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SC Court of Appeals

The South Carolina Court of Appeals

Claudine Garver, Both Individually and as Personal Representative of the Estate of Jeremy Garver, Appellant,

v.

McLeod Loris Seacoast Hospital; McLeod Physician Associates, II; and Michael McCaffrey, M.D., Defendants,

Of which McLeod Loris Seacoast Hospital is the Respondent.

Appellate Case No. 2023-000577

The Honorable William H. Seals, Jr.
Horry County

Trial Court Case No. 2019CP2605302

FINAL BRIEF OF APPELLEE

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STANDARD OF REVIEW

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response ... must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e) SCRCP. "[A] party opposing summary judgment must do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial." Kitchen Planners, LLC v. Friedman*, __ S.C. __, __ S.E.2d __, No. 2020-001669, 2023 WL 5420401, at *2 (S.C. Aug. 23, 2023) (citations and punctuation omitted). "The existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment." *Id*. (citations omitted) (overruling *Hancock v. Mid-S. Mgmt. Co*., 381 S.C. 326, 673 S.E.2d 801 (2009), and abrogating *Anders v. S.C. Farm Bureau Mut. Ins. Co.*, 307 S.C. 371, 415 S.E.2d 406 (1992), and *Bell v. Progressive Direct Ins. Co*., 407 S.C. 565, 757 S.E.2d 399 (2014). "[W]hen the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Kitchen Planners, LLC v. Friedman*, No. at *3 (citation omitted).

"The trial court should grant summary judgment against a party who fails to make a showing sufficient to establish the existence of an essential element of the party's case." *Fender & Latham, Inc. v. First Union Nat. Bank of S.C.*, 316 S.C. 48, 50, 446 S.E.2d 448, 449 (Ct. App. 1994). "To prevail in a negligence action, a plaintiff must demonstrate: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." *Peterson v. Porter*, 389 S.C. 148, 153–54, 697 S.E.2d 656, 659 (Ct. App. 2010). See, also, *Pryor v. Nw. Apartments, Ltd.*, 321 S.C. 524, 529, 469 S.E.2d 630, 633 (Ct. App. 1996) (affirming summary judgment for Northwest because there was "no evidence, even in the light most favorable to Pryor, that Northwest breached its duty of care").

The determination of whether a claim sounds in medical malpractice or in ordinary negligence is left to the discretion of the trial court. *Chalfant v. Carolinas Dermatology Grp., P.A.*, 439 S.C. 372, 384, 887 S.E.2d 1, 7 (Ct. App. 2023), *reh'g denied* (May 24, 2023). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion is without evidentiary support." *Turner v. Med. Univ. of S.C.*, 430 S.C. 569, 589, 846 S.E.2d 1, 11 (Ct. App. 2020).

STATEMENT OF FACTS

Respondent, McLeod Loris Seacoast Hospital ("**Hospital**"), includes this Statement of Facts to address substantive, inaccurate factual representations in Appellant, Claudine Garver's ("**Garver**") Final Brief. As permitted by Rule 208(b)(1)(E) SCRAP, the Hospital includes its contentions related to the actual pleadings and facts in evidence:

The Hospital and Co-Defendant, McLeod Physician Associates, II ("**Associates**"), are separate and distinct corporations, albeit with similar names. (R. p. 274; Hosp. Exhibit 6, *Barnes Affidavit* p. 1); (R. p. 278; Hosp. Exhibit 7, *McCaffrey Am. Answer*, p. 2); (R. p. 290; Hosp. Exhibit

8, *Hospital Answer*, p. 2); (R. p. 278; *Associates Answer*, p 2).

Likewise, Co-Defendant, Michael McCaffrey, M.D., ("**Dr. McCaffrey**"), was employed by Associates at all times relevant, rather than by the Hospital. (R. p. 278; Hosp. Ex. 7, *McCaffrey Am, Answer*, p. 2). Garver concedes this fact in her brief. (Final Brief of Appellant, p. 2).

Contrary to these facts, Garver alleged an ownership relationship among the Co-Defendants, and that the Hospital has vicarious liability for the acts of the Co-Defendants. (R. p. 37; Compl. p. 18, ¶¶ 84-87). On appeal, she continues to assert this relationship to support vicarious liability, stating incorrectly that the Hospital employed Associates' office staff, and claiming a vague association between Dr. McCaffrey and the Hospital. (Final Brief of Appellant, pp. 4, 7, 14, 15).

Garver's evidence in support of this theory consists of a vague excerpt from Dr. McCaffrey's deposition testimony, stating that his office staff worked for "McLeod;" but this cherry-picked excerpt does not specify whether he refers to McLeod Loris Seacoast **Hospital**, McLeod Physician **Associates**, II, or some other person or entity called McLeod. (*Id*.[1]) And, because Garver's complaint refers to all Co-Defendants as "McLeod Defendants" (R. p. 22; Compl. p. 2, ¶ 4), Dr. McCaffrey's testimony is extremely ambiguous, at best.

The Hospital contends that Dr. McCaffrey's excerpted deposition testimony is not sufficient to create an issue of genuinely disputed material fact, particularly in light of the explicit, clear and unambiguous pleadings and evidence presented to the trial court:

> (1) Dr. McCaffrey admitted that he was employed by Associates, not the Hospital, and he asserted that the Hospital and Associates are "separate and distinct corporations." (R. p. 278; Hosp. Exhibit 7, McCaffrey Am. Answer, p. 2);
>
> (2) Associates made the same admission and assertion. (R. p. 278; Associates Answer, pp.

[1] The correct citations to this testimony are: (R. pp. 318-319; Garver Exhibit 4, *McCaffrey Dep*. p. 31, lines 17-24; p. 32, lines 7-9).

1-2);

(3) Dr. McCaffrey and Associates moved jointly for summary judgment, asserting the same facts. (R. p. 299; *Joint Motion for Summary Judgment*, Exhibit 9, p. 1);

(4) Dr. McCaffrey's and Associates' joint memorandum in support of their joint motion for summary judgment asserted the same facts. (R. p. 69; McCaffrey/Associates Memo. p. 1);

(5) Dr. McCaffrey's and Associates' joint Exhibit A is the affidavit of Associates' general counsel, swearing to the same facts. (R. p. 273; McCaffrey/Associates Exhibit 7, Barnes Affidavit, p. 1); and,

(6) Dr. McCaffrey's and Associates' joint Exhibit C shows that Dr. McCaffrey's medical liability insurance was provided by his employer, Associates. (McCaffrey/Associates Exhibit C, Mag Mutual Dec. pages filed December 29, 2022).

It would be ***un***reasonable to infer from Dr. McCaffrey's ambiguous deposition excerpt that he intended to contradict his own pleadings and materials offered to support his own motion for summary judgment. At best, it is a mere scintilla of evidence, which is insufficient to overcome the Hospital's amply supported motion for summary judgment. See, e.g., *Kitchen Planners, LLC v. Friedman*, __ S.C. __, __ S.E.2d __, No. 2020-001669, 2023 WL 5420401, at *2 (S.C. Aug. 23, 2023). Facts contested in this deficient manner cannot overcome a properly supported motion for summary judgment. "[I]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Edgewater on Broad Creek Owners Ass'n, Inc. v. Ephesian Ventures, LLC*, 430 S.C. 400, 405, 845 S.E.2d 211 (Ct. App. 2020).

Moreover, Garver does not support her vicarious liability theory with coherent argument and citations to pertinent legal authority showing how the order granting summary judgment erred, due to her vicarious liability theory. (Final Brief of Appellant, pp. 4, 7, 14, 15). As a result, those factual statements and related arguments should be disregarded as abandoned on appeal. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994); and *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001).

Additionally, Garver factually represents that her claim against the Hospital alleges **only** ordinary negligence related to the Hospital's faulty administrative patient referral process. (Final Brief of Appellant, *passim*). But Garver's complaint explicitly alleges professional negligence against "all named Defendants" referenced as "McLeod Defendants" unless specifically restricted or defined within a cause of action. (R. p. 22; Compl. p. 2, ¶ 4). It alleges all Co-Defendants' actions occurred in the scope of their employment or agency. (*Id*., ¶ 8). And it does not limit or exclude the Hospital from any of her allegations. (*Id*., passim).

Of crucial importance, Garver alleges the following:

> 39. [D]uring his admission(s) to the Hospital, Jeremy Garver suffered multiple injuries due to the negligent acts and/or omissions of the McLeod Defendants, including, but not limited to:
> (a) subarachnoid hemorrhage;
> (b) ruptured cerebral aneurysm;
> (c) physical suffering and mental anguish;
> (d) untreated and unmanaged pain; and
> (e) untimely death due to McLeod Defendants negligent acts and/or omissions.
> ...
> 41. This count involves professional negligence perpetrated by the McLeod Defendants through hospital staff who provided services individually and/or in the course and scope of their employment to Jeremy Garver while a patient of McLeod Defendants.
> ...
> 45. The McLeod Defendants individually and/or as agents, servants, or employees ... departed from the prevailing professional standards of care, ... jointly and severally, including, but not limited to the following ...:
> a. Failure to conduct proper assessments of Jeremy Garver;
> b. Failure to properly warn Jeremy Garver;
> c. Failure to properly assess Jeremy Garver;
> d. Failure to refer Jeremy Garver;
> e. Failure to conduct appropriate assessments and inspections of Jeremy Garver's condition(s);
> f. Failure to properly control Jeremy Garver's conditions;
> g. Failure to properly monitor Jeremy Garver;
> h. Failure to properly monitor the progression of Jeremy Garver's symptoms;
> i. Failure to recognize the severity of Jeremy Garver's condition, and failing to properly diagnose, monitor, refer, and treat Jeremy Garver's conditions;
> j. Failure to transfer Jeremy Garver in a timely manner for CT scan, MRI, and/or surgical intervention;
> k. Failure to properly communicate and explain the urgency of Jeremy Garver's conditions

and/or symptoms;
l. Failing to make certain that Jeremy Garver received the appropriate referral(s) and/or surgical intervention(s) and/or transfer to a facility in a timely manner so that the appropriate surgical interventions could be accomplished in a timely manner;
m. Causing a delay in the surgical intervention necessary to treat Jeremy Garver's condition;
n. Failure to respond to an emergency situation in an appropriate and timely manner;
o. Failure to use due care to determine the extent and severity of Jeremy Garver's condition;
p. Failure to properly consider complications of the aneurysm as a possible explanation of Jeremy Garver's continued signs and symptoms;
q. Failure to take adequate steps for evaluation and treatment of Jeremy Garver's symptoms and/or conditions;
r. Failure to avoid delay in the transfer of Jeremy Garver to an appropriate medical care provider;
s. Failure to properly examine Jeremy Garver;
t. Failure to properly consult the records of previous admission to Defendant's facility and/or previous admissions to other medical providers;
u. Failure to consult with a physician properly qualified to assess and treat the condition(s) of Jeremy Garver;
v. Failure to admit Jeremy Garver to the hospital;
w. Failure to properly consider complications of the aneurysm, as a possible explanation of Jeremy Garver's signs and symptoms; and,
x. Failure to utilize appropriate measure to treat Jeremy Garver condition;
y. Failing to provide the appropriate referral for surgical interventions;
z. Failing to recognize the warning signs associated with Jeremy Garver's conditions and/or symptoms;
aa. Failing to comply with applicable state and federal codes, regulations, statutes, customs and standards, including, but not limited to without limitation, the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd *et seq*., DHEC R. 61-16 *et seq*.;
bb. Failing to exercise that degree of knowledge, care, and skill in the interpretation, diagnosis, care and treatment of Jeremy Garver's medical condition ordinarily possess [sic] and exercised by physicians and medical personnel similarly situated throughout the United States, including the State of South Carolina; and
cc. Departing from the generally accepted standards of the medical practice, which existed throughout the United States, including the State of South Carolina, in the diagnosis, medical care and treatment of Jeremy Garver's medical condition(s).
...

(R. pp. 27-30; Compl., pp. 7-10, ¶¶ 39, 41, 45).

The complaint does not plead in the alternative, and it does not contain a standalone claim for ordinary negligence. (*Id*. passim). Instead, it incorporates the above-quoted allegations into all seven other causes of action. (R. p. 32; Compl. p. 12, ¶ 52; p. 13, ¶ 56; p. 14, ¶ 59; p. 15, ¶ 65; p. 16, ¶ 72; p. 17 ¶ 83; p. 18, ¶ 88). And it explicitly refers to the Hospital in allegations of additional

acts deviating from the Hospital's **professional** standard of care in her sixth cause of action for fraud, negligent misrepresentation, or spoliation (*id*. pp. 16-17, ¶¶ 72-82), which are, in turn, incorporated and realleged in her seventh and eight causes of action. (*Id*. p. 17, ¶ 83; p. 18, ¶ 88).

As a result of these allegations, the Hospital contends that it is beyond dispute that Garver alleged only professional negligence against the Hospital, and did not state any claim for ordinary negligence. See, e.g., *Manufacturers & Merchants Mut. Ins. Co. v. Harvey*, 330 S.C. 152, 163, 498 S.E.2d 222, 228 (Ct. App. 1998) (holding that the underlying facts alleged did not support a cause of action for negligent conduct.).

Garver's brief repeatedly makes factual statements to the effect that MUSC consulting neurologist, Dr. Andrews "instructed" or "ordered" the Hospital, its emergency room staff, and/or its attending physician, Dr. Larson, to obtain or provide a referral to Mr. Garver, for a brain MRI on the night of October 23, 2017. (Final Brief of Appellant, pp. 8; 11; 12; 20). But Garver presents no evidence of any such "order" or "instruction" by MUSC or Dr. Andrews. (*Id. passim*). And Garver presents no evidence, argument or legal authority for a reasonable inference that MUSC or Dr. Andrews were empowered or authorized to "order" or "instruct" the Hospital, its staff, or Dr. Larson to do or not do anything. For example, she presents no evidence of any "Practice agreement" between the Hospital and MUSC or Dr. Andrews, under S.C. Code Ann. § 40-47-20(35). (Final Brief of Appellant, *passim*).

Instead, the evidence before the trial court includes the Hospital nurses' assessment (R. pp. 132-4; Hosp. Exhibit 2, Bates # 0150-0152), reassessments (R. pp. 135-6; *id*., Bates # 0153-0154), and nurses' triage report (R. pp. 135-9; *id*., Bates # 0153-0157), at "Triage Level 3" (R. p. 138; *id*., Bates # 0156). The Hospital's records show Dr. Larson's "Physician Notes" (R. pp. 140-6; *id*., Bates # 0158-0164) including his "ED Department Orders" (R. p. 142; *id*., Bates # 0160) and "ED

stroke orders CPOE 457" (R. p. 143; *id*., Bates # 0161), including blood tests, a chest X-ray and CT scans of the cervical spine and head (R. pp. 142-6; *id*., Bates # 0160-0164). The Hospital records show explicitly that Dr. Larson made all of these orders. (R. pp. 144-6; *id*., Bates # 0162-0164). And it includes the Hospital's "Visit Information" showing "Dispositional Provider[s] Eric J. Larson MD, [and] Michael P. Booth RN," with no mention of MUSC or Dr. Andrews. (R. p. 147; *id*., Bates # 0165).

The Hospital records also show that Dr. Larson called "reach" and discussed the need for follow-up with Mr. and Mrs. Garver and that the "need for follow up with neurology [was] stressed," before he discharged Mr. Garver in stable condition. (R. p. 146; *id*., Bates # 0164). The Hospital does not dispute that, in this context, "reach" means a telephone consultation with MUSC neurologist, Dr. Andrews. But Garver presented no evidence from which it may be reasonably inferred that Dr. Andrews or MUSC *instructed* or *ordered* the Hospital, Dr. Larson or other staff to do or not to do anything during this consultation.

Instead, the above-referenced Hospital records show that the nurses acted in their professional capacity as Hospital employees, according to their own professional judgment and standard of care, and, that Dr. Larson acted in his professional capacity as the Hospital's ED attending physician, according to his own professional judgment and standard of care. (R. pp. 132-147; *id*. Bates # 0150-0165) (*See also*, R. pp. 366-70; Garver Exhibit 2, *Hosp. Discharge Records*, Bates # 0035-0039).

Specifically, they show Dr. Larson's medical judgment in connection with his recommendation that Garver should obtain a referral for a brain MRI and follow up with MUSC:

> MDM and **Diagnosis**. **Medical Decisionmaking**. 10/23/2017 21:53. Final Diagnostic Impression: Intracranial Mass. Headache. **Diagnosis and Management Option**: New Problem (to examining Provider), **Additional Workup Planned**.

(R. p. 146; Hosp. Exhibit 2, Bates # 0164) (emphasis added).

The Hospital contends that the above-emphasized records show that Dr. Larson's actions are included in the statutory definition of the practice of medicine, which includes "offering or undertaking to ... diagnose, correct or treat in any manner, or by any means, methods, or devices, disease, illness, pain, wound, fracture, infirmity, defect, or abnormal physical or mental condition" (S.C. Code Ann. § 40-47-20(c)); "rendering a written or otherwise documented medical opinion concerning the diagnosis or treatment of a patient or the actual rendering of treatment to a patient" (§ 40-47-20(e); and "rendering a ... decision affecting the diagnosis and/or treatment of a patient is the practice of medicine." (S.C. Code Ann. § 40-47-20(f)).

The Hospital contends that it is undeniable that Garver's 'faulty referral' claim implicates the above-referenced diagnosis and recommendation as the "Additional Workup Planned" includes Dr. Larson's professional standard of care, pursuant to the statutory definition of "Unprofessional conduct" as "acts or behavior that fail to meet the minimally acceptable standard expected of similarly situated professionals including, but not limited to, conduct that may be harmful to the health, safety, and welfare of the public" per S.C. Code Ann. § 40-47-20(54); the statutory definition of 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. Code Ann. § 15-79-110(6); and the strictures of malpractice litigation. (S.C. Code Ann. § 15-79-125, *et seq*.). Thus, Dr. Larson's above-emphasized treatment, diagnosis, medical decision making and management option, including the recommendation to obtain a referral for a brain MRI, are all within the definition of the practice of medicine, and not within the realm of ordinary negligence and the common knowledge of a jury.

Garver's complaint did not allege, nor did she present any evidence that Dr. Larson or the ER staff acted as laypersons in a nonmedical, administrative or ministerial function, as contemplated by *Dawkins v. Union Hosp. Dist*., 408 S.C. 171, 178, 758 S.E.2d 501, 504 (2014). But Garver's brief makes unsupported factual assertions to the effect that once Dr. Andrews ordered or instructed the Hospital to make a referral for a brain MRI, and that the Hospital's referral process amounted only to "paperwork," which is totally unsupported. (Final Brief of Appellant, pp. 5, 8, 11, 12).

Garver's brief makes additional unsupported factual assertions to the effect that there was particular urgency in obtaining a brain MRI on the night of October 23, 2017; that the Hospital was aware of this urgency; that it did not properly address this urgency; and, that it did not communicate this urgency to Mr. and Mrs. Garver. (Final Brief of Appellant, pp. 5; 6; 8; 11; 14; 15; 16). But a claim based on the Hospital's alleged failures to properly respond to an urgent medical condition is inherently one for medical malpractice, not ordinary negligence.

Garver refers to this undocumented referral urgency as "admitted urgency," based on the Hospital's "Triage Level 3" and "ED EKG, Reason: Stroke symptoms, Do no delay CT of head to complete, STAT," performed at the Hospital, implying that they constitute the Hospital's admission of the existence of, and its knowledge of urgency in making a referral for a brain MRI that night. (Final Brief of Appellant, p. 16) (R. pp. 139, 142; Hosp. Exhibit 2, Bates #0157, #0160).

But no inference of urgency, nor of the Hospital's knowledge of such urgency may be drawn, because Garver presented no medical expert testimony relevant to a referral urgency, nor any other aspect of her claim against the Hospital, nor any evidence that a referral urgency is a matter of common knowledge. Garver presents no evidence that Mr. Garver's medical condition urgently required a brain MRI referral be completed on October 23, 2017, as opposed to the

following morning when it was actually completed. (See, R. p. 132; Hosp. Exhibit 2, Bates # 0150-0165). Indeed, that would be a medical question, outside the scope of the common knowledge exception under *Dawkins, supra,* and it would require medical expert testimony.

Garver makes unsupported factual statements to the effect that the Hospital negligently delayed the referral and that it inadequately explained the referral process to Mr. & Mrs. Garver. (Final Brief of Appellant, pp. 5; 6; 8; 11; 14; 15; 16). But she presented no evidence of any delay in referral, nor that Mr. Garver lacked understanding of Dr. Larson's recommendation that he obtain a referral for a brain MRI the following morning. Garver obliquely describes delay, Mr. and Mrs. Garver's state of mind and understanding of the circumstances, and Mrs. Garver's actions, without reference to any evidence:

> On discharge, Mr. and Mrs. Garver were under the impression that the only option for a brain MRI referral was through Respondent's neurology office, even though - time was of the essence! This did not make sense to Mr. and Mrs. Garver as evident by Mrs. Garver's testimony.

(Final Brief of Appellant, p. 6).

> Eventually, Mr. Garver was able to obtain a referral from Respondent's neurology department for brain MRI. When Mrs. Garver was asked if she recalls when she contacted the MRI specialists, Mrs. Garver replied that she called immediately, she was moving everything as fast as she could, because she couldn't even believe Respondent sent Mr. Garver home in the first place from Respondent's hospital. (R. p. 111; Transcript of Proceedings p. 9: lines 22-23).

(*Id*. p. 7-8). This argument cites only to counsel's arguments at the hearing.

The arguments of counsel are not evidence. *See Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006). Appellate briefs must "contain references to the transcript, pleadings, orders, exhibits, or other materials ...to support the salient facts alleged. References shall also be made to where relevant objections and rulings occurred in the transcript. In the initial briefs, these references should be to the page and line number of the transcript prepared by the court reporter

or by the page of the material to be referenced[.]" Rule 208(b)(4) SCRAP.

Many of Garver's factual statements to this Court refer only to counsel's comments at the hearing, leaving the Court and counsel to comb the record for the actual evidence:

> When Mrs. Garver was asked if she recalls when she contacted the MRI specialists, Mrs. Garver replied that she called immediately, she was moving everything as fast as she could, because she couldn't even believe Respondent sent Mr. Garver home in the first place from Respondent's hospital. (R. p. 111; Transcript of Proceedings p. 9: lines 22-23).
>
> On October 31, 2017, eight (8) days after MUSC instructions that a MRI referral was necessary, Mr. Garver finally met with a neurosurgeon at MUSC. After reviewing the brain MRI, the neurosurgeon's plan at that point was to coordinate an expedited visit with his neuro-endovascular colleagues for appropriate management. (R. p. 111; Transcript of Proceedings p. 9; lines 22-25).

(Final Brief of Appellant, p. 8).

> Mrs. Garver testified she was moving everything as fast as we could, because they couldn't even believe they sent Mr. Garver home in the first place from Respondent's hospital. (R. p. 110; Transcript of Proceedings p. 8, lines 22-23).

(*Id*. p. 14).

> The drawn-out referral process caused Mr. Garver to lose valuable time before the consultation with a neurosurgeon at MUSC approximately (twelve) 12 days after Mr. Garver's hospitalization at Respondent's facility. By that time, MUSC neurosurgeon was aware of the urgency, as his plan at that point was to coordinate an expedited visit with his neuro-endovascular colleagues for appropriate management. (R. p. 111; Transcript of Proceedings p. 9; lines 22-25).

(*Id*. p. 15).

> On October 31, 2017, eight (8) days after MUSC instructions that a MRI referral was necessary, Mr. Garver finally met with a neurosurgeon at MUSC. MUSC's neurosurgeon then coordinated an expedited visit with his neuro-endovascular colleagues to discuss appropriate management. (R. p. 11; Transcript of Proceedings p. 9; lines 22-25).

(*Id*. p. 16).

> Garver presented no evidence that any delay in the referral process occurred. The records

show that Mrs. Garver obtained the referral a few hours after Mr. Garver's ED visit[2]. And Garver presents no evidence that the timing of the referral proximately caused any delay in (1) performing the October 26, 2017 MRI[3]; (2) scheduling the October 30, 2017 initial visit at MUSC[4]; (3) scheduling the November 1, 2017[5] angiogram procedure at MUSC; (4) scheduling the November 8, 2017 procedure at MUSC[6]; nor (5) November 3, 2017[7] rupture of the aneurism resulting in Mr. Garver's death at Grand Strand Hospital on November 4, 2017[8].

Thus, the Hospital contends that all of Garver's above-referenced unsupported or factual statements and conclusory arguments should be disregarded by the Court, because they do not comply with Rule 208(b)(4) SCRAP. *And, see Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence."); *see also McClurg v. Deaton*, 395 S.C. 85, 87, note 2, 716 S.E.2d 887, 888 (2011) (citation omitted) (noting that the Court is not required to search the record for evidence in order to reverse an appealed order).

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE HOSPITAL BECAUSE PLAINTIFF PRESENTED NO EXPERT WITNESS EVIDENCE OF THE HOSPITAL'S PROFESSIONAL STANDARD OF CARE, NOR ANY DEVIATION FROM IT.

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[2] (R. p. 380; Garver Exhibit. 3, *Garver Dep*. p. 59, lines 16-25).

[3] (R. p. 213; Hosp. Exhibit 5, *Ward Dep*. p. 56, lines 8-15; R. p. 380; Garver Exhibit 3, Garver Dep. p. 59, lines 16-25).

[4] (R. p. 198; Hosp. Exhibit 5, *Ward Dep*. p. 41, lines 14-17; Compl. p. 5, ¶ 30).

[5] (R. p. 396; Garver v. MUSC NOI Exhibit A, *Holmes Affidavit*, pp. 2-3; R. pp. 94-6; Garver v. MUSC *Compl*, pp. 3-5).

[6] (See, R. p. 24; Compl. p. 5, ¶ 30).

[7] (R. p. 396; Garver v. MUSC NOI Exhibit A, *Holmes Affidavit*, pp. 2-3; R. pp. 94-96; Garver v. MUSC *Compl*, pp. 3-5).

[8] (R. p. 141; McCaffrey/Associates Exhibit 3, *Grand Strand "Brain Summary Note*").

(A) IT IS BEYOND DISPUTE THAT GARVER ALLEGES MEDICAL MALPRACTICE BY THE HOSPITAL.

Garver appeals from summary judgment granted to the Hospital due to her failure to present expert medical evidence of the Hospital's professional standard of care, deviation from that standard, and, the third failure that inevitably followed the first two - failure to offer evidence of proximate cause[9]. (R. pp. 403-4; Notice of Appeal) (R. p. 5-8; Order, February 15, 2023, pp 3-6). In sum, Garver contends that her claim against the Hospital sounds in ordinary negligence, requiring no medical expert testimony, because she only alleges a faulty nonmedical, administrative or ministerial referral process. (Final Brief of Appellant, pp. 9-17). But, as shown in the Statement of Facts, above, Garver's complaint makes lengthy and detailed allegations that the Hospital deviated from its medical professional standard of care, causing Mr. Garver's injuries, death and damages. (R. pp. 27-9; Comp. pp. 8-10). Garver's complaint alleges no specific basis for ordinary negligence. (R. pp. 20-38; Compl. passim). And she offers only unsupported factual statements and conclusory arguments to the contrary. (Final Brief of Appellant, *passim*).

All claims of medical professional negligence require expert medical evidence, both in their pre-suit notices of intent to file such claims, and at trial. S.C. Code Ann. §15-79-125 et seq., *And, see, e.g.*, *Pederson v. Gould*, 288 S.C. 141, 341 S.E.2d 633 (1986) ("In medical malpractice actions, the plaintiff must use expert testimony to establish both the required standard of care and the defendant's failure to conform to that standard[.]") *Id*. at 143, 341 S.E.2d at 634 (citation omitted). The only exception to this rule occurs when "the subject matter lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." *Id*. (citation omitted).

[9] Proximate cause is addressed separately in Argument IV, below.

"On a defendant's motion for summary judgment, there will usually be no genuine issue of material fact unless the plaintiff presents expert testimony on the standard of care and its breach by the defendant." *Jernigan v. King*, 312 S.C. 331, 334, 440 S.E.2d 379, 381 (Ct. App. 1993). Expert testimony is also required to establish proximate cause in a medical malpractice case. *Bramlette v. Charter–Medical–Columbia,* 302 S.C. 68, 393 S.E.2d 914 (1990).

The determination of whether a claim sounds in medical malpractice or in ordinary negligence is left to the discretion of the trial court. *Chalfant v. Carolinas Dermatology Grp., P.A.*, 439 S.C. 372, 384, 887 S.E.2d 1, 7 (Ct. App. 2023), *reh'g denied* (May 24, 2023). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion is without evidentiary support." *Turner v. Med. Univ. of S.C.*, 430 S.C. 569, 589, 846 S.E.2d 1, 11 (Ct. App. 2020).

Garver cited and quoted from *Dawkins v. Union Hosp. Dist*., 408 S.C. 171, 758 S.E.2d 501 (2014) in her complaint. (R. p. 22; Compl. p. 3, ¶¶ 15-18). But she did not allege any facts asserting a claim for ordinary negligence. (R. pp. 20-38; Compl. *passim*). She refers to *Dawkins* in her Argument to this Court once in passing, without offering any citation to the record nor any argument showing how the analysis and holding in Dawkins could apply to the facts here. (Final Brief of appellant, p. 13).

As shown in the Statement of Facts, above, it is undeniable that Garver alleged medical malpractice and departures from the Hospital's professional standard of care in all eight of her causes of action against the Hospital. (R. pp. 20-38; Compl., p. 2, ¶ 4; pp. 8-10, ¶ 45; p. 12, ¶ 52; p. 13, ¶ 56; p. 14, ¶ 59; p. 15, ¶ 65; pp. 16-17, ¶¶ 72-83; p. 18, ¶ 88). And Garver singled out the Hospital for allegations of additional deviations from the Hospital's professional standard of care. (*Id*. p. 2, ¶¶ 6-7; p. 6, ¶¶ 35-37; p. 7, ¶¶ 39, 41-42; p. 9 ¶ 45(v); and p. 16, ¶ 73(b)).

Moreover, at summary judgment, Garver's memorandum explicitly conceded that the following allegations pertained to the Hospital (to which she refers as "Seacoast"):

> Specifically, Plaintiff alleges, among other things, that Defendant Seacoast:
> • failed to **recognize the severity** of Jeremy Garver's condition;
> • failed to **properly diagnose, monitor, refer, and treat** Jeremy Garver's conditions;
> • **failed to transfer** Jeremy Garver in a timely manner **for** CT scan, **MRI,** and/or surgical intervention;
> • failed to **properly communicate and explain the urgency** of Jeremy Garver's condition(s) and/or symptoms; and
> • failed to **make certain that Jeremy Garver received the appropriate referral(s) and/or surgical intervention(s) and/or transfer** to a facility **in a timely manner** so that the appropriate surgical interventions could be accomplished in a timely manner.

(Garver Memo. pp. 5-6) (emphasis added).

All of the emphasized acts, above, implicate the Hospital's professional standard of care and require expert medical evidence, per *Dawkins*, *supra*, and S.C. Code Ann. § 15-79-110; and § 15-79-125 *et seq*. By conceding that the above allegations apply to the Hospital, Garver conceded that she alleged failures which are explicitly included in the statutory definition of the practice of medicine. See, S.C. Code Ann. § 40-47-20 defining the practice of medicine as including includes "offering or undertaking to ... **diagnose**, correct or **treat in any manner, or by any means, methods, or devices,** disease, illness, pain, wound, fracture, infirmity, defect, or abnormal physical or mental condition" (S.C. Code Ann. § 40-47-20(c) (emphasis added).

Likewise, in argument to the trial court, Garver again conceded that certain allegations implicating medical malpractice applied to the Hospital:

> Specifically, on page 8 through 9 [she] says that they failed to properly refer Mr. Garver for an MRI; they failed to properly communicate the urgency of Mr. Garver's conditions; they failed to make certain that Mr. Garver had appropriate referral in a timely manner.

(R. p. 108; Tr. p. 6, lines 2-6). But nowhere in the court below, nor in this Court, does Garver present argument, citations to specific facts of record and to legal authority showing that Garver

alleged a claim of ordinary negligence against the Hospital. (Compl., *passim*; Tr. *passim*; Final Brief of Appellant, *passim*).

Thus, it is beyond dispute that Garver alleges only medical malpractice by the Hospital.

(B) IT IS BEYOND DISPUTE THAT GARVER PRESENTED NO EXPERT MEDICAL TESTIMONY OF THE HOSPITAL'S PROFESSIONAL STANDARD OF CARE OR ANY DEVIATIONS FROM IT.

The evidence presented to the trial court includes no medical expert testimony of the Hospital's professional standard of care, nor deviations from it. Garver's discovery responses show that her only medical expert was Dr. Ward, whose affidavit accompanied the NOI, testified that he was a Neurologist and that he was expected to testify to "[n]eurology and/or neurologist standard(s) of care and causation of the alleged injuries and damages." (R. pp. 151-152; Hosp. Ex. 4*, P's 3rd Resp. to Hosp. Interrog*., pp. 3-4).

To qualify as an expert medical witness, testifying about the Hospital's professional standard of care or Dr. Larson's professional standard of care, the witness must have "actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given." S.C. Code Ann. § 15-36-100. But Dr. Ward testified that he does not hold himself to be an expert in the standard of care for an emergency room physician (R. pp. 191, 229; Hosp. Ex. 5, *Ward Dep*., p. 34, line 6; p. 72 lines 6-9); and that he would not offer any expert opinion that that anyone at the Hospital deviated from their standard of care on October the 23, 2017. (R. pp. 229-30; *Id.* pp. 72 line 10 - 73 line 10).

It is, thus, beyond dispute that Garver presented no expert medical evidence of the Hospital's or Dr. Larson's professional standard(s) of care, nor any deviations from it. For this reason, summary judgment for the Hospital was appropriate.

(C) IT IS BEYOND DISPUTE THAT THE COMMON KNOWLEDGE EXCEPTION DOES NOT APPLY TO GARVER'S EIGHT CAUSES OF ACTION AGAINST THE HOSPITAL.

The only exception to the requirement that medical malpractice must be proved by expert medical testimony, "occurs when the subject matter lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." *Pederson v. Gould*, 288 S.C. at 143, 341 S.E.2d at 634 (citation omitted).

Garver's lengthy allegations against the Hospital, detailed in the Statement of Facts, above, are factually incompatible with a claim for ordinary negligence because they describe only acts of professional negligence, which occurred while Dr. Larson treated Mr. Garver at the Hospital. (R. pp. 26-9; Compl., pp. 7-10, ¶¶ 39, 45; R. pp. 35-36; Compl. pp. 16-17, ¶¶ 72-82). All of these allegations involve providing medical care, and they require proof by way of medical expert testimony, per *Pederson v. Gould*, 288 S.C. at 143, 341 S.E.2d at 634 (citation omitted). "While providing medical services to a patient, the medical professional acts in his professional capacity and must meet the professional standard of care, as established by expert testimony." *Dawkins v. Union Hosp. Dist.*, 408 S.C. at 178, 758 S.E.2d at 504.

When only acts of malpractice in providing medical care are alleged, a plaintiff cannot seek relief for unalleged acts of ordinary negligence, in order to avoid the consequences of failing to provide medical expert testimony of the elements of her claim. See, e.g., *Manufacturers & Merchants Mut. Ins. Co. v. Harvey*, 330 S.C. 152, 163, 498 S.E.2d 222, 228 (Ct. App. 1998) (holding that underlying facts did not support a cause of action for negligent conduct.).

> Appellants cannot assert that [defendants] committed intentional acts, incorporate these intentional acts into each cause of action, and then seek recovery based on a negligence theory. These allegations do not constitute mere alternative pleading. Rather, the allegations are factually incompatible in that they characterize intentional conduct as negligent conduct."

Id. According to the analysis in *Harvey,* Garver cannot make lengthy and wide-ranging allegations of medical negligence, incorporate them into each of her eight causes of action, but survive summary judgment by seeking recovery on a theory of ordinary negligence, because the facts do not add up to ordinary negligence.

It is well established in South Carolina that, at summary judgment, a plaintiff's claim is limited by the material facts alleged in the complaint. See, e.g., *Carroll v. Isle of Palms Pest Control, Inc.*, __ S.E. 2d __, __, No. 2019-000797, 2023 WL 5065405, at *2 (S.C. Ct. App. Aug. 9, 2023) (affirming summary judgment for failure to allege facts showing the claim was not barred by economic loss rule); *Oulla v. Velazques*, 427 S.C. 428, 445, 831 S.E.2d 450, 458–59 (Ct. App. 2019) (affirming summary judgment where plaintiff failed to allege facts sufficient to sustain a claim of negligence); *Pallares v. Seinar*, 407 S.C. 359, 367, 756 S.E.2d 128, 132 (2014) (affirming summary judgment in malicious prosecution action where plaintiff failed to allege material facts that defendants did not believe they had probable cause to complain); *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 708 S.E.2d 218 (Ct. App. 2011), *aff'd,* 410 S.C. 346, 764 S.E.2d 912 (2014) (affirming summary judgment where plaintiffs failed to allege unique special damages required to state a claim for civil conspiracy); *Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 352 S.C. 95, 99–100, 572 S.E.2d 306, 308, (Ct. App. 2002) (affirming summary judgment where plaintiff failed to allege a compensable property interest); and, *Mibbs, Inc. v. S.C. Dep't of Revenue*, 337 S.C. 601, 607, 524 S.E.2d 626, 629 (1999) (affirming summary judgment where plaintiff failed to allege a compensable taking).

Garver's complaint was required to allege "a short and plain statement of the facts showing that the pleader is entitled to relief, and [] a prayer or demand ... for the relief to which he deems himself entitled." Rule 8(a) SCRCP. This she did not do, because none of the negligent acts she

alleged are "within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the defendant's conduct." *Jernigan v. King*, 312 S.C. 331, 333, 440 S.E.2d 379, 381 (Ct. App. 1993). And Garver presents no relevant, admissible evidence, cogent argument, nor valid legal authority to the contrary.

Deviations from the medical professional standard of care are statutorily presumed (S.C. Code Ann. § 15-79-125 et seq.) to be beyond the common knowledge of a jury, unless a plaintiff presents admissible evidence that the common knowledge exception applies, and this evidence must "rise [] above mere speculation or conjecture." *Chalfant v. Carolinas Dermatology Grp., P.A.*, 439 S.C. at 384, 887 S.E.2d at 7. "Unsupported speculation is not sufficient to defeat a summary judgment motion." *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 875 (4th Cir. 1992).

But Garver offers only speculation as to what the Hospital's referral process entailed, and she speculates further that this process caused her damages. (Final Brief of Appellant, p. 11). In support, she offers *Clark v. Ross*, 284 S.C. 543, 328 S.E.2d 91 (Ct. App. 1985). (*Id*.) But our Supreme Court abrogated that decision, and it is no longer valid authority. *Sherer v. James*, 290 S.C. 404, 408, 351 S.E.2d 148, 150 (1986).

Garver acknowledges that differentiating between medical malpractice and negligence claims "depends heavily on the facts of each individual case (Final Brief of Appellant, p. 10), and she attributes this principal to a Tennessee decision, *Estate of French v. Stratford House*, 333 S.W.3d 546, 555 (Tenn. 2011), which, being out of state, would have no weight here, but for the fact that it was cited in our Supreme Court's analysis in the *Dawkins* decision. *Dawkins v. Union Hosp. Dist.*, 408 S.C. at 178, 758 S.E.2d at 504. However, it must be noted that *Estate of French* was abrogated by a Tennessee statute subjecting every claim against a health care provider to the strictures of medical malpractice claims, and this abrogation was recognized by the Tennessee

Supreme Court:

> Under *Estate of French*, Tennessee courts had to distinguish between claims involving ordinary negligence and claims involving medical malpractice. But the Civil Justice Act statutorily abrogated *Estate of French*'s nuanced approach for distinguishing ordinary negligence and health care liability claims. In doing so, the Legislature expressed a clear legislative intent to broaden the scope of the Act to include every lawsuit against a health care provider that alleged an injury related to the provision of health care without regard to the theory of liability.

Cooper v. Mandy, 639 S.W.3d 29, 34 (Tenn. 2022) (citations and quotation marks omitted). Thus, *Estate of French* is also no longer valid legal authority.

Garver argues that it was Dr. Andrews' "instructions" or "orders" for an MRI referral that "triggered" the Hospital's referral process, which, she contends, was "simply paperwork" involving no medical judgment by the Hospital. (Final Brief of Appellant, pp. 11-12). But, as shown in the Statement of Facts, above, Garver did not allege facts, showing that any "nonmedical, administrative, ministerial, or routine care" was provided by the Hospital, per *Dawkins v. Union Hosp. Dist.*, 408 S.C. at 177–78, 758 S.E.2d at 504. She presents:(1) no evidence that Dr. Andrews or MUSC made any such instructions or orders; (2) no evidence of what the Hospital's referral process actually entailed; and (3) no evidence that the Hospital's patient referral process was within the common knowledge of the jury. (Final Brief of Appellant, *passim*).

Garver offers Mrs. Garver's speculation that Dr. McCaffrey should have been involved in the referral process; and that somehow the Hospital knew Dr. McCaffrey had "missed it" (referring to the aneurism). (R. pp. 383-4; Garver Exhibit 4, Garver Dep. pp. 117, lines 9 - 118, line 25). (Final Brief of Appellant, p. 15). But this speculative testimony is not probative of any of the three points in the preceding paragraph, and it does not create an issue of fact to survive summary judgment. A party may not create a genuine issue of material fact through speculation or guesswork." *In re Eleanor McCarthy Lenahan Tr. under agreement Dated July 12, 2001*, 428 S.C.

598, 605, 836 S.E.2d 793, 797 (Ct. App. 2019) (citing *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010) (holding one may not create a genuine issue of material fact by speculation or an "inferential leap")).

The facts in this case, appearing from the pleadings and evidence presented to the trial court, demonstrate that Dr. Larson's decision to recommend that Mr. and Mrs. Garver obtain a referral for a brain MRI was inextricably intertwined with the medical care Mr. Garver received at the Hospital on October 23, 2017. That medical care cannot be separated from the Hospital's and Dr. Larson's professional standard(s) of care. *See, e.g.*, *Delaney v. United States*, 260 F. Supp. 3d 505, 509 (D.S.C. 2017) ("[T]he complaint makes clear that Delaney is alleging that the medical providers at the US Naval Hospital had specific duties that were inseparably intertwined with their role as medical professionals—not as laymen.").

In fuller context, the pleadings, and evidence presented at summary judgment show that Dr. McCaffrey treated Mr. Garver for worsening migraine headaches for nearly two years before Mr. Garver presented to the Hospital on October 23, 2017; but Dr. McCaffrey, who was employed by Associates, and not by the Hospital[10], did not discover Mr. Garver's aneurism. (*See*, R. pp. 22-3; Compl., pp. 4-5, ¶¶ 20-26); (R. p. 273-4; Exhibit 6, Affidavit of William Barnes); (R. p. 277; Exhibit 7, McCaffrey Am, Answer, p. 2, ¶ 4); (R. p. 289; Exhibit 8, Hosp. Answer, p. 2, ¶ 5).

Plaintiff's sole medical expert, Neurologist, Dr. Ward, whose affidavit accompanied the NOI (R. p. 120-2; Garver Exhibit A to January 15, 2019 NOI), testified in deposition that Dr. McCaffrey first saw Mr. Garver on December 29, 2015, and that Mr. Garver had been having headaches for five or six years before that date. (R. p. 196; Exhibit 5, Ward Dep. p. 39, lines 13-

[10] As discussed in the Statement of Facts, above, Garver repeatedly asserts, without evidence, that Dr. McCaffrey, his staff, and his neurology office (Associates,), were employed by or associated with the Hospital, so as to implicate the Hospital in actions of Dr. McCaffrey and his staff, relative to the referral. (Final Brief of Appellant, pp. pp. 4, 7, 15).

15). Dr. McCaffrey's medical records also reflect this medical history. (R. p. 128; Exhibit 1, p. 1). Then, over the course of several visits with Dr. McCaffrey, Mr. Garver's headaches became more frequent "which by definition is a change in headache pattern, which is a red flag, and I believe he should have had [MRI] imaging at that point, as the headaches were worsening despite preventive treatment, and he was not imaged." (R. p. 190; Exhibit 5, Ward Dep. p. 33 lines 4-10). This "red flag" occurred on May 31, 2016, at which point Dr. Ward opined that Dr. McCaffrey should have ordered an MRI of the brain (R. p. 197; *Id*., p. 40, lines 5-13 and 22-25); and he opined that an MRI at that point would have revealed "a giant basilar artery aneurysm." (R. p. 198; *Id*. p. 41, lines 4-5). The Court may take judicial notice of the fact that this red flag date, May 31, 2016 was more than a year before Mr. Garver presented to the Hospital ED on October 23, 2017. SCRE 201(b) and (c).

Garver's evidence shows that Mr. Garver presented to the Hospital at 7:14 p.m. or 19:14 hours (R. p. 302; Garver Exhibit 1, pp. 2) and that the Hospital (Dr. Larson) discharged Mr. Garver that same night when the discharge instructions were printed for the patient at 21:55 hours (9:55 p.m.). (*Id*.). The discharge instructions direct Mr. Garver to follow up with the Neurology Department the following morning for an MRI, and to consider further follow-up with MUSC. (*Id*.).

Garver's evidence also shows that Associates completed the referral a few hours later: Mrs. Garver testified that she called Associates and obtained the referral for MRI on the morning of October 24, 2017. (R. p. 310; Garver Exhibit. 3, Garver Dep. p. 59, lines 16-25). Garver's brief refers to the referral process as "drawn out" and describes it as having been "eventually" completed. (Final Brief of Appellant, pp. 15, 16). But this mischaracterizes the evidence in an attempt to support her conclusory arguments that there was a negligent "delay" in the referral, and

that this delay caused Garver's damages. (*Id*. pp. 11, 13, 15, 17). Garver presents no evidence that completion of the referral the morning after Mr. Garver's visit to the ED constitutes delay by the Hospital or Dr. Larson.

Instead, Garver makes the *inferential leap* that the Hospital's "faulty" referral process caused a delay in obtaining diagnostic care and surgery at MUSC, and that Mr. Garver suffered a ruptured aneurism and death as a result of this delayed care at MUSC.

> [The] faulty referral process caused unnecessary delay which pushed Mr. Garver's consultation and procedure with MUSC back by several weeks before Mr. Garver, expectedly, died as a result of a ruptured aneurysm.

(Final Brief of Appellant, p. 17).

But the referral itself was completed on the morning of October 24, 2017, within hours of Mr. Garver's discharge. (R. p. 310; Garver Exhibit 3, Garver Dep. p. 59, lines 16-25). Dr. Ward testified in reference to the MRI which was performed on October 26, 2017. (R. p. 213; Hosp. Exhibit 5, Ward Dep. p. 56, lines 8-15). This date is consistent with Mrs. Garver's testimony that she called Associates on October 24, 2017, and that they scheduled the MRI for that Thursday. (R. p. 310; Garver Exhibit 3, Garver Dep. p. 59, lines 16-25). The Court may take judicial notice of the 2017 calendar and that October 26, 2017 was the Thursday following Mr. Garver's October 23, 2017 Hospital visit. Rules 201(b) and (c) SCRE.

Dr. Ward also testified that a consultation with MUSC's Dr. Vandergrift occurred on October 30, 2017. (R. p. 199; Hosp. Exhibit 5, Ward Dep. p. 41, lines 14-17). This date is consistent with the complaint's allegation that the aneurism was discovered on October 30, 2017. (R. p. 25; Compl. p. 5, ¶ 30). But Garver presents no evidence that the Hospital played any role in scheduling or performing the MRI on October 26, 2017, or in scheduling the October 30, 2017 consultation at MUSC.

Garver speculates, citing only to counsel's comments to the trial court:

> On October 31, 2017, eight (8) days after **MUSC instructions** that a MRI referral was necessary, Mr. Garver finally met with a neurosurgeon at MUSC. MUSC's neurosurgeon then coordinated an expedited visit with his neuro-endovascular colleagues to discuss appropriate management. Transcript of Proceedings p. 9; lines 22-25 (R. p. 111).
> Mr. Garver was scheduled to return to MUSC for a procedure to address the large brain mass. **Unfortunately, Mr. Garver never made it to that appointment**. Instead, Mr. Garver was **readmitted to Respondent's facility on November 3, 2017**, unresponsive, eleven (11) days after MUSC instructions that a MRI referral was necessary. (R. p. 390, Exhibit 6 Plaintiff's Motion to Reconsider p. 1).

(Final Brief of Appellant, pp. 15-16) (emphasis added). The reference to October 31 is likely a typographical error, to which we all fall prey. But the other factual errors, emphasized in the quote above, must be addressed.

As shown in the Statement of Facts and Arguments above, Garver presents no evidence that MUSC (Dr. Andrews) "instructed" or "ordered" or had authority to instruct or order the Hospital or Dr. Larson in any way. All evidence shows that Dr. Larson acted on the basis of his own medical professional judgment as the Hospital attending physician. *See*, (R. pp. 132-147; Hosp. Exhibit 2, Bates # 0150-0165); (R. pp. 302-6, Garver Exhibit 1, *Hosp. Discharge Records*, Bates # 0035-0039).

In the argument emphasized above, Garver asserts that Mr. Garver was readmitted to the Hospital on November 3, 2017. But she presents no evidence of this readmission. Evidence presented to the trial court shows that Mr. Garver was admitted to Grand Strand Regional Medical Center on the morning of November 4, 2017 where he was pronounced dead. (R. p. 149, McCaffrey/Associates Exhibit 3, *Grand Strand "Brain Summary Note*").

And, in the above emphasized argument, Garver asserts that Mr. Garver never made it to MUSC for a procedure scheduled for November 8, 2017. But this is also deceptively incomplete, and it is contradicted by her own related lawsuit against MUSC. In Garver v. MUSC, Charleston

County Court of Common Pleas, 2019-NI-10-00084, Garver's NOI, affidavit, and complaint assert that Mr. Garver underwent an invasive procedure at MUSC on November 1, 2017, which was immediately followed by symptoms of aneurism worsening or rupture, and that MUSC's failure to treat these symptoms caused Mr. Garver's injuries and death:

> [O]n November 1, 2017, Jeremy Garver was discharged from [MUSC], but immediately returned to Defendant's ER with complaints of nausea and/or severe headache/pain...

(R. p. 93, Garver v. MUSC, Am. NOI, p. 2).

Garver's expert medical witness affidavit of Brian Holmes, M.D., attached thereto, swears:

> On November 1, 2017, Mr. Garver, accompanied by his wife Claudine Garver, appeared at the MUSC for an angiogram scheduled for 10 a.m. that day. ... It is my opinion to a reasonable degree of medical certainty that the care and treatment rendered by MUSC, fell below the accepted standard of care for similar medical providers for the following reasons: Mr. Garver had undergone a catheter cerebral angiogram, which is an invasive diagnostic procedure. ... The cerebral angiogram identified an unruptured cerebral aneurysm ... The staff of MUSC fell below the accepted standard of care when they did not respond to Mr. and Mrs. Garver's report of neurological symptoms by arranging a medical evaluation. Instead, MUSC staff assumed that Mr. Garver' s symptoms were of no importance and he was sent home after a sip of Ginger Ale and some crackers. ... It is my opinion that these violations of the standard of care proximately caused Jeremy Garver' s injuries.

(R. pp. 397-398; Garver v. MUSC, NOI Exhibit A, *Holmes Affidavit*, pp. 2-3).

The complaint filed against MUSC likewise asserts as fact that Mr. Garver was treated by MUSC on November 1, 2017, was discharged thereafter, and immediately returned with complaints of neurological symptoms consistent with aneurysm expansion and/or rupture; but MUSC refused to readmit him or treat him; and, as a result of MUSC negligent actions, he suffered a catastrophic subarachnoid hemorrhage and/or ruptured cerebral aneurysm on November 3, 2017 and was pronounced dead on November 4, 2017. (R. p. 94-96; Garver v. MUSC Compl, pp. 3-5).

The Court may take judicial notice of these factual statements made in pleadings filed in Garver's related law suit. Rules 201(b) and (c) SCRC. While these materials were not presented to the trial court, the Hospital's counsel did inform the court of the existence of the law suit at

summary judgment the hearing. (R. p. 113; Tr. p. 11, line 7). At minimum, these documents show that Garver's statements of fact as to alleged delay in scheduling MUSC's examination and procedures are incomplete, misleading and false. MUSC performed its procedure on Mr. Garver on November 1, 2017 after which he showed symptoms of aneurism rupture. There can be no reasonable inference that, but for the alleged "delay" in the Hospital's "paperwork" referral process, MUSC's care would have prevented Garver's aneurism from rupturing, and would have given him a chance of survival beyond November 4, 2017.

But, even if the Court declines to take judicial notice of the pleadings in Garver v. MUSC, Garver's claim against the Hospital is inextricably intertwined with the medical care the Hospital provided on October 23, 2017. The claim is of negligent medical care, outside the common knowledge of the jury, and, therefore, it sounds in professional negligence and not in ordinary negligence.

Nowhere does Garver present evidence or valid legal authority supporting a reasonable inference that the Hospital's (Dr. Larson's) treatment and recommendations on discharge of Mr. Garver are within the realm of common knowledge. (Final Brief of Appellant, pp. 10-17). Garver's arguments should, thus, be disregarded as abandoned on appeal. *See, First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue."); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

Thus, it is beyond dispute that that the common knowledge exception does not apply to Garver's eight causes of action against the hospital, and summary judgment was properly granted

for failure to present medical expert evidence of the Hospital's professional standard of care and any deviations from it.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE HOSPITAL BECAUSE PLAINTIFF PRESENTED NO EVIDENCE OF THE HOSPITAL'S STANDARD OF ORDINARY CARE IN THE CONTEXT OF AN ADMINISTRATIVE NEGLIGENCE CLAIM, NOR ANY DEVIATION FROM IT.

Garver contends that her claim against the Hospital pertains only to its patient referral process and that no medical expert testimony is required as to the Hospital's standard of care in making the referral, nor as to any deviation from that standard. (Final Brief of Appellant, pp. 10-17) In Garver's view, the claim against the Hospital is not for professional negligence under S.C. Code Ann. § 15-79-125, but, rather, for ordinary negligence under the analysis of *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 758 S.E.2d 501 (2014). (Final Brief of Appellant, p. 13).

In *Dawkins,* our Supreme Court held that plaintiff's claim against the hospital, stemming from her fall during a trip to the bathroom, sounded in ordinary negligence, rather than medical malpractice. *Id*. at 178. Dawkins had been admitted to the emergency room, but, before treatment, the hospital left her unattended and unmonitored and it prevented her family members from accompanying her into the emergency room area. *Id*. at 173, 758 S.E.2d at 502. At some point after being admitted but still before being treated, she attempted to use the restroom and fell, fracturing her foot. *Id*.

The *Dawkins* Court determined that the claim was not subject to the strictures of S.C. Code Ann. § 15-79-125 et *seq*. *Id*. In reaching this conclusion, the Court considered cases from other jurisdictions, involving injuries from falling hospital ceiling tiles, and improperly maintained hallways and parking lots, noting that they involved ordinary negligence, and, specifically, that they involved premises liability as opposed to medical care. *Id*. at 177 758 S.E.2d at 504 (citations omitted). These decisions focused on whether expert testimony was "necessary to aid the jury's

determination of fault, particularly with respect to the "duty" and "causation" elements of the claim;" and they determined that if the patient received "nonmedical, administrative, ministerial, or routine care, expert testimony establishing the standard of care is not required, and the action instead sounds in ordinary negligence." *Id.* at 177-178, 758 S.E.2d at 504 (citations omitted).

The Court explained:

> [N]ot every action taken by a medical professional in a hospital or doctor's office necessarily implicates medical malpractice and, consequently, the requirements of section 15–79–125. **While providing medical services to a patient, the medical professional acts in his professional capacity and must meet the professional standard of care, as established by expert testimony.** However, at all times, the medical professional must "exercise ordinary and reasonable care to insure [sic] that no unnecessary harm [befalls] the patient."
>
> **The statutory definition of medical malpractice found in section 15–79–110(6) does not impact medical providers' ordinary obligation to reasonably care for patients with respect to nonmedical, administrative, ministerial, or routine care**. Thus, medical providers are still subject to claims sounding in ordinary negligence.
>
> ... Appellant's claim sounds in ordinary negligence and is not subject to the statutory requirements associated with a medical malpractice claim. **Appellant's complaint makes clear that she had not begun receiving medical care at the time of her injury, nor does it allege the Hospital's employees negligently administered medical care**. Rather, the complaint states that Appellant's injury occurred when she attempted to use the restroom unsupervised, prior to receiving medical care.

Dawkins v. Union Hosp. Dist., 408 S.C. at 178-179, 758 S.E.2d at 504-505 (citations omitted) (emphasis added).

But here, Dr. Larson made the recommendation for referral while providing Mr. Garver's ED care on October 23, 2017. "While providing medical services to a patient, the medical professional acts in his professional capacity and must meet the professional standard of care, as established by expert testimony." *Id.*., 408 S.C. at 178, 758 S.E.2d at 504.

But even if the Court were to decide that Garver alleged a claim of ordinary negligence against the Hospital, Garver is not relieved of the obligation to present evidence of the Hospital's

standard of ordinary care and of any breach of that standard. "When expert testimony is not required, the plaintiff must offer evidence that rises above mere speculation or conjecture." *Chalfant v. Carolinas Dermatology Grp., P.A.*, 439 S.C. at 384–85, 887 S.E.2d at 7 (citation omitted).

On appeal, Garver argues that "subject matters that fall within a juror's common knowledge do not require expert testimony ... because the jurors can easily understand and evaluate the relevant facts and law merely by exercising their common knowledge." (Final Brief of Appellant, p. 10). But she does not present evidence of what the Hospital's standard of ordinary care entailed, nor how the Hospital breached that standard, and she provides no valid legal authority supporting her contentions to the contrary. (Final Brief of Appellant, pp 10-17).

Instead, Garver offers her conclusory description of a patient referral process, without evidence or authority for applying it here. (Final Brief of Appellant, p. 11). See, e.g., *Chalfant v. Carolinas Dermatology Grp., P.A.*, __S.E.2d __, __, 2023 WL 2904636, at *5 (S.C. Ct. App. Apr. 12, 2023) (citation omitted) (emphasis added) (affirming directed verdict for medical facility as to its one-page telephone discharge instructions and phone prompt because no expert testified that either the doctor or the facility breached the standard of care).

"Ultimately, due to the fact-specific nature of the determination, it is a question that must be left within the discretion of the trial judge." *Id.* (citation omitted). "An abuse of discretion occurs when the trial court's rulings either lack evidentiary support or are controlled by an error of law." *Hamilton v. Reg'l Med. Ctr.*, No. 2019-001921, 2023 WL 4919530, at *4 (S.C. Ct. App. Aug. 2, 2023) (citation and punctuation omitted). But Garver does not argue that the trial court abused its discretion on this or any other issue. (Final Brief of Appellant, *passim*).

Applying *Dawkins* to the facts in this case, summary judgment was appropriate, because

Garver presented no evidence of the Hospital's or Dr. Larson's standard of ordinary care in discharging Mr. Garver with a recommendation that he seek a referral for a brain MRI the following morning, and follow up with MUSC. And she presents no evidence that the Hospital or Dr. Larson breached that standard of ordinary care. "To prevail in a negligence action, a plaintiff must demonstrate: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." *Peterson v. Porter*, 389 S.C. 148, 153–54, 697 S.E.2d 656, 659 (Ct. App. 2010).

Garver offered[11] an excerpt of Dr. McCaffrey's deposition testimony, admitting that he did not know what had occurred and only guessed at what should have occurred:

> Q ... Is there not a process where McLeod contacts you and asks for a referral or is that up to the patients?
>
> A **I don't know what happened** in that situation. I'm on call ten days a month. That just happened to be one of the days I wasn't on call**. I guess** it should have been somebody calling me up on the phone as opposed to the patient's wife.

(R. p. 319; Garver Exhibit 4, *McCaffrey Dep*. pp. 61, line 24 - 62, line 8) (emphasis added).

The standard of care is not proved by the guesswork of a co-defendant at the summary judgment stage. "A party may not create a genuine issue of material fact through speculation or guesswork." *In re Eleanor McCarthy Lenahan Tr. under agreement Dated July 12, 2001*, 428 S.C. 598, 605, 836 S.E.2d 793, 797 (Ct. App. 2019) (citing *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010) (holding one may not create a genuine issue of material fact by speculation or an "inferential leap")).

[11] Garver attached only four pages of Dr. McCaffrey's deposition as Exhibit 4 to her Memorandum opposing summary judgment. (R. pp. 317-20; Garver Exhibit 4, *McCaffrey Dep*. pp. 31, 32, 61, 62). Garver quoted it in argument to the trial court. (R. p. 110; Tr. 1/3/2023, p. 8 line 1-12). And Garver again relies on this evidence on appeal. (Final Brief of Appellant, p. 14)

Garver also offered[12] an excerpt of Mrs. Garver's deposition testimony, but the quoted selection omitted that, when asked if she had any specific complaints about the Hospital, she answered "No." She testified:

> Q ... Do you have specific complaints and criticisms about the way the ER staff dealt with you and your family on either of those two visits?
>
> A. **No**. But I find it interesting that the doctor on record was McCaffrey and they never contacted him and he was never part of conversation until I had to get the MRI. And I'm not sure why that is, other than we kept saying that was his doctor. And maybe they knew he missed it. **I don't know**. I find it interesting that -- we said that he had been under the care of Dr. McCaffrey, and he was nowhere to be found, other than for us to make a referral for an MRI. So I find that interesting. I don't -- that's, I guess, what I have to say about that. That's like -- I mean -- so -- because **I would have thought that if they found something neurologically wrong with him** immediately at the ER of which his doctor was associated with, **I would have thought that he would have been involved a little bit**. I shouldn't even had to call him. He could have called us, like -- you know, that's -- I have had with doctors. Like doctors check on you. Doctors check on me, you know. They -- if they feel like something -- they check on Julian. If he's sick, they -- if they really feel concerned, they take the time and check in. And I find it interesting. So I don't -- that's more of my term. I find it interesting that the hospital didn't even include him at all when that was -- he was associated with the hospital, that they went right over his head.

(R. p. 383; Garver Exhibit 4, *Garver Dep*. pp. 117, lines 9 - 118) (emphasis added).

Mrs. Garver's testimony, above, is not evidence of the Hospital's or Dr. Larson's standard of ordinary care in recommending a referral for an MRI, nor of how that standard was breached. Instead, it amounts to a grieving widow's attempt to understand a horrific event in the context of complex *medical* care, part of which Mr. Garver received at the Hospital. And it clearly implicates the practice of medicine and the strictures of S.C. Code Ann. § 15-79-125 *et seq*. in proving medical negligence.

Finally, as to the standard of ordinary care, Garver offered the MUSC nurse's call note:

Received patient's information from Dr. Andrews who performed a REACH consult on

[12] Garver attached six pages of the deposition testimony of decedent's wife, Claudine Garver, as Exhibit 3 to the Memorandum opposing summary judgment. One of those pages was, apparently, duplicated inadvertently. (R. pp. 279-385; Garver Exhibit 4, *Garver Dep*. pp. 59, 60, 116, 117, 118, 60).

> this patient last night. Patient had a CT scan done at an outside facility and it showed a brainstem tumor. Patient was discharged home and told to follow-up with Neurosurgery. I called and spoke with patient's wife and she states they are working on getting the patient a MRI brain scan. I notified her that Dr. Vandergrift can certainly see the patient in clinic with imaging CD once the MRI is completed. She states she spoke with scheduling earlier today and they told her she would need a referral, so they are working on getting the Neurologist and/or the McLeod Seacoast to send a referral over. She will call our office back to set up appointment once MRI is scheduled.

(R. p. 308; Garver Exhibit 2, *MUSC Health Call Documentation*). This call documentation, likewise, is not probative of the Hospital's or Dr. Larson's standard of ordinary care in recommending a referral, nor does it describe any breach thereof. It is consistent with the Hospital's records and shows only that another hospital, MUSC, and Mrs. Garver were both aware that the referral process was underway within a few hours of having been recommended by Dr. Larson the night before.

None of Garver's evidence tends to prove the standard of ordinary care in Dr. Larson's recommendation for a referral, nor could it be, because Dr. Larson made the recommendation based on his professional judgment, while providing care to Mr. Garver. "While providing medical services to a patient, the medical professional acts in his professional capacity and must meet the professional standard of care, as established by expert testimony." *Dawkins v. Union Hosp. Dist.*, 408 S.C. at 178, 758 S.E.2d at 504.

"In a given case, a court may establish and define the standard of care by looking to the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines." *Roddey v. Wal-Mart Stores E., LP*, 415 S.C. 580, 589, 784 S.E.2d 670, 675 (2016) (citation omitted). "Evidence of a company's deviation from its own internal policies is relevant to show the company deviated from the standard of care, and is properly admitted to show the element of breach." *Id.* (citation omitted).

But Garver offers no evidence of referral policies, procedures or guidelines in place at the

Hospital; no evidence that the Dr. Larson deviated from these processes, procedures or guidelines in making the recommendation for a referral; nor any evidence that the Hospital's policies or Dr. Larson's actions in this case deviated from any industry standard or regulations related to referrals.

Thus, the court properly granted summary judgment to the Hospital because, even if the claim is one for nonmedical administrative, ministerial or routine care under *Dawkins,* Garver failed to present evidence of the Hospital's standard of ordinary care, nor any breach thereof.

III THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE HOSPITAL BECAUSE THE PLAINTIFF PRESENTED NO EVIDENCE OF PROXIMATE CAUSE.

Even if Garver had leaped the hurdles of proving the Hospital's standard of care (either professional or ordinary care), and proving that the Hospital breached that standard, to survive summary judgment, Garver was required to present "specific facts" (see *Kitchen Planners, LLC v. Friedman*, __ S.C. __, __ S.E.2d __, No. 2020-001669, 2023 WL 5420401, at *2) of the element of proximate cause. "Negligence is not actionable unless it is a proximate cause of the injuries[.]" *McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 386, 684 S.E.2d 566, 569 (Ct. App. 2009) (citation omitted). "[F]or a plaintiff to recover damages, she must prove by the greater weight or preponderance of the evidence not only the injury but also that it was caused by the actionable negligence of the defendant." *King v. J. C. Penney Co.*, 238 S.C. 336, 340, 120 S.E.2d 229, 230 (1961). "This burden cannot be met by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence." *Id*.

Garver's evidence had to be admissible. *See, e.g., Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("[M]aterials used to support or refute a motion for summary judgment must be those which would be admissible in evidence."). And Garver's evidence of proximate cause had to be more than a mere scintilla to overcome a motion for summary judgment.

Kitchen Planners, LLC v. Friedman, at *2 (citation omitted).

Garver's proximate cause argument consists of less than two full pages. (Final Brief of Appellant, pp. 16-17). In those pages she provides no legal authority whatsoever for her contention that the court erred in granting summary judgment for failure to present evidence of proximate cause, and only conclusory argument. (*Id.*). As a result, that argument should be disregarded by this Court and treated as abandoned on appeal. *See, e.g., First Sav. Bank v. McLean*, 314 S.C. at 363, 444 S.E.2d at 514 ("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue."); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. at 81, 557 S.E.2d at 691 ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

Even if the Court were to consider Garver's proximate cause argument, it fails, because she points us to no admissible evidence of proximate cause presented to the trial court. Proximate cause requires proof of cause-in-fact and legal cause. *Ruh v. Metal Recycling Servs., LLC*, 439 S.C. 649, 660, 889 S.E.2d 577, 583 (2023). Foreseeability is the touchstone of legal cause, and it is determined by looking to the natural and probable consequences of the defendant's act or omission. *Wickersham v. Ford Motor Co.*, 432 S.C. 384, 390, 853 S.E.2d 329, 332 (2020) (citation omitted).

But Garver does not argue that the Hospital (Dr. Larson) could have foreseen that a referral obtained on the morning of October 24, 2017, instead of during his care in the ED the night before, could have caused his undiagnosed aneurism to rupture and cause his death. And this causation premise is not supported by any of the evidence presented to the trial court and discussed at length herein above.

"When the evidence is susceptible to only one inference legal cause becomes a matter of law for the court." *Id.* (citation omitted). Garver presented no evidence of legal cause, and, therefore, the only inference to be drawn is that there is no such evidence, and her claim is properly subject to summary judgment.

"Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence." *Id*. (citation omitted).

Garver's 'but for' argument, in essence, boils down to a claim of "loss of chance," which South Carolina courts do not recognize. See, *Jones v. Owings*, 318 S.C. 72, 456 S.E.2d 371 (1995).

In *Jones*, the allegations parallel our own - Jones sued for the death of his wife, alleging that Dr. Owings was negligent and willful in failing to inform the Decedent of another doctor's reports, failing to follow up on that other doctor's recommendations, and failing to diagnosis the Decedent's lung cancer, which later killed her. *Id.*, at, 74, 456 S.E.2d at 372.

The case proceeded as a normal medical malpractice case, with expert evidence, and, at summary judgment, the court found that even if the lung cancer had been diagnosed and treated after the first chest x-ray, Decedent would not have had a better than fifty percent chance of survival, and on that basis the court granted Owings' motion for summary judgment finding Jones had not met the burden of proof required to show that any breach of duty by Owing proximately caused Decedent's death. *Id.*, at 74, 456 S.E.2d at 372.

Here, Garver's expert, Dr. Ward, testified that if Dr. McCaffrey (not the Hospital) had ordered an MRI on May 31, 2016 when his headaches became more frequent, the MRI would have revealed a "giant basilar artery aneurysm." (R. p. 197; Hosp. Exhibit 5, *Ward Dep*. p. 40, line 22 - p. 41, line 5). But Dr. Ward did not opine as to Mr. Garver's chances of survival at that point, nor did he opine as to Mr. Garver's chance of survival more than a year later, when Mr. Garver went

to the Hospital ED.

To be clear, Garver presented no expert testimony, nor any other evidence that Mr. Garver would have had a chance of survival beyond November 4, 2017, if the referral had been completed on October 23, 2017, instead of the following morning on October 24, 2017.

In *Jones*, the appellant argued that the injury caused by Owings' delay was Decedent's "loss of chance of survival" rather than her death and, therefore, the trial judge had erred in granting summary judgment. *Jones v. Owings*, 318 S.C. at 75, 456 S.E.2d at 373.

Garver's brief states a very similar contention:

> In the complaint, Appellant allege that Respondent failed to recognize the severity of Mr. Garver's condition, failed to properly communicate and explain the urgency of Mr. Garver's condition(s) and/or symptoms, and failed to make certain that Mr. Garver received the appropriate referral(s) .... in a timely manner so that the appropriate surgical interventions could be accomplished in a timely manner. Complaint pp. 8-10[13] (R. p. 27-9).

(Final brief of Appellant, p. 8).

In *Jones*, the Supreme Court held that a medical malpractice plaintiff has the same stringent burden of proof as one in other negligence actions, and, in either action the plaintiff "must introduce evidence that the defendant's negligence *most probably* resulted in the injuries alleged." *Id.*, at 74–75, 456 S.E.2d at 372 (citation omitted) (italics original).

Based on this requirement of proof, the Court rejected the "loss of chance" doctrine:

> After a thorough review of the "loss of chance" doctrine, we decline to adopt the doctrine and maintain our traditional approach. ... Legal responsibility in this approach is ... based on the mere *possibility* that a tortfeasor's negligence was a cause of the ultimate harm. This formula is contrary to the most basic standards of proof which undergird the tort system. Accordingly, we find the trial judge properly held Jones did not establish Owings' alleged negligence most probably caused Decedent's death.

Jones v. Owings, 318 S.C. at 77, 456 S.E.2d at 374 (citation omitted).

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[13] This fairly captures the allegation found at: (R. p. 27; Compl. p. 8, ¶ 45(l)).

Garver's argument appears to track the rationale rejected by the *Jones*:

> In the case at hand, Appellant alleged that Respondent's patient referral process, or lack thereof: was the cause and/or contributed to Appellant's damages. See Complaint.[14]

(Final Brief of Appellant, p. 11).

> The drawn-out referral process caused Mr. Garver to lose valuable time before the consultation with a neurosurgeon at MUSC approximately (twelve) 12 days after Mr. Garver's hospitalization at Respondent's facility.

(Id. p. 15).

> Respondent's faulty referral process caused unnecessary delay which pushed Mr. Garver's consultation and procedure with MUSC back by several weeks before Mr. Garver, expectedly, died as a result of a ruptured aneurysm.

(Id. p. 17).

More recently, this Court again rejected "loss of chance," even though there was evidence the decedent had a chance of survival. *See, Martasin v. Hilton Head Health Sys.*, 364 S.C. 430, 441, 613 S.E.2d 795, 801 (Ct. App. 2005) (noting that "loss of chance" was rejected in *Jones*, *supra*, and holding expert opinion that there was a one in three chance Mr. Martasin's fatal event could have been prevented had he been admitted and treated sooner, did not prove proximate cause.). *Id*. at 441, 613 S.E.2d at 801. "This assessment fails to establish the causal link." *Id*.

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[14] This allegation is not found in the complaint. Instead, Plaintiff alleged: "**One or more of the deviations from the standard of care as set forth above proximately caused severe injury to Jeremy Garver, which resulted in his death**. The rupture of the subarachnoid hemorrhage and/or cerebral aneurysm more likely than not would not have occurred had there been reasonable care, treatment, and monitoring of Jeremy Garver prior to his transfer/referral for a CT scan and/or MRI, including monitoring Jeremy Garver's symptoms, controlling Jeremy Garver's symptoms, monitoring the progression of Jeremy Garver's symptoms, and/or transferring/referring Jeremy Garver in a timely manner for urgent care and/or surgery. If the McLeod Defendants had not deviated from the standard of care, Jeremy Garver's rupture of the subarachnoid hemorrhage and/or cerebral aneurism would not have occurred and Jeremy Garver would not have died." (R. pp. 29-30; Compl. pp. 10-11, ¶ 47). The standard of care to which it refers is alleged as: "The **McLeod Defendants ... owed a duty to Jeremy Garver to comply with the standard of care and skill exercised by healthcare providers** generally under similar conditions and like surrounding circumstances as those presented by Jeremy Garver during his multiple admissions to the Hospital." (R. p. 26; Compl. p. 7, ¶ 42) (emphasis added) Thus, even in the context of the allegations of proximate cause, it is undeniable that Garver sued the Hospital only for medical professional negligence and not for ordinary negligence.

Here, the evidence relevant to a 'but for' or cause in fact argument shows that the Hospital discharged Mr. Garver from the Emergency Room on October 23, 2017 in stable condition with a recommendation that he obtain a referral for MRI from the neurology department the following morning. (R. p. 146; Hosp. Exhibit 2, *Hosp. ED Records*, Bates # 0164); (R. pp. 127-130 Garver Exhibit 1, *Hosp. Discharge Records*, Bates # 0035-0039). Garver presented no evidence that Dr. Larson was negligent in making this recommendation.

Mrs. Garver obtained the referral from Dr. McCaffrey's office the following morning, October 24, 2017; Dr. McCaffrey's office scheduled it for Thursday, October 26, 2017, and it was performed on that date. (R. p. 213; Hosp. Exhibit 5, *Ward Dep*. p. 56, lines 8-15); (R. p. 380; Garver Exhibit 3, *Garver Dep*. p. 59, lines 16-25). Garver presented no evidence that the MRI could have been performed before October 26, 2017, had the referral been completed on October 23, 2017, instead of the following morning.

Mr. Garver saw Dr. Vandergrift at MUSC on October 30, 2017. (R. p. 198; Hosp. Exhibit 5, *Ward Dep.* p. 41, lines 14-17). Garver presented no evidence that Mr. Garver could have been seen at MUSC sooner, had the referral been completed on October 23, 2017, instead of the following morning.

In the related MUSC law suit, Garver and another expert medical witness alleged that Mr. Garver underwent an invasive diagnostic procedure at MUSC on November 1, 2017 immediately followed by nausea and headache and symptoms of aneurism rupture, for which MUSC declined to treat him, and that MUSC's failure to treat these symptoms on November 1, 2017 caused his death three days later. (R. p. 392; Garver v. MUSC, Am. NOI, p. 2); (R. p. 296; Garver v. MUSC NOI Exhibit A, *Holmes Affidavit*, pp. 2-3). Mr. Garver suffered a catastrophic aneurism rupture on November 3, 2017 and was pronounced dead by medical staff at Grand Strand on November 4,

2017. (R. p. 149; McCaffrey/Associates Exhibit 3, *Grand Strand "Brain Summary Note*").

Thus, Garver presented no "specific facts" in evidence proving legal cause or cause in fact either under the standard for medical malpractice cases or the standard of ordinary care in other negligence actions. Even combing the record and Garver's brief, one finds no authority supporting her contention that the court erred in granting summary judgment for her failure to present evidence of proximate cause. Garver supports her argument with guesswork and inferential leaps that do not create a genuine issue of fact. *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010). And, in its essence, Garver's proximate cause argument takes a "loss of chance" position, that South Carolina does not recognize. *Jones v. Owings*, 318 S.C. 72, 456 S.E.2d 371 (1995). And, as a result, summary judgment was appropriate.

CONCLUSION

On the basis of all of the above, the Hospital respectfully requests that the Court affirm the trial court's grant of summary judgment.

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October 12, 2023
Mt. Pleasant, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr, Circuit Court

Trial Court Case No.: 2019-CP-26-05302

Appellate Case No.: 2023-000577

Claudine Garver, Both Individually and as Personal Representative of the Estate of Jeremy Garver,

Appellant,

v.

McLeod Loris Seacoast Hospital; McLeod Physician Associates, II; and Michael McCaffrey, M.D., Defendants,

Of which McLeod Loris Seacoast Hospital is the,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

October 12, 2023

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