ORIGINAL

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.

FINAL BRIEF OF RESPONDENT

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II. Whether the Lower Court's dismissal of Ms. Dawkins's action should be upheld on the additional sustaining ground that, pursuant to Rule 12(b)(1), SCRCP, the Lower Court lacked jurisdiction to entertain her action because her Amended Complaint alleges medical malpractice but she failed to comply with the pre-suit requirements set forth in S.C. Code Ann. § 15-79-125 prior to filing her Amended Complaint.

III. Whether the Lower Court should uphold dismissal of Ms. Dawkins's Amended Complaint on the additional sustaining ground that her Amended Complaint fails to state a claim for premises liability because she does not allege the existence of a dangerous or defective condition.

STATEMENT OF THE CASE

On February 18, 2011, Sarah Dawkins ("Ms. Dawkins") filed a Summons and Complaint against Wallace Thomson Hospital, properly identified as Union Hospital District d/b/a Wallace Thomson Hospital (hereinafter, the "Hospital"), alleging injuries due to a fall while a patient. On May 2, 2011, the Hospital timely filed a Notice of Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6), South Carolina Rules of Civil Procedure ("SCRCP"), arguing that Ms. Dawkins filed a medical malpractice lawsuit without first complying with the pre-suit procedures in accordance with S.C. Code Ann. § 15-79-125 (hereinafter, the "NOI Requirements").

On May 9, 2011, Ms. Dawkins filed an Amended Complaint against the Hospital. (R. pp. 12 – 15.) On June 7, 2011, the Hospital filed a timely Notice of and Motion to Dismiss Plaintiff's Amended Complaint on the same grounds as those set forth in the Hospital's Notice of Motion to Dismiss Ms. Dawkins's original Complaint. (R. pp. 16 –

17.) Both Ms. Dawkins and the Hospital provided detailed memoranda to the lower court. (R. pp. 18 – 23; 24 – 31.)

Following a January 17, 2012 hearing (R. pp. 48 – 69), the Lower Court granted the Hospital's June 7, 2011 Motion and dismissed Ms. Dawkins's action for failure to state a claim on the grounds that she filed a claim for medical malpractice without first complying with the NOI Requirements. (R. pp. 1 – 5.)

Following entry of the February 7, 2012 Order, Ms. Dawkins filed a Motion for Reconsideration on the grounds that she alleged a premises liability cause of action and the NOI Requirements were inapplicable to her action. (R. pp. 32 – 42.) On March 16, 2012, the Hospital filed a Memorandum in Opposition to Plaintiff's Motion for Reconsideration on the grounds that the Lower Court properly determined that Ms. Dawkins filed a medical malpractice action and properly dismissed her action for failure to comply with the NOI Requirements. (R. pp. 43 – 47.) On April 4, 2012, the Lower Court issued an Order denying Ms. Dawkins's Motion for Reconsideration on the same grounds as those cited within the Lower Court's February 7, 2012. (R. pp. 6 – 11.)

On May 2, 1012, Ms. Dawkins filed her Notice of Appeal.

STATEMENT OF THE FACTS

The Hospital is a governmental hospital district created pursuant to state law. (R. p. 12, ¶ 2.) Ms. Dawkins alleges that on or about February 22, 2009, she presented at the Hospital via ambulance to obtain medical care for "headaches and the inability to maintain balance or walk." (R. pp. 12 – 13, ¶ 3.) Ms. Dawkins also alleges that "intake nurses" were informed of her "conditions" and that her daughter-in-law "disclosed to the staff that Ms. Dawkins was experiencing instability and possible symptoms of stroke."

(R. p. 13, ¶¶ 5, 6.) Ms. Dawkins further alleges that the Hospital staff was "fully aware" of her medications and "the side effects of the medications that were being administered by the Hospital." (R. p. 14, ¶ 11.)

Ms. Dawkins claims that she fell while attempting to use the bathroom after being placed in a room. (R. p. 13, ¶ 7.) She argues, "In response to [her] noted ailments, [she] 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." (R. p. 13, ¶ 5.) Secondly, Ms. Dawkins argues that if the Hospital's staff "performed their duties in compliance with the Hospital Policies, she would not have suffered" the fall and alleged resulting injuries. (R. p. 14, ¶ 10.)

Distilling Ms. Dawkins's allegations, she claims her fall was caused by the Hospital's negligence in failing to properly assess her medical condition and put into place fall risk and safety precautions in light of the Hospital's knowledge of her condition and the side effects of medications that the Hospital was administering to her. Based upon Ms. Dawkins's allegations on the face of her Amended Complaint, the Lower Court correctly determined that she filed a medical malpractice action and properly dismissed her action for failure to state a claim based upon her failure to comply with the NOI Requirements.

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the Appellate Court applies the same standard of review as the trial court." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (internal citation omitted). "In considering a motion to dismiss a complaint based on 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." Id. (internal citation omitted). The Appellate Court must sustain the Lower Court's grant of a motion to dismiss "if the facts alleged in the complaint do not support relief under any theory of law." Flateau v. Harrelson, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003) (internal citation omitted).

ARGUMENT

I. The Lower Court correctly dismissed Ms. Dawkins's action for failure to state a claim because she improperly filed her medical malpractice action without first complying with the NOI Requirements.

a. The Lower court properly determined that Ms. Dawkins has filed a medical malpractice claim because her allegations relate to the Hospital's provision of medical care.

The NOI Requirements apply to claims alleging "medical malpractice." S.C. Code Ann. § 15-79-125(A). For purposes of the NOI Requirements, "medical malpractice" is "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" includes nurses and any similar categories of licensed health care providers. S.C. Code Ann. § 15-79-110(3). A hospital is a "health care institution." S.C. Code Ann. § 15-79-110(2).

In addition to the definition of "medical malpractice" provided by S.C. Code Ann. § 15-79-110(6), South Carolina case law provides guidance as to what constitutes a claim for medical malpractice. The South Carolina Supreme Court has held that "the tort of medical malpractice fully covers **all acts performed in relation** to medical services." Linog v. Yampolsky, 376 S.C. 182, 187, 656 S.E.2d 355, 358 (2008) (emphasis added).

The Linog Court reiterated, "[A] claim is a claim for medical negligence" when the plaintiff allegedly sustains injuries "while receiving treatment within the medical context." Id. at 188, 656 S.E.2d at 358-59. Further, medical malpractice can be distinguished from ordinary negligence at the point where the plaintiff's allegations concern matters of proper diagnosis or treatment outside of the knowledge of laymen. See, e.g., Botehlo v. Bycura, 282 S.C. 578, 583, 320 S.E.2d 59, 62 (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.").

Applying the above definitions of "medical malpractice," the Lower Court correctly determined that Ms. Dawkins's Amended Complaint alleges medical malpractice. As stated above, Ms. Dawkins alleges that she arrived at the Hospital for medical treatment, the Hospital's "intake nurses" and staff were informed of her medical conditions, and the Hospital knew which medications it was administering to her as well as the side-effects of those medications. (R. pp. 12 – 14, ¶¶ 2, 5 – 6, 11.)[1] She claims that despite the Hospital having knowledge of the above medical conditions and factors, it failed to follow and put into place "appropriate fall Hospital procedures," monitor "her condition," and ensure her safety. (R. pp. 13 – 14, ¶ ¶ 6, 8, 11-12).

Patient assessments and application of fall risk precautions pursuant to hospital

[1] At the January 17, 2012 Hearing, Appellant's counsel argued that the Hospital "didn't administer any medications." (R. p. 66:23-24.) Counsel's representation is irreconcilable with the plain language of the allegations in Paragraph 11 of Appellant's Amended Complaint. At the same hearing, Appellant attempted to soften the inconsistencies between her pleading and her representations to the Lower Court, noting "that in our rules of civil procedures [sic], specifically Rule 11, there is some issues [sic] here with respect to our pleading." (R. p. 60:23 – 24.) However, on a motion to dismiss, "the trial court must base its ruling solely on allegations set forth in the complaint." Doe, 373 S.C. at 395, 645 S.E.2d at 247 (internal citation omitted). The facts and allegations as pleaded in Appellant's Amended Complaint were presented to and ruled upon by the Lower Court.

policies based on those assessments are "acts performed in relation to medical services." See Linog, 376 S.C. at 187, 656 S.E.2d at 358. Likewise, administering medications to a patient and understanding and analyzing the potential side-effects of those medications a patient is taking are acts and treatment performed in the context of and related to medical services. These analyses, acts, and treatments are all acts of skilled and technical medical services rising above the knowledge of laypersons.

However, Ms. Dawkins argues that her Amended Complaint does not allege "medical malpractice" for purposes of the NOI Requirements. First, she notes that the definition of "medical malpractice" found at S.C. Code Ann. § 15-79-110(6) is "ambiguous." See Appellant's Brief, p. 8. This argument was not raised to and/or ruled upon by the Lower Court. As such, any argument concerning the alleged ambiguity of Section 15-79-110(6) is not properly before the Court on appeal. See Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

Assuming, hypothetically, that this issue is properly before this Court on appeal, it does not advance Ms. Dawkins's argument. Ms. Dawkins cites numerous out-of-state opinions to make two points: (1) "medical malpractice" as defined by the NOI Requirements means claims arising out of the provision of medical services or the failure to provide medical services and (2) every tort occurring in a hospital is not a medical malpractice claim. See Appellant's Brief, p. 9 – 13. In support of her argument, Ms. Dawkins cites examples incongruous with the nature of her claim arguing, "For instance, had Plaintiff been struck by a ceiling tile that became dislodged, or assaulted by a

hospital employee, those claims would not fall within the intended reach of the pre-suit procedure for medical negligence." Appellant's Brief, p. 12.

Certainly, not all torts that happen within a hospital rise to the level of medical malpractice. Patients and guests may well be subject to ordinary negligence claims such as injuries caused by falling ceiling tiles or improperly maintained hall ways or parking lots. These examples do not result from acts performed in relation to the provision of or failure to provide appropriate medical services. Also, in these examples, there is no medical input, analysis, or failure to act by a medical provider.

Unlike the above examples, Ms. Dawkins's attempt to couch the allegations of her Amended Complaint as ordinary negligence falls flat. She argues that her allegations sound in ordinary negligence: "Plaintiff's complaint essentially asserts that the Hospital assumed a duty of due care once it undertook custody and care of Plaintiff, and its failure to **follow its own procedures** resulted in a breach of that duty of due care." Appellant's Brief, p. 13 (emphasis added). She adds that she is not contending that the Hospital "provided inappropriate treatment for her medical condition" but is arguing that the Hospital "failed to exercise due care once it took charge of her by failing to secure her safety." Appellant's Brief, p. 14.

No matter how she softens or re-terms her allegations, Ms. Dawkins cannot escape the nature of her allegations with wordsmithery. The "duty of due care" undertaken by the Hospital was the duty to provide medical care. This is harmonious with Ms. Dawkins's own allegation that she presented to the Hospital for medical care. (R. pp. 12 – 13, ¶ 3.) The "failure to follow its own policies" refers to fall risk policies. (R. p. 13, ¶ 5.) Fall risk policies require the application of medical judgment based upon a health

care provider's medical analysis of a patient's condition. Finally, when Ms. Dawkins argues that the Hospital failed to "secure her safety," she means that the Hospital failed to put fall precautions in place and provide appropriate medical care based upon knowledge of her medical conditions, the medications it was administering to her, and the side effects of those medications. (R. pp. 13 – 14, ¶¶ 5 – 6, 11.)

Simply put, Ms. Dawkins's allegations—and her attempted explanations of those allegations—relate to the Hospital's provision of or failure to provide medical services. Considering the plain language of these allegations, the Lower Court correctly ruled:

> [T]hese assertions cannot be reconciled with the specific allegations made in Plaintiff's Amended Complaint....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.

(R. p. 4.)

At the January 17, 2012 Hearing, Ms. Dawkins also attempted to re-cast her case as "a **premises liability** gross negligence case." (R. p. 63:5 – 6 (emphasis added).) Ms. Dawkins again presented this argument in her March 5, 2012 Motion: "Plaintiff respectfully submits that she has sufficiently alleged, in her Amended Complaint, a general negligence action based on the premises liability of the Defendants." (R. p. 33.)

Ms. Dawkins's Amended Complaint alleges medical malpractice. However, hypothetically applying premise liability law, the Hospital agrees with Ms. Dawkins that she would likely be a business invitee. (R. p. 35.) A hospital, just like any other landowner opening its property to business invitees, "is not the insurer of the safety of his customer." Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). Instead,

a landowner owes a business invitee the "duty to warn an invitee **only** of latent or hidden dangers of which the landowner has knowledge or should have knowledge." Larimore v. Carolina Power & Light, 340 S.C. 438, 445, 531 S.E.2d 535, 538 (Ct.App. 2000) (emphasis added). A landowner's liability to a business invitee is based entirely upon the landowner's knowledge of a dangerous condition or defect existing on the property and the business invitee's lack of knowledge of the same. Id. at 448, 531 S.E.2d at 540.

Ms. Dawkins's Amended Complaint recites no dangerous or defective condition which allegedly caused her injuries. If she had intended to make a claim for premises liability, surely she would have alleged the central tenet of such a claim: the dangerous or defective condition. As such, the Lower Court correctly observed and ruled, "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." (R. p. 10.)

Only health care providers conduct patient and fall risk assessments, put fall risk precautions in place, and analyze medication side effects. Health care providers perform these acts based upon their medical knowledge and expertise in reviewing and assessing a patient's medical condition. Through her allegations, Ms. Dawkins questions services provided by the Hospital in the medical context. As such, she is alleging medical malpractice for purposes of the NOI Requirements.

b. Considering an improperly filed and procedurally defective medical malpractice action, the Lower Court properly dismissed Ms. Dawkins's action.

Because Ms. Dawkins filed a medical malpractice claim, the NOI Requirements govern her action. The "prime object" of statutory construction "is to ascertain and give effect to the legislative intent." Media Gen'l Comm., Inc. v. SC Dep't of Rev., 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010) (internal citation omitted). The best evidence of legislative intent is the language of the statute itself. Id. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id. (internal citation omitted).

The South Carolina Supreme Court has found that both S.C. Code Ann. § 15-79-125 and § 15-36-100 are "unambiguous" and must be interpreted based upon their plain language. Grier v. Amisub of S.C., Inc., d/b/a Piedmont Medical Center, 397 S.C. 532, 536 - 39, 725 S.E.2d 693, 696 - 98 (2012). Interpreting Section 15-79-125(A), the Grier Court held, "Read plainly and strictly, section 15-79-125(A)...requires the contemporaneous filing of both the notice [of intent to file suit] and the [expert] affidavit." Id. at 539, 725 S.E.2d at 697. Section 15-79-125(A) expressly provides that a potential plaintiff must comply with these two requirements "**[p]rior to filing or initiating a civil action** alleging injury or death as a result of medical malpractice." (Emphasis added).

Interpreting Section 15-79-125(C), the Grier Court held, "[S]ection 15-79-125(C) requires that parties to a medical malpractice claim engage in mandatory pre-suit mediation. It is **only if this mediation fails** that a civil action officially is initiated in the circuit court." Id. at 539, 725 S.E.2d at 698 (emphasis added). As noted in Grier, Section 15-79-125(E) expressly provides that "the plaintiff may initiate the civil action by filing a

summons and complaint" only after the parties have satisfied the pre-suit mediation requirement and the mediator determines that the claim cannot be resolved through pre-suit mediation. S.C. Code Ann. § 15-79-125(E).

The NOI Requirements are not mere technical requirements that can be ignored or set aside. The Legislature specifically passed these requirements "to curtail frivolous litigation by ensuring plaintiffs only present colorable claims." Id. at 539, 725 S.E.2d at 697 – 98. The Legislature also intended to provide a process for pre-suit resolution of legitimate medical malpractice claims:

> Section 15–79–125 enables potential litigants to identify likely causes of action, gather information, and pursue a resolution of their medical malpractice disputes through mediation, while shielding the potential plaintiff from the fear of losing his or her right to file suit. An affidavit filed pursuant to this section serves as notice to potential defendants of the claim and qualifies potential plaintiffs and defendants to engage in prelitigation discovery. **Such an affidavit is a threshold requirement a medical malpractice claimant must satisfy** in order to seek disclosure of sensitive and often highly technical information.

Ranucci v. Crain, 397 S.C. 168, 177-78, 723 S.E.2d 242, 247 (Ct.App. 2012), reh'g denied March 15, 2012 (emphasis added). The plain language and intent behind the NOI Requirements demonstrate that they are substantive procedural requirements with which a potential plaintiff must comply before filing a valid complaint alleging medical malpractice. See id. at 180, 723 S.E.2d at 248 (Few, C.J., concurring) ("Section 15-79-125 requires prelitigation mediation and other steps to be taken before a medical malpractice action may be commenced.").

Considering the nature of the NOI Requirements, the Lower Court correctly framed the issue: "[T]he court does not see this as a pleading issue....This is a

fundamental issue; that is, compliance with a statute with specific requirements and specific remedies." (R. p. 9.) Though Ms. Dawkins's Amended Complaint alleges medical malpractice, she initiated her action against the Hospital without contemporaneously filing a Notice of Intent to File Suit and expert affidavit, without participating in a pre-suit mediation conference, and without a mediator determining that a pre-suit mediation failed to resolve her claim. Because Ms. Dawkins failed to comply with the unambiguous NOI Requirements, she had no statutory or procedural right to initiate an action against the Hospital. Ms. Dawkins's action amounts to nothing more than an improperly filed, procedurally defective, and invalid Amended Complaint.

When deciding a motion to dismiss for failure to state a claim, the question before the Lower Court "is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). In addition to the authority provided to the Lower Court to dismiss Ms. Dawkins's action pursuant to Rule 12(b)(6), SCRCP, the NOI Requirements specifically vest the circuit court with "jurisdiction to enforce the provisions of [Section 15-79-125]." S.C. Code Ann. § 15-79-125(D). Considering an improperly filed, procedurally defective, and invalid Amended Complaint, the Lower Court responded appropriately by dismissing Ms. Dawkins's Amended Complaint "for failure to state a claim." (R. p. 5.)[2]

[2] The Lower Court looked to S.C. Code Ann. § 15-36-100(C)(1) as support for its ruling to dismiss Ms. Dawkins's action for failure to state a claim. (R. pp. 10 – 11.) The Hospital recognizes that the Ranucci Court held that Section 15-36-100(C)(1) is inapplicable to the NOI Requirements. See Ranucci at 177, 723 S.E.2d at 246 (inserting footnote 3 and citing Sections 15-36-100(A)(3), (C)(1) and (C)(2) as examples of subsections of Section 15-36-100 inapplicable to the NOI Requirements). However, Ms. Dawkins has never argued that Section 15-36-100(C)(1) is an inapplicable in this matter. It was not raised to and/or ruled upon by the Lower Court and it was not set out in Ms. Dawkins's statement of issues on appeal. As such, any argument concerning the inapplicability of Section 15-36-100(C)(1) is not properly before the Court on appeal. See Pye, 369 S.C. at 564, 633 S.E.2d at 510 ("It is well settled that an issue cannot be raised for the

c. Ms. Dawkins's incorrectly argues that the common knowledge exception provided in S.C. Code Ann. § 15-36-100(C)(2) excused her from compliance with the NOI Requirements.

Ms. Dawkins argues that her allegations "would fall within the common knowledge exception to the expert witness requirement" and that S.C. Code Ann. § 15-36-100(C)(2) relieves "a plaintiff from the NOI Requirements where the underlying tort involves matters of common knowledge." See Appellant's Brief, 8. Ms. Dawkins waived this argument by presenting it as a conclusory statement with no supporting authority. See Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285, n. 3 (Ct.App. 1993) ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority."). Hypothetically, even if Ms. Dawkins had properly raised and argued this point, her argument still would be misguided because (1) Section 15-36-100(C)(2) is inapplicable to the NOI Requirements; (2) her allegations do not fall within the common knowledge of laymen; and (3) she failed to file a Notice of Intent to File Suit pursuant to the NOI Requirements.

i. Section 15-36-100(C)(2) is inapplicable to the NOI Requirements because it does not relate to the preparation or content of expert affidavits.

Applying generally accepted principles of statutory interpretation, this Court has interpreted the interaction between Section 15-79-125 and Section 15-36-100. Ranucci, 397 S.C. 168, 723 S.E.2d 242. Finding that the language of the statutes "is both clear and explicit," the Ranucci Court properly determined that S.C. Code Ann. § 15-79-125 and S.C. Code Ann. § 15-36-100 operate independently of one another, only sharing "the

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first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."); State v. Culbreath, 377 S.C. 326, 332, 659 S.E.2d 268, 271 (Ct.App. 2008) ("In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal.").

criteria for preparing affidavits of expert witnesses." Id. at 175-77, 723 S.E.2d at 246-47. Specifically, the Ranucci Court held that Section 15-79-125(A) "invokes only the provisions of section 15-36-100 governing the preparation and content of the affidavit," citing only to subsections (A) and (B) of Section 15-36-100. Id. at 176, 723 S.E.2d at 246.

In fact, the Ranucci Court expressly found that Section 15-26-100(C)(2) is inapplicable to the NOI Requirements: "Provisions concerning affidavits filed pursuant to subsection B [of Section 15-36-100] or the contemporaneous filing provision of subsection B [of Section 15-36-100] do not apply to affidavits filed under the authority of section 15-79-125." Id. at 177, 723 S.E.2d at 246 (inserting footnote 3 and citing Section 15-36-100(C)(2) as an example of a subsection of Section 15-36-100 inapplicable to the NOI Requirements). As such, the common knowledge exception of Section 15-36-100 is inapplicable to Plaintiff's action and does not save the same from dismissal.

ii. Ms. Dawkins's medical malpractice claims require expert testimony because special knowledge is necessary to evaluate the Hospital's provision of services within the medical context to Ms. Dawkins.

Generally, "expert testimony is required in medical malpractice actions." Pederson v. Gould, 288 S.C. 141, 142, 341 S.E.2d 633, 634 (1986) (internal citation omitted). Courts require expert testimony in medical malpractice actions because medical malpractice allegations such as proper diagnosis and treatment "ordinarily involve technical knowledge beyond the ken of laymen." Botehlo, 282 S.C. at 583, 320 S.E.2d at 62. The only exception to the requirement for expert testimony is where the subject matter of a plaintiff's allegations lies within the layperson's "common knowledge and experience so that the layperson does not need "special learning" to evaluate the

defendant medical providers' conduct. Id. Hypothetically applying Section 15-36-100(C)(2) to the NOI Requirements, Ms. Dawkins's claims would not fit within the ambit of the common knowledge exception to the requirement of filing an expert affidavit.

Ms. Dawkins claims her fall was caused by the Hospital's negligence in failing to properly assess her, monitor her, and put into place fall risk and safety precautions in light of the Hospital nurses' and staff's knowledge of her condition and the side effects of medications that the Hospital was administering to her. (R. pp. 12 – 14, ¶¶ 2, 5 – 6, 11.) As the Lower Court correctly ruled, "Any obligation or duty owed to [Mrs. Dawkins] as a result of [Ms. Dawkins's] initial medical complaints and the disclosure of her current medications to the intake nurses could arise only from a professional medical analysis." (R. p. 4.) This professional medical analysis of medical conditions, medication side-effects, and fall policies and procedures requires a medical provider's special knowledge and training and falls outside the common knowledge of the layperson.

Simply, laymen lack adequate knowledge and training required to make a determination of the reasonableness of the Hospital's acts without the aid of expert testimony. As such, even hypothetically applying Section 15-36-100(C)(2) to the NOI Requirements, Ms. Dawkins still was required to file a notice of intent and expert affidavit pursuant to the NOI Requirements.

iii. Ms. Dawkins failed to file a Notice of Intent to File Suit as required by Section 15-79-125(A), the most basic NOI Requirement.

Ms. Dawkins argues in her Appellant's Brief that S.C. Code Ann. § 15-36-100(C)(2) relieves "a plaintiff from the NOI Requirements." Appellant's Brief, p. 8. Section 15-36-100(C)(2) is inapplicable to the NOI Requirements. See, supra, Argument

I(c)(i). However, hypothetically applying Section 15-26-100(C)(2) to Section 15-79-125(A), Ms. Dawkins's action still would be subject to dismissal because she failed to file a Notice of Intent to File Suit pursuant to Section 15-79-125(A).

A claimant must comply with two requirements "[p]rior to filing or initiating a civil action alleging injury or death as a result of medical malpractice." S.C. Code Ann. § 15-79-125(A). First, the claimant must "file a Notice of Intent to File Suit" which, among other requirements, "must contain a short and plan statement of the facts showing the party filing the notice is entitled to relief." Id. A second and distinct NOI Requirement is that a claimant alleging medical malpractice must file an affidavit of an expert witness pursuant to the affidavit requirements set forth in Section 15-36-100. Id.

Section 15-79-125(A) provides no exception to the requirement of filing a Notice of Intent to File Suit. As such, even if Section 15-36-100(C)(2) applied to the NOI Requirements, Ms. Dawkins's still would be incorrect in claiming that Section 15-36-100(C)(2) would relieve her from complying with all of the NOI Requirements, and her action still would be subject to dismissal because she failed to file a Notice of Intent to File Suit as is required by Section 15-79-125(A).

II. The Lower Court's dismissal of Ms. Dawkins's Amended Complaint should be upheld on the additional sustaining ground that the Lower Court lacked jurisdiction to entertain Mrs. Dawkins's action.

It is well-settled that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000); see also Rule 220(c), SCACR. The only requirement is that the additional sustaining ground must appear in the Record

on Appeal. Id. Though it is within the appellate court's discretion whether to consider additional sustaining grounds, the Supreme Court has recognized that "it would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review." Id. Indeed, "[a]n affirmance promotes judicial economy and finality in private and public affairs which are important public policies." Id. at 421, 526 S.E.2d at 723.

The Lower Court properly dismissed Ms. Dawkins's action for failure to state a claim upon which relief could be granted because she failed to comply with the NOI Requirements and attempted to commence her action by filing an improper and invalid Amended Complaint. However, alternatively, this Court should uphold the Lower Court's dismissal on the additional sustaining ground that because Ms. Dawkins's filed her Amended Complaint without first complying with the NOI Requirements, the Lower Court lacked jurisdiction to hear her action and dismissal was the only appropriate action.[3]

The Hospital incorporates by reference its above arguments supporting the Lower Court's ruling that Ms. Dawkins's Amended Complaint alleges medical malpractice and is subject to the NOI Requirements. See, supra, Argument I. The Hospital also reincorporates its arguments concerning Ms. Dawkins's failure to comply with the NOI Requirements See, supra, Argument I. As stated in Argument I(b) above, the circuit court statutorily is granted jurisdiction to enforce the NOI Requirements found in Section 15-79-125. S.C. Code Ann. § 15-79-125(D).

[3] The Hospital briefed and argued before the Lower Court that Ms. Dawkins's action was subject to dismissal pursuant to Rule 12(b)(1), SCRCP. (R. pp. 21 – 22; 56:14 – 55:3.) Ms. Dawkins also briefed and argued before the Lower Court in opposition to the Hospital's Rule 12(b)(1) argument. (R. pp. 25 – 26; 59:14 – 60:5.)

The negative implication of Section 15-79-125(D)'s grant of jurisdiction to the Lower Court to enforce the NOI Requirements is that where a plaintiff fails to comply with the NOI Requirements prior to filing a medical malpractice action, the circuit court lacks jurisdiction to hear and preside over the plaintiff's case. Ms. Dawkins's failure to comply with the NOI Requirements deprived the Lower Court of subject matter jurisdiction to consider her claims asserted in the Amended Complaint. Pursuant to S.C. Code Ann. § 15-79-125(D), the Lower Court only retained subject matter jurisdiction to enforce the NOI Requirements and dismiss this action for failure to comply therewith pursuant to Rule 12(b)(1), SCRCP.

Because the Lower Court lacked jurisdiction to hear Plaintiff's Amended Complaint, her action was subject to dismissal for lack of jurisdiction. As such, the Hospital respectfully urges this Court to uphold the Lower Court's dismissal of Ms. Dawkins's action pursuant to Rule 12(b)(1), SCRCP.

III. The Lower Court's dismissal of Ms. Dawkins's Amended Complaint should be upheld on the additional sustaining ground that her Amended Complaint fails to state a claim for premises liability because she does not allege the existence of a dangerous or defective condition.

The Hospital incorporates by reference its argument in Argument II above concerning the Appellate Court's ability to uphold dismissal of Ms. Dawkins's Amended Complaint on additional sustaining grounds appearing in the record. See, supra, Argument II.

As stated in Argument I(a) above, at the January 17, 2012 Hearing, Ms. Dawkins attempted to re-cast her case as "a **premises liability** gross negligence case." (R. pp. 63:5 – 6 (emphasis added).) Ms. Dawkins again presented this argument in her March 5, 2012 Motion: "Plaintiff respectfully submits that she has sufficiently alleged, in her Amended

Complaint, a general negligence action based on the premises liability of the Defendants." (R. p. 33.)

Ms. Dawkins's Amended Complaint alleges medical malpractice. However, hypothetically applying premise liability law, the Hospital agrees with Ms. Dawkins that she likely would be a business invitee. (R. p. 37.) A hospital, just like any other landowner opening its property to business invitees, "is not the insurer of the safety of his customer." Garvin, 343 S.C. at 628, 541 S.E.2d at 832. Instead, a landowner owes a business invitee the "duty to warn an invitee **only** of latent or hidden dangers of which the landowner has knowledge or should have knowledge." Larimore, 340 S.C. at 445, 531 S.E.2d at 538 (emphasis added). A landowner's liability to a business invitee is based entirely upon the landowner's knowledge of a dangerous condition or defect existing on the property and the business invitee's lack of knowledge of the same. Id. at 448, 531 S.E.2d at 540.

Ms. Dawkins's Amended Complaint recites no dangerous or defective condition which allegedly caused her injuries. If she had intended to make a claim for premises liability, surely she would have alleged the central tenet of such a claim: the dangerous or defective condition. The Lower Court correctly observed and ruled, "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." (R. p. 10.)

As such, even if Ms. Dawkins attempts to set out a claim for premises liability in her Amended Complaint, this Court should uphold dismissal of Ms. Dawkins's action

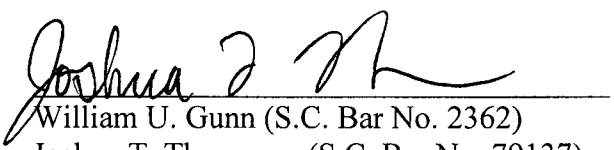
pursuant to Rule 12(b)(6), SCRCP because she fails to state a claim for premises liability.

CONCLUSION

The Lower Court properly dismissed Ms. Dawkins's action for failure to state a claim because she filed a medical malpractice action without first complying with the NOI Requirements. Further, this Court should exercise its discretion and affirm dismissal in the Hospital's favor because the Lower Court lacked jurisdiction to entertain Ms. Dawkins's action pursuant to S.C. Code Ann. § 15-79-125(D) and Rule 12(b)(1), SCRCP. Based upon these arguments as set forth in more detail above, the Hospital respectfully requests that this Court uphold the Lower Court's dismissal of Ms. Dawkins's action.

Respectfully submitted,

HOLCOMBE BOMAR, P.A.

By: 

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July 17th, 2013

Spartanburg, SC

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 certifies that this Final Brief of Respondent Union Hospital District (aka) Wallace Thomson Hospital complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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PROOF OF SERVICE

The undersigned hereby certifies that on this 25th day of July 2013, he has served counsel for Appellant Sarah Dawkins with a copy of the FINAL BRIEF OF RESPONDENT in this matter by mailing copies of the same by United States Mail, postage prepaid, to the following addresses:

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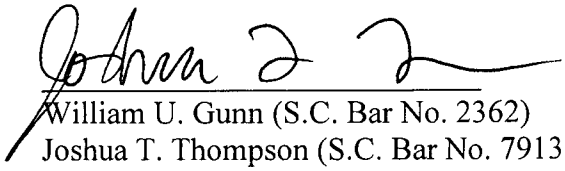
By: 

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