subject matter is within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant. *Hoeffner v. The Citadel*, 311 S.C. 361. 429 S.E.2d 190 (1993), reh'g denied, (May 17, 1993). The Code reiterates the court's finding and states that "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. (South Carolina Code Annotated § 15-36-100 (C)(2)).

The legislative intent of Section 15-36-100 was not to make an absolute requirement that all negligence actions against a healthcare provider require expert testimony and special learning to evaluate the conduct of the defendant. This case is similar to the Circuit Court's position in the case of the *Estate of Smilie Christie v., South Carolina Department of Mental Health*, Case No. 2009-CP-40-134, argued by Plaintiff's counsel before the Honorable George C. James on July 13, 2009. Plaintiff offers this parallel case for the Court's review as the circumstances in that case are akin to the present action before the Court. (Attachment: *Estate of Smilie Christie*, Judgment in a Civil Case Dated July 17, 2009). No expert is necessary when the subject matter is within the common knowledge and experience so that no special learning is needed by the judge or the jury to evaluate the conduct of the defendant. *Id.* The circumstances in the case at bar do not require expert or special learning to evaluate the common sense requirement of hospital staff to supervise and maintain a watchful eye upon a potential patient who is having problems with balancing (yet to be diagnosed) and allowing that person to go to the bathroom unescorted and to leave them in the bathroom unsupervised.

This action arose not as a result of a specialized knowledge or skill that requires a special duty but as simple gross negligence to take care and do what is necessary. Furthermore, neither a jury nor judge would need any special learning to evaluate the grossly negligent conduct of the Defendant. Accordingly, as a matter of law, Plaintiff was not required to file an affidavit in accordance with § 15-36-100.

V. CONCLUSION

For the reasons stated herein, the Plaintiff in this case has pleaded specific facts for which relief may be granted. Accordingly, for the foregoing reasons, Plaintiff's claims should succeed as a matter of law, and the Court should deny the Defendant's Motion to Dismiss.

GIST LAW FIRM, PA

By: _____

Donald Gist
4400 North Main Street
Columbia, South Carolina 29230
(803) 771-8007
ATTORNEY FOR THE PLAINTIFF

Columbia, South Carolina
January 31, 2012

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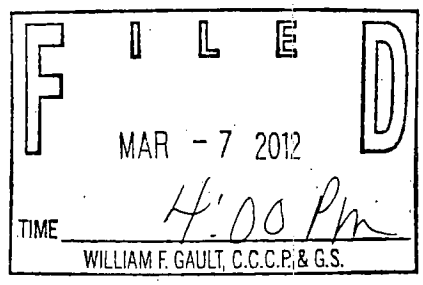
STATE OF SOUTH CAROLINA COUNTY OF UNION	IN THE COUNTY OF UNION COURT OF COMMON PLEAS
SARAH DAWKINS, Plaintiff vs. UNION HOSPITAL DISTRICT (aka) WALLACE THOMSON HOSPITAL, Defendant	Case No. 2011-CP-44-00074



PLAINTIFF'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

The Plaintiff herein respectfully requests that this Honorable Court reconsider its Amended Order dated February 13, 2012 which grants Defendant Union Hospital District (aka) Wallace Thomson Hospital's Motion to Dismiss.

In that Order, the Court dismisses Plaintiff's Complaint on the basis that Plaintiff failed to file a notice of intent to file suit and an affidavit of an expert witness, as required by *S.C. Code* § 15-79-125 and §15-36-100 (hereinafter referred to as the "NOI" requirements). The gravamen of this Court's holding is that by failing to comply with the "Notice of Intent" statute, Plaintiff's Complaint fails to state a claim, thus depriving the Court of subject matter jurisdiction and preventing Plaintiff from litigating her case. Plaintiff respectfully submits that the Court's holding is in error. The effect of this holding is to eviscerate Plaintiff's rights without providing an opportunity to litigate this issue and develop Plaintiff's theory of the case.

II. BASIS FOR PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff respectfully submits that she has sufficiently alleged, in her Amended Complaint, a general negligence action based on the premises liability of the Defendants. Plaintiff filed her Amended Complaint in this Court on May 3, 2011. It is Plaintiff's contention that the NOI requirements are procedurally inapplicable to these proceedings and that Plaintiff has sufficiently stated a claim such that this Court has jurisdiction to hear her case. There is case law regarding the NOI requirements and similar statutes in South Carolina and other jurisdictions that support Plaintiff's theory of the case, and to dismiss Plaintiff's case runs afoul of legislative intent regarding the NOI requirements.

Additionally, Plaintiff respectfully submits that even if Plaintiff had couched her complaint as one of professional negligence, Plaintiff should not be forced to provide a medical affidavit has proscribed by the NOI requirements since the subject matter of the allegations in Plaintiff's Complaint fall within the ambit of common knowledge and experience, such that no special learning is needed to evaluate the conduct of the defendant. *Hoeffner v. The Citadel,* 311 S.C. 361, 429 S.E.2d 190 (1993), reh'g denied, (May 17, 1993). The legislature provides an exception to the NOI requirements in section § 15-36-100(C)(2) for cases based on matters which lie within the ambit of common knowledge and experience. *SC CodeAnn* § 15-36-100 (C)(2).

III. BRIEF RECITATION OF THE FACTS OF THIS CASE

On February 22, 2009, Plaintiff's daughter-in-law noticed that Plaintiff was having great difficulty walking and balancing in general. Plaintiff was also complaining of a severe headache. In fear that her mother-in-law was having a stroke, Plaintiff's daughter-in-law called an

ambulance. Upon arrival at the hospital, the emergency room front desk staff was apprised of Plaintiff's symptoms and Plaintiff was taken in the emergency room area while her family was required to wait in the waiting area. Plaintiff's son arrived a few hours later and requested to see his mother. It was not until his arrival that the family was notified that Plaintiff had fallen in the bathroom and fractured her foot.

Plaintiff contends that she fell while attempting to use the bathroom with no assistance from any hospital staff. Unable to reach the call button she was forced to lie on the floor in agony and scream for help. However, it was not until sometime later that someone arrived to help Plaintiff. Plaintiff contends that the Defendant was grossly negligent in failing to perform its duties in compliance with its own policies and procedures, failing to secure her safety and well-being before leaving her unattended, and failing to check on Plaintiff. In essence, Plaintiff claims that this is a negligence action based on principles of premises liability alleging that Defendant was negligent in its supervision and failure to keep a watchful eye on Plaintiff in the bathroom where the fall occurred.

IV. STANDARD OF REVIEW FOR A MOTION TO DISMISS

A judgment on the pleadings is considered to be a drastic procedure by our courts. *Russell v. Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). The motion cannot be sustained if facts alleged in the complaint and inferences reasonably deductible therefrom would entitle plaintiff to any relief on any theory of the case. *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987). If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Brazell*

v. Windsor, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). The court should not dismiss the complaint merely because there exists doubt that the plaintiff will prevail in the action. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 248 (2007). All properly pleaded factual allegations are deemed admitted for the purposes of considering a motion for judgment on the pleadings. *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Pleadings in a case should be construed liberally so that substantial justice is done between the parties. *Id.*

V. LEGAL ARGUMENT

Plaintiff has Sufficiently Alleged a Premises Liability Action in her Amended Complaint

Defendant avers and this Court has ruled in this case that the Defendant's duty to Plaintiff, as alleged in Plaintiff's Amended Complaint, is solely based on medical diagnosis. "Any obligation or duty owed to Plaintiff as a result of Plaintiff's initial medical complaints and the disclosure of her current medications to the intake nurses could arise only from a professional medical analysis or diagnosis" (Attachment: Judge Hayes 2/2/12 Amended Order). It is Plaintiff's contention that this is not a medical diagnosis case, but rather that Plaintiff has alleged a negligence action based on principles of premises liability. It is Plaintiff's contention that Defendant has breached a duty of care to Plaintiff as an invitee and that Plaintiff was proximately harmed by this breach. "Hospitals are subject to general principles of premises liability and standard of care owed to an invitee. Thus, in addition to having liability for negligence of physicians and employees, hospitals also bear liability for injuries caused by their own breach of duty of care to patients and other invitees." SCJUR Hospitals § 22.

This Court bases its ruling dismissing Plaintiff's Complaint on several paragraphs of Plaintiff's Complaint that the Court indicates amount to an assertion of medical malpractice.

The Defendant, in their Memorandum in Support of Defendant's Motion to Dismiss Plaintiff's Amended Complaint, places special emphasis on the fact that Plaintiff presented at Defendant Hospital for the purposes of receiving medical treatment.

In its Amended Order, this Court indicates that its ruling is based on the following assertions by the Plaintiff:

1. "Plaintiff checked into the Defendant's Hospital for the expressed purpose of receiving medical attention for headaches and the inability to maintain balance or walk." (Attachment: Amended Complaint, Paragraph 3);

2. "At the time of admission, the Plaintiff asserts that the intake nurses were informed of the conditions surrounding her admittance. In response to the noted ailments, the Plaintiff should not have been left unattended and unmonitored until proper tests could be performed or at the very least until the appropriate fall Hospital procedures were put in place." (Amended Complaint, Paragraph 5);

3. "Defendant had every obligation to the Plaintiff to ensure her safety with regard to her original complaints, as well as the side effects of the medications that were being administered by Defendant," (Amended Complaint, Paragraph 11).

Plaintiff submits that these statements are not statements which allege medical malpractice. Plaintiff avers that these statements support her claims that the duty owed to Plaintiff is not one of professional negligence, but rather the duty owed from landowner to invitee. Under South Carolina law, an invitee is defined as "a person who enters onto property of another by express or implied invitation, his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land, and there is a

mutuality of benefit or a benefit to the owner." *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196, 203 (Ct. App. 2008). The first statement listed above clearly establishes this mutuality of benefit when viewed in a light most favorable to the Plaintiff, since it simply states that the Plaintiff went to the Defendant for medical treatment and medical treatment is what the Defendant is in the business of providing.

It is the law in South Carolina that a hospital can be found liable for unreasonably dangerous premises. *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 237 S.E.2d 753. In Hughes, a mother took her minor son to a children's clinic to be treated for a nose and throat infection. The sick boy fainted and fell backward into a mirror in the receptionist's area of the clinic. The Court held that the boy was an "... invitee on the clinic's premises and that the clinic thus owed him an active, affirmative duty of exercising reasonable or ordinary care for his safety commensurate with particular circumstances involved including the age and capacity of the invitee and including refraining from any act which may make invitee's use of premises dangerous or result in injury to him, and clinic was liable for any injury resulting from breach of this duty." *Id.* The second statement relied on by this court in issuing its Amended Order, references the Hospital fall procedures. When viewed in light of the Court's holding in *Hughes*, and in a light most favorable to the Plaintiff, this statement merely acknowledges the duty of an invitee to exercise reasonable care for the safety of an invitee and not, as Defendant contends, a failure to diagnose. Plaintiff's theory of the case is not that the Defendant failed to properly diagnose the Plaintiff, but rather that Defendant failed to ensure that proper fall procedures were in place for the Plaintiff. In this statement, Plaintiff is alleging that the Defendant failed to take into account the condition of Plaintiff when leaving her unattended. Plaintiff is not disputing the diagnosis techniques or professional diagnosis ability of the hospital staff. In fact, since this case

was dismissed before Plaintiffs have had an opportunity to fully engage in discovery, Plaintiff is unaware of whether it was a licensed professional or staff member who left Plaintiff unmonitored, nor is Plaintiff aware to what extent, if any, licensed medical personnel are involved in enforcing the Hospital fall prevention procedures. Plaintiff's theory of the case is simply that Defendant, as a facility which invites sick and infirmed members of the public into its doors for its own benefit, has a duty to ensure that those members of the public are not exposed to a dangerous environment and that proper fall procedures should have been in place and enforced in order to prevent incidents such as the one alleged in Plaintiff's Amended Complaint from occurring.

In construing the third statement in a light most favorable to the Plaintiff, Plaintiff submits that Defendant had a duty to Plaintiff, commensurate with Plaintiff's physical condition, to ensure that the premises were safe for Plaintiff. It is Plaintiff's contention that this statement does not allege a medical diagnosis. Plaintiff had not yet been diagnosed by Defendant at the time when the incident alleged in the Complaint took place. To the extent that this statement can be construed as suggesting that a medical diagnosis should have been made, this statement only addresses actions taken subsequent to this diagnosis. Subsequent measures that the Defendant provides to the Plaintiff to ensure that the Plaintiff does not slip and fall while on the premises do not necessarily involve medical judgment. Plaintiff strongly contends that the Defendant's obligation to follow its fall procedures and to not be negligent to ensure the safety of its invitees is independent of its duty to not engage in medical malpractice and that the failure of the Defendant to do so proximately caused harm to the Plaintiff.

In light of the foregoing, dismissal of the Plaintiff's Complaint for failing to comply with the NOI requirements is improper at this stage of the proceeding because under Plaintiff's theory

of the case this action is not a medical malpractice action, but rather one properly couched in premises liability.

Dismissing Plaintiff Complaints Runs Afoul of the Legislative Intent Underlying the NOI Requirements

Our South Carolina legislature defines "Medical Malpractice" as "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" *S.C. CodeAnn* § 15-79-110(6). In South Carolina, a plaintiff must, prior to filing suit in a medical malpractice action, file a notice of intent to file suit and an affidavit of an expert witness. *S.C. Code Ann.* §15-79-125(A). Additionally, pursuant to the statute, the expert affidavit must specify at least one negligent act or omission and the factual basis for each claim must be based on the available evidence at the time of the filing of the affidavit. *S.C. Code Ann.* §15-36-100. Further exploration of *S.C. CodeAnn.* § 15-36-100(A), indicates that in order to be considered an "expert" for purposes of the NOI requirements, the affiant must be either licensed as a professional in the same profession as the professional whose conduct is at issue or otherwise have knowledge in such area. *S.C. CodeAnn* § 15-36-100. These requirements suggest that the legislature did not intend for all causes of action that arise within the walls of a health care institution to give rise to the NOI requirements. In fact, the construction of the statute suggests that only actions which would require a medical professional's testimony are such actions as are subject to the NOI requirements. Since Plaintiff's theory of the case is based in premises liability and not medical malpractice, application of the NOI requirements to Plaintiff's case runs afoul of the legislative intent underlying the statute.

In 2006, the Indiana Court of Appeals was faced with interpreting a similar statute as *S.C. CodeAnn §15-36-100.* The Plaintiff in that case was alleging that a health care provider failed to keep its property in a reasonably safe condition and that their cause of action was one in premises liability and not medical malpractice, which the Indiana Medical Malpractice Act defined as, "a tort or breach of contract based on health care or professional services that were provided, or that should have been provided, by a health care provider, to a patient." *Madison Center, Inc. v. R.R.K.*, 853 N.E.2d 1286, Ind. App., 2006 (September 21, 2006). The trial court ruled that it did not have subject matter jurisdiction to hear the case because the Plaintiff had failed to comply with the provisions of the Act. In overruling the trial court and holding that the trial court erred by dismissing the Plaintiff's Complaint, the Indiana Court of Appeals stated, "Fact that the alleged misconduct occurs in a healthcare facility does not, by itself, make the claim one for malpractice, nor does the fact that the injured party was a patient at the facility or of the provider, create such a claim; instead, the test is whether the claim is based on the provider's behavior or practices while acting in his professional capacity as a provider of medical services." *Madison Center, Inc. v. R.R.K.*, 853 N.E.2d 1286, Ind. App., 2006 (September 21, 2006).

Expert Testimony is not Required in Order to Establish that Defendants were Negligent

The courts and the legislature provide that where professional negligence is alleged, expert testimony will usually be necessary to establish both the standard of care and the defendant's departure therefrom, **unless** the subject matter is within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant. *Hoeffner v. The Citadel*, 311 S.C. 361, 429 S.E.2d 190 (1993). Additionally, the Code reiterates this holding by stating that "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. *SC CodeAnn* § 15-36-100 (C)(2).

The facts of this case, as alleged by Plaintiff, are such that they fall clearly within the statutory exception to the affidavit requirement. Plaintiff's Amended Complaint states in paragraph six, "In addition, her daughter in law had also disclosed to the staff that Ms. Dawkins was experiencing instability and possible symptoms of stroke". When viewed in a light most favorable to the Plaintiff, it is clear that the staff of the Hospital was on notice of Plaintiff's condition and that it does not take a medical expert to affirm that a person who is unstable on their feet should not be left alone, since such knowledge is within the common knowledge and experience of both a judge and a jury. Moreover, paragraph eight of the Amended Complaint states, "[t]he Plaintiff remained on the floor until staff assisted her. She was in excruciating pain and could not believe that any staff members had not come in to check on her condition." Paragraph nine of the Amended Complaint states, "[t]he Plaintiff asserts that she was only rendered assistance after someone heard her repeated pleas for help." Both of these allegations in the Amended Complaint are such that a jury could find that the Defendant was grossly negligent in failing to provide a reasonably safe environment for Plaintiff. In fact, when read in conjunction with paragraph six, Plaintiff has clearly stated a claim that Plaintiff was injured as a proximate result of Defendant's breach of its duty to provide reasonably safe premises for its invitees. Moreover, it does not require a medical expert to draw this conclusion from the allegations in the Amended Complaint. Clearly, the exception to the NOI requirements as stated in both *Hoeffner* and *SC CodeAnn* § 15-36-100 (C)(2) should be applied to the instant case.

VI. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that this Court reconsider its Amended Order and issue an Order Denying Defendant's Motion to Dismiss.

GIST LAW FIRM, PA

By: _____
Donald Gist
4400 North Main Street
Columbia, South Carolina 29230
(803) 771-8007
ATTORNEY FOR THE PLAINTIFF

Columbia, South Carolina
March 5, 2012

STATE OF SOUTH CAROLINA COUNTY OF UNION	)	IN THE COURT OF COMMON PLEAS
Sarah Dawkins, Plaintiff, vs. Union Hospital District (aka) Wallace Thomson Hospital, Defendant.	)	**MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION** C.A. No. 2011-CP-44-00074

Defendant Wallace Thomson Hospital ("Wallace Thomson") respectfully requests that this Court deny Plaintiff's Motion for Reconsideration and uphold its Amended Order filed on February 22, 2012.

Background

Plaintiff filed an amended complaint in this matter on May 2, 2011 alleging that on or about February 22, 2009, she presented at Wallace Thomson to obtain "medical attention for headaches and the inability to maintain balance or walk." Amended Complaint, ¶ 3 (emphasis added). Plaintiff further alleges that after she was admitted to a patient room at Wallace Thomson, she fell while attempting to use the restroom. Amended Complaint, ¶ 3, 4. Plaintiff claims that her fall was caused by Wallace Thomson's negligence in failing to properly assess her medical condition and put into place fall risk and safety precautions in light of her condition and the medications that she was taking. Amended Complaint, ¶ 5, 10, 11, 12(a).

Plaintiff did not comply with S.C. Code Ann. § 15-79-110, et seq. and S.C. Code

Ann. § 15-36-100, South Carolina's Notice of Intent to File Suit and expert affidavit procedures required in medical malpractice actions (the "NOI Requirements") prior to filing her Amended Complaint. As such, Wallace Thomson filed a motion to dismiss Plaintiff's amended complaint on the grounds that (1) Plaintiff failed to comply with the NOI Requirements; (2) the Court lacks subject matter jurisdiction to preside over Plaintiff's claims because she failed to comply with the NOI Requirements; (3) Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted because she improperly filed her summons and amended complaint without first complying with the NOI Requirements.

At a January 17, 2012 hearing on Wallace Thomson's motion to dismiss, counsel for the parties argued their respective positions before The Honorable John C. Hayes. On February 22, 2012, Judge Hayes issued an order dismissing Plaintiff's Amended Complaint (the "Order") because Plaintiff failed to comply with the NOI Requirements despite having filed an action alleging medical malpractice.

Argument

Within her motion for reconsideration, Plaintiff argues that the Court improperly dismissed her Amended Complaint because (1) she alleges ordinary negligence or premises liability, and not medical negligence, (2) not every act of negligence that occurs within a health care institution is medical malpractice, and (3) expert testimony is not required to prove the negligent acts alleged in this case. However, Plaintiff's motion for reconsideration should be denied because she does not focus upon the allegations she has made within her Amended Complaint: allegations of medical malpractice triggering application of the NOI Requirements.

Within its Order, the Court correctly focused upon the allegations of the Amended Complaint. See, e.g., Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007), citing Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006) ("In considering a motion to dismiss a complaint based upon a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint.") As stated within the Order, Plaintiff's assertions that her claims are not claims of medical malpractice simply "cannot be reconciled with the specific allegations made in Plaintiff's Amended Complaint." Order, p. 2.

As the Court cites in its Order, Plaintiff's Amended Complaint alleges that she presented at Wallace Thomson for the "expressed purpose of receiving medical attention for headaches and the inability to maintain balance or walk." See Amended Complaint, ¶ 3, Order, p. 2. Plaintiff also alleges that Wallace Thomson's nursing staff failed to put into place fall risk precautions in accordance with hospital policy after assessing her condition and Wallace Thomson failed to take additional precautions for her safety based upon the nursing staff's knowledge of the medications administered to her as well as the side effects of those medications. See Amended Complaint, ¶ 5, 11, Order, p. 2.

Within her Motion for Reconsideration, Plaintiff attempts to explain why the above allegations contained within her Amended Complaint are not allegations of medical malpractice. While the Court properly based its ruling on the actual allegations set forth in Plaintiff's complaint, Plaintiff's explanations of her allegations support the Court's ruling that Plaintiff's claims are based in medical malpractice. For example, as to her allegation in Paragraph 5 of her Amended Complaint, Plaintiff explains, "In this statement, Plaintiff is alleging that the Defendant failed to take into account the condition of Plaintiff when leaving

her unattended." Motion for Reconsideration, p. 6. As to her allegation in Paragraph 11 of her Amended Complaint, Plaintiff explains, "...Plaintiff submits that Defendant had a duty to Plaintiff, commensurate with Plaintiff's physical condition, to ensure that the premises were safe for Plaintiff." Motion for Reconsideration, p. 7.

Not only do Plaintiff's allegations sound in medical negligence on their face, but Plaintiff's explanations of those allegations sound in medical negligence. As the Court stated in its Order, "Any obligation or duty owed to Plaintiff as a result of Plaintiff's initial medical complaints and the disclosure of her current medications to intake nurses could arise only from a professional medical analysis or diagnosis." Order, p. 2. As Plaintiff continues to allege that her claims of negligence result from Defendant's failure to "properly take into account her [medical] condition," she only underscores why the allegations of her complaint are claims of medical malpractice.

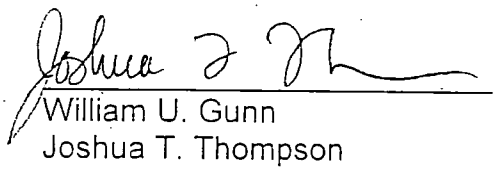
For this reason, the Court properly determined that Plaintiff's claims fit within the broad definition of "medical malpractice" found at S.C. Code. Ann. § 15-79-100(6), triggering application of the NOI Requirements. Order, p. 2 - 3. Though she alleged medical malpractice, Plaintiff did not even attempt to comply with the NOI requirements. Instead, Plaintiff now attempts to couch the allegations of her complaint as ordinary negligence or premises liability. Regardless of Plaintiff's efforts to shift the meaning of the allegations of her complaint from medical malpractice to ordinary negligence or premises liability, the Court correctly ruled that Plaintiff's Amended Complaint alleges medical malpractice and that Defendant is entitled to dismissal of Plaintiff's Amended Complaint

for Plaintiff's failure to comply with the NOI Requirements.[1]

CONCLUSION

For the reasons set forth above, Defendant Wallace Thomson respectfully requests that this Court deny Plaintiff's Motion for Reconsideration and uphold its February 22, 2012 Order dismissing Plaintiff's Amended Complaint.

HOLCOMBE BOMAR, P. A.

By: 

William U. Gunn
Joshua T. Thompson
Post Office Box 1897
Spartanburg, SC 29304
(864) 594-5300

Attorneys for Defendant

March 14, 2012

Spartanburg, South Carolina

[1] On page 3 of the Court's Order, the Court cites to S.C. Code Ann. § 15-79-125(c)(1) as support for its dismissal of Plaintiff's Amended Complaint. It appears that this may be a clerical mistake and that the Court may have intended to cite S.C. Code Ann. § 15-36-100(c)(1).

State of South Carolina) In the Common Please Court
) Of Union
)
County of Union.) Case No.: 2011-CP-44-00074

Sarah Dawkins.,
)
Plaintiff.,
)
-vs-) Transcript of Record
)
Union Hospital District.,
a/k/a Wallace
Thompson Hospital.,
)
Defendant.

January 17, 2012
Union, South Carolina

B E F O R E:

Honorable John C. Hayes, III, Judge.

A P P E A R A N C E S:

Mr. Donald Gist
Gist Law Firm, PA
P.O. Box 30007
Columbia, South Carolina 29230
803-771-8007
Donaldgist@gistlawfirm.com
For the Plaintiff

ORIGINAL

Mr. William Gunn
Mr. Josh Thompson
Holcombe Bomar, PA
P.O. Box 1897
Spartanburg, South Carolina 29304
864-594-5300
Bgunn@holcombebomar.com
For the Defendant

Wanda Nelson, CVR-M
Circuit Court Reporter
Sixteenth Judicial Circuit

I-N-D-E-X

E-X-H-I-B-I-T S

NO EXHIBITS WERE ENTERED INTO THE RECORD

(ON THE RECORD TUESDAY, JANUARY 17, 2012 AT 10:42 A.M..)

THE COURT: I see Mr. Gist is now here so we can move back to the Dawkins versus Wallace Thompson.

I hope you weren't involved in the wreck.

MR. GIST: Oh no. Pulp wood truck. Sawdust all over the road.

THE COURT: All right, this is the Defendant's motion to dismiss based on the statutory requirement of expert affidavit and pre --

Go ahead, I'll let you tell me about it.

MR. THOMPSON: Yes, sir, Your Honor, I'm Josh Thompson I'm with Holcombe Bomar Law Firm out of Spartanburg and I will freely admit I'm at the bottom of the ladder and I am happy to be here anyway.

Your Honor, we're here today, this case is Sarah Dawkins versus Union Hospital District doing business as Wallace Thompson Hospital. I represent - We represent Union Hospital District, Wallace Thompson, of course.

Your Honor, we filed - as you so stated, we filed a motion to dismiss the case based on Ms. Dawkin's failure to comply with the Notice of Intent to file Suit Requirements, founded in 15-79-110 through 15-79-130 as well as South Carolina Code 15-36-100. We've also filed this Motion to Dismiss based on the Court's lack of jurisdiction, subject matter jurisdiction to hear Ms. Dawkins claims pursuant to

Rule 12-B 1 of the South Carolina Rules of Civil Procedure. And we've also asserted that the Plaintiff has failed to state a claim upon which relief can be granted pursuant to Rule 12 B 6 of the South Carolina Rules of Civil Procedure, but does all those grounds for relief all relate to the Plaintiff's failure to comply with the Notice of Intent Requirements.

Your Honor, I want to start by giving a brief rendition of the facts.

THE COURT: I notice I have the - I notice that you cite some law that I think was not good law at all. Bothella versus Bycura?

MR. THOMPSON: Yes, sir.

THE COURT: Because I've also --

MR. THOMPSON: Yes, sir.

THE COURT: I was right.

MR. THOMPSON: Yes, sir. I saw that Your Honor was counselor on that case.

THE COURT: And they changed that. But anyway go ahead.

MR. THOMPSON: Yes, sir. And I accordance with the standard for a motion to dismiss, Your Honro, we - I plead the facts solely as they are set forth in the Plaintiff's amended complaint. Plaintiff first filed Ms. Dawkins first filed the complaint on February 18th of 2011. In response

Billy Gunn of our office filed a Motion to Dismiss the complaint. In response to that the Plaintiff filed an amended complaint on May 9th, 2011 and this motion is based off that amended complaint.

Your Honor, I'll start with in Paragraph Three of the Plaintiff's amended complaint it states "that she arrived at Wallace Thompson via ambulance on February 22nd, 2009, and was placed in a room within the emergency department." Ms. Dawkins states in her complaint that she was complaining of stroke like symptoms including the inability to maintain balance and the inability to walk. Move on to Paragraphs Five and Six of the complaint, the amended complaint, Ms. Dawkins states that intake nurses were informed of her medical conditions and failed to put appropriate fall procedures into place based on her medical conditions.

Moving on to Paragraph Eleven in the amended complaint, Your Honor, the plaintiff reiterates that Wallace Thompson was fully - and it's staff was fully aware of her medical condition. She adds that Wallace Thompson knew the medication she was on. And she states that after knowing the Plaintiff, after knowing her medical conditions as well as the medication she was on and the side affects of those medications that Wallace Thompson and its staff should have put - should have taken extra precautions

safety or otherwise to in it's care for the safety of Ms. Dawkins.

And, Your Honor, based on that we filed this motion and as you are aware Section 15-79-125 of the South Carolina Code that requires that prior to filing a civil action alleging claims arising out of a medical malpractice causes of action, the Plaintiff must file a Notice of Intent to File Suit as well as an expert affidavit. That expert affidavit is intended to specify at least one negligent act or omission of the claims that are made and the factual basis for those claims.

For purposes of the Notice of Intent to File Suit requirements Section 15-79-110 states that those requirements apply to health care providers and defines health care providers to include nurses. The plaintiff has alleged the intake nurses at the hospital assessed her condition or learned of her condition.

In addition 15-79-110 states that the Notice of Intent Requirements upon a health care institutions, health care institutions is defined to include hospitals and the Plaintiff's complaint fairly alleges that Wallace Thompson is a hospital. So, your Honor, that draws me to the final point of consideration at least in my opinion as whether the Plaintiff's Amended Complaint alleges medical malpractice or ordinary negligence. And I believe if Your

Honor has reviewed or does review the Plaintiff's Memorandum in Opposition to our motion, Your Honor will find that the Plaintiff alleges that this is an ordinary negligence claim within the common knowledge of laymen.

Your Honor, we of course respectfully disagree with the Plaintiff's argument. We do state that the allegations that I recited above sounded medical negligence. And as Your Honor mentioned that I cited to the case of Bothella versus Bycura which is a Court of Appeals case. Along that line of cases the Courts in this state have defined - have kind of drawn the line between ordinary negligence in medical malpractice at the point in which the Plaintiff's allegations concern matters of proper treatment involving the technical knowledge outside of what a layman knows.

Your Honor, I think if you reviewed the complaint, the amended complaint that the Plaintiff has filed, you'll see that it alleges, it calls into question the medical treatment and the prudence of reasonableness of that medical treatment provided by Wallace Thompson and it's nurses. The Plaintiff has subtlety reworded her allegation from the original complaint to the amended complaint and now to her memorandum in opposition. But solely based off what's plainly pled in the amended complaint, Your Honor, her allegations boil down to medical malpractice. It's

within the providers - within our health care providers scope of treatment that the provider assesses and learns of the plaintiff's condition and medical history, learns the medications she's on, considers that condition, that assessment and the side effects of those medications. And in accordance with hospital policy determines what fall risk and safety procedures or precautions are put into effect.

Simply, you know, the common knowledge of laymen just doesn't apply to an analysis of a patients history, medical conditions, administration of medications, side effects of medications, and exercising medical judgment or medical knowledge in the treatment of the plaintiff in putting precautions into place to protect her safety.

We just think that in consideration of the definition of medical malpractice found in 15-79-110 doing or not doing that, doing that which a reasonably prudent health care provider would not do or not doing that which a reasonably prudent health care provider would do, along with the line the court have drawn that medical malpractice transforms from ordinary negligence at the point that the providers course of treatment is called into question.

We think that these allegations clearly sounded medical malpractice and for that reason, Your Honor, we would ask that this amended complaint be dismissed with

prejudice. We base that in the Courts power under 15-79-125 D to enforce the Notice of Intent Requirements. We believe that the negative implication of that is that the court can enforce those requirements through granting a motion to dismiss when those NOI requirements are not complied with.

In addition we find that - we assert that Section 15-36-100 F which addresses the expert affidavit requirement of NOI procedures, specifically provides that a Motion to Dismiss is proper where the plaintiff fails to file a Notice of Intent to File Suit an expert or an expert affidavit within the statutory limitations of the - asserting the claim.

In addition to dismissal based on the face of the Notice of Intent Requirements 1579-125 and 1536-100, Your Honor, we assert that this Court also lacks subject matter jurisdiction to hear the plaintiff's claims pursuant to 12-B 1. Again Section 15-79-125 D provides the circuit court the jurisdiction to enforce the Notice of Intent Requirements. In our opinion, Your Honor, we assert that the negative implication of that grant of jurisdiction is that the Court lacks subject matter jurisdiction to hear the plaintiff's allegations within her amended complaint that she has failed to comply with the Notice of Intent Requirements. We assert that pursuant to 15-79-125 D this

court only retains subject matter jurisdiction to dismiss the case for failure to comply with the Notice of Intent Requirements.

Lastly, Your Honor, we tack on that we believe dismissal is proper pursuant to 12 B 6. We do not believe that the plaintiff has stated a claim upon which relief can be granted because she's improperly filed an amended complaint. Section 15-79-125 E of the South Carolina Codes specifically provides that a plaintiff can institute a civil action in a medical malpractice case only after it is determined and in accordance with the Notice of Intent Requirements that present mediation is unsuccessful and that those requirements have been satisfied.

Your Honor recalls the plaintiff did not comply with the NOI requirements, we assert that she is not entitled or is not entitled to properly file her amended complaint and there's currently not allegations before the court upon which - proper allegations before the court upon which relief can be granted.

And, Your Honor, lastly and briefly I'll touch on the fact that in the plaintiff's Memorandum in Opposition she has cited to a Circuit court order - in Judge James I believe - and asserted that in that Circuit Court order it's the court's argument that in this case this is a common negligence, ordinary negligence claim and no Notice

of Intent is required.

Your Honor, I won't touch on that too much. I know that Your Honor can consider that trial court order though its not binding precedent. In the same vein I believe that that case is clearly distinguishable. That case involved a patient who in a long term care facility if I'm not mistaken that had a propensity for violence. And that claim was based on the fact that knowing the - knowing that patient's violent past the staff should have done more to protect his room mate or another resident from violence. We feel that that's clearly within the scope of the common knowledge of laymen and something that does not rise to the level of medical malpractice. And we think that distinguishes it from the current action that's calling into question the medical treatment, the patient assessment, knowledge of medications, knowledge of medication side effects, the analysis of those things; assessing the patient, putting fall risk and safety precautions into place.

And, Your Honor, if it would help at all or if you intend to consider the other court order or trial court orders submitted by Ms. Dawkins, I would also like to hand up a court order entered by special court Judge Jack Kimball in York County that addresses and supports my opinion and our arguments today.

THE COURT: Okay.

MR. THOMPSON: I'll provide a copy to Plaintiff's counsel.

THE COURT: All right.

Mr. Gist.

MR. GIST: Thank you, Your Honor.

First of all let me say that I appreciate the Court's indulgence where I was delayed because of a pickup truck - I mean the pulp wood truck coming out of Columbia.

I want to first of all deal with the issue that Mr. Thompson I believe - is it Thompson - raises as to the issue regarding the Rule 12 B 1 and 12 B 6 Motion that he filed.

I mean clearly we disagree that this court lacks subject matter jurisdiction. Subject matter jurisdiction primarily is to determine case of a general class which we contend that this case falls. This is a tort action. Its no question that this is a tort action. We filed it basically under gross negligence. Plaintiff disagrees with the defendant's argument that the court does not have subject matter jurisdiction simply because it is a tort action. Second of all, there is but one court in South Carolina to hear matters of this nature which is the Circuit Court. We cite basically primarily the case of Riley v. Martin which is a 1980's case as well as the South

Carolina Constitution Article V, Section I. This court has subject matter jurisdiction on this matter. The characterization from the standpoint that the complaint doesn't state the facts which - upon which relief can be granted.

First of all this is a 12 B 6, or a 12 B 1 and a 12 B 6 motion. The defendant is literally arguing from a summary judgment perspective before this court that there is no what we call ultimate facts. In our pleading we specifically have to prove the facts that are basically discoverable. There has been no discovery in this case as of yet. We believe that the plaintiff's motion first of all on the 12 B 6 motion should die on the issue with respect to the lack of subject matter jurisdiction. We believe that the court does have subject matter jurisdiction.

Second of all, we believe that because of the action that has been pending, now we filed this complaint back in - we did the amended complaint back on May the 9th 2011. There has been plenty of time primarily for us to hatch through and determine whether or not this was or was not a medical malpractice case. I would also like to point out that in our rules of civil procedures, specifically Rule 11, there is some issues here with respect to our pleading. Our pleading when we did the pleading we cited that there

were intake nurses but at the same time later on in our pleadings we talk about medical staff. But there is no issue as to whether or not any medical diagnostic treatment was ever given to Ms. Dawkins. The facts as we understand those facts present to us is that Ms. Dawkins went to the hospital by way of an ambulance. She checked into Wallace Thompson Hospital. When she got to the emergency room they took her back to a waiting area. They had her to lie down. When she lied - when she laid down there was no evidence that they did any blood pressure checks or anything.

They did - And the reason we put in there about the medications, when she checked in at the intake desk they ask her daughter-in-law who had no knowledge of her medical condition other than the fact that she gave them some idea about some medications that she was taking, she filed out the form. There is no evidence that the nurses in the back ever had the chance to do any diagnostic treatment on Ms. Dawkins. She was placed back there; when she got back there she said I need to use the restroom. The nurses at that point even though they had told them when they checked in she was having difficulty walking - she weighs three hundred and six pounds. She had difficulty walking and in addition to that she was feeling - she couldn't keep her balance. The nurses there then told her well if you got to go to the restroom the restroom is over there. They let

her get up off of the bed and walk to the restroom. She got in the restroom and when she got in the restroom got on the toilet, the commode, she fell. Nobody came in the restroom, it was not until she began to scream and ask for help that the nurse - I don't know whether it was nurses, don't know whether or not it was the secretaries, have no idea as to who it was that went to the restroom and basically picked her up and then carried her back to the waiting area.

The end result of that is that the hospital staff - her son arrives about an hour later - the hospital staff does not tell the son that she has fractured her foot. There is no diagnostic evaluation done. There is no medications, there is no blood pressure taken, there is nothing. Okay.

Now Mr. Thompson argues that this case is akin to the Ronnie Collins versus Piedmont Medical Center. I'm not novice of these kinds of cases. This is about the fourth case that we've actually had. The legislature, when the legislature passed Section 15-36-100 the legislature did not intend for every action in South Carolina to be a medical malpractice action that requires a medical expert. It does not require a medical expert on behalf of someone with a specific professional knowledge to be able to assess whether or not you need to watch somebody who says I'm

having trouble with my balancing and watch that person go to the bathroom. That doesn't require a doctor to determine whether or not you should allow her to walk into a bathroom and allow her to walk back out from that bathroom unescorted. This is a premises liability gross negligence case.

Now they're trying to couch it in that respect but they can't have it both ways. Okay. And what I mean by that is they try to cite Ronnie Collins. Ronnie Collins case is a case where specifically there was diagnostic services administered to Mr. Collins. Now they even go back and try to - the order that we put up before Judge - Honorable George Jenkins from this court. Christie's case was not what he characterized. We argued that case. Primarily Mr. Christie was in a long term medical facility. Mr. Christie basically was in a bed and there was another patient who attached Mr. Christie. That patient when he attached Mr. Christie basically had a propensity; they knew about the medication of that patient. Now if he wants to handle it that way, they knew about the medication that patient was taking. They knew that the patient basically was prone to violence without his medication.

The patient attacked Mr. Christie and attacked two other persons that evening. Mr. Christie dies the next morning at Six o'clock in the morning. He's hit in the

head by the patient. We didn't argue that that was a wrongful death case by whether or not. We argued primarily that that case was one where once again it was a gross negligence. There was actually a staff nurse there that evening, there was actually a registered nurse. There also was an LPN nurse there from the Department of Mental Health plus five nursing assistants.

Now Judge James in his ruling listened to the arguments that both counsel made in that case, but the real issue here was did they properly provide safety to protect? Did they take the violent patient and isolate him from other patients? Now counsel in that - defense counsel in that case tried to argue too that, that was medical malpractice within the statute. Our argument there as well as before this court this morning is no that was gross negligence. They failed to supervise and to monitor and isolate that patient, the violent patient, and protect him from other persons. Our argument here this morning is the same, they failed to supervise and watch Ms. Dawkins as she got up off the bed, walked to the bathroom, and fell. There is no evidence here.

Now if Mr. Thompson wants to come back later on a Rule 56 Motion after discovery is done and present to this court evidence to the contrary, but I do not believe on a Rule 12 B 1 and 12 B 6 motion that the court can decide under a 12

B 6 motion whether or not Ms. Dawkins will prevail in this case or whether she will not prevail. The law is very clear on that. He's saying that on the four corners of the complaint and the complaint should be dismissed because it doesn't state any relief available. We disagree. The relief available is clearly there in tort. It's a gross negligence action.

Now he also argues that the court should just clearly dismiss the case. But we understand primarily that this court in a case called Doe versus martin which is a 2007 Court of Appeals Case, says very specifically "a dismissal under a 12 B 1; 12 B 6 is improper if the facts alleged and the circumstances and the inferences reasonably deducted from that." Our inferences is that they were grossly negligent. That it would view it in the light most favorable to my client. That it would in fact entitle the plaintiff to relief under any theory of the law. We believe that the theory of the law that she's entitled to with respect to this action is gross negligence, failure to supervise.

If every case in this state is going to be couched into a medical malpractice argument then it certainly deprives the majority of the people in this state who go to a hospital who go to a health care facility and people fail to properly monitor or supervise them. This lady is

complaining I'm dizzy. As a matter of fact she didn't make any complaints. She was incoherent at that point. The daughter-in-law says she's having problems, she's dizzy look at her. They said okay. But the facts are gonna bear out in this case there are facts that are going to bear out that they did nothing, they absolutely did nothing. It's not until this woman is - actually her son shows up at the hospital and says get my mom out of here you caused her to break her ankle that they transport this lady to Mary Black Hospital in Spartanburg. It's only at Mary Black that it's determined that she breaks her foot - that the foot was broken.

We believe it's a gross negligence case of failure to supervise and a failure to put policies and procedures. It doesn't require a doctor to determine whether or not you need to have fall precautions in place within a hospital. That doesn't require a doctor's order, Your Honor. We respectfully submit that One, the court does have subject matter jurisdiction. We respectfully also submit that this is an action of gross negligence that within the ambian of common knowledge, good old common sense, that anyone knew or should have known that they should not have allowed the lady to get up off the bed and walk to the bathroom. They didn't administer any medications, didn't take a blood pressure, did nothing. There only was the reassertion that

she was feeling - that she couldn't maintain her balance. And we do believe that Judge George James' ruling in a previous case is very - it's almost identical to this case.

And we understand that Judge James is one of your colleagues and as you can independently make your decision however you so deem necessary we respect that, Your Honor. But we believe that precedent has been established with respect to these kinds of cases and the legislature intended. The legislature never intended to deprive people of their day in court on gross negligence by having to couch it into a medical malpractice defense argument. Thank you very much.

THE COURT: Any follow up?

MR. THOMPSON: Yes, sir, briefly.

I would just like to say with all due respect I appreciate Mr. Gist's opinion on the ultimate facts and how those mere out. Also I appreciate his rendition of the facts but I would just reiterate to the court it's hard for me on a motion to dismiss argument to respond to any facts that aren't within the four corners of the complaint. And that's the standard as I understand it before a consider of a motion to dismiss.

Along those lines, Your Honor, we've clearly set forth what allegations we deem go towards medical negligence aspects. We of course think there could be, you know, on

its' face there could very well be facts upon which a claim could be established if the complaint was properly filed. The complaint is not properly filed and therefore our Rule 12 B 6 argument I believe has been misunderstood to the extent that we state there is no claim upon which relief can be granted because there is no proper complaint or amended complaint filed since the plaintiff failed to comply with the notice of Intent Requirements. And I believe that's all I would like to add, Your Honor. I appreciate your indulgence.

THE COURT: Thank you.

Yes, sir, briefly.

MR. GIST: Your Honor, I believe that the complaint on the four corners of the complaint is properly filed. I think it sets out a tort claim action for gross negligence. I also believe that their motion is premature at this time and to use a 12 B 6 Motion to deny this lady her right to court; like I said earlier if he wants to come back on a Rule 56 Summary Judgement Motion later on when the facts are flushed out, and by his own admission he doesn't know what the facts are. Bottom line, once the discovery is taken in this case and when we come back on a Rule 56 Summary Judgment Motion then we believe that that would be the proper time. But at this point this 12 B 6 Motion is premature. And certainly it should be dismissed.

THE COURT: Thank you. I'm going to take it under advisement.

MR. THOMPSON: Thank you, Your Honor.

(END OF TRANSCRIPT OF RECORD.)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2011-CP-44-00074

Sarah Dawkins, ... Appellant,

v.

Union Hospital District
(aka) Wallace Thomson Hospital, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

John S. Nichols
SC Bar No. 004210
Bluestein, Nichols,
Thompson & Delgado, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599

July 3, 2013

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2011-CP-44-00074

Sarah Dawkins, ... Appellant,

v.

Union Hospital District
(aka) Wallace Thomson Hospital, ... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Joshua T. Thompson, Esquire
William U. Gunn, Esquire
Holcombe Bomar, P.A.
P.O. Drawer 1897
Spartanburg, South Carolina 29304

Erin Bridges

July 8, 2013
Columbia, South Carolina

Erin Bridges
Paralegal
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC