

RECEIVED

Oct 25 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS

THE HONORABLE ROBERT J. BONDS, CIRCUIT COURT JUDGE

Case No. 2024-CP-21-00406

Donna S. Ard, Appellant,

v.

Willie S. Edwards and McLeod Spine Center, Respondents.

RESPONDENTS' INITIAL BRIEF

s/J. David Banner

J. David Banner

Aiken, Bridges, Elliott, Tyler
& Saleeby, P. A.

P. O. Drawer 1931

Florence, South Carolina 29503

(843) 669-8787

jdb@aikenbridges.com

Attorney for the Respondents

October 25, 2024

TABLE OF CONTENTS

Table of Authorities	3
Statement of Issues on Appeal	4
Statement of the Case	5-6
Standard of Review	7-8
Argument:	9-14
I. The trial court properly granted the Respondents’ Motion to Dismiss because the Appellant failed to comply with § 15-36-100 <i>et. seq.</i> (2005) of the <i>Code of Laws of South Carolina</i> as she did not submit an affidavit of an expert specifying a negligent act or omission in a professional negligence claim against a medical doctor and licensed healthcare facility.	
Conclusion	15

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Grimsley v. S.C. Law Enforcement Division</i> , 396 S.C. 276 281, 721 S.E.2d 423, 426 (2012)	7
<i>Flateau v. Harrelson</i> , 355 S.C. 197 201-03, 584 S.E.2d 413, 415-16 (Ct. App. 2003)	7
<i>Fleming v. Rose</i> 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)	7
<i>Medical Univ. of S.C. v. Arnaud</i> , 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004)	8
<i>Hansson v. Scalise Builders of S.C.</i> , 374 S.C. 352, 357-58, 650 S.E.2d 68, 71 (2007)	8
<i>Baughman v. Amer. Tel. & Tel. Co.</i> , 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991)	8
<i>Lusk v Verderosa</i> , 431 S.C 1, 846 S.E.2d 596 (Ct. App. 2020)	8
<i>Brouwer v. Sisters of Charity Providence Hospitals</i> , 409 S.C. 514, 763, S.E.2d 200 (2014)	9
<i>Cohen v. Cohen</i> , 881 S.E.2d 650 (Ct. App. 2022)	12
<i>Wilder Corp v. Wilke</i> , 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)	13
<i>Covil Corp v. Pennsylvania National Mutual Casualty Insurance Company</i> , 436 S.C. 85, 870, S.E.2d 191 (Ct. App. 2022)	13
<i>Dawkins v. Union Hospital District</i> , 408 S.C. 171, 758, S.E.2d 501 (2014)	13
<i>Kujawski v. Arbor View Health Care Center</i> , 139 Wis.2d 455 407 N.W.2d 249, 252 (Wis. 1987)	14
 <u>Statutes</u>	
§ 15-36-100 <i>et. seq.</i> (2005) of the <i>Code of Laws of the State of South Carolina</i>	2, 6, 9, 13, 15
 <u>Rules</u>	
SCRCP Rule 12(b)(6)	6, 7, 13
SCRCP Rule 12(c)	7
SCRCP Rule 56	7, 8

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err when it granted the Respondents' Motion to Dismiss on the grounds the Appellant failed to comply with § 15-36-100, *et. seq.* (2005) of the *Code of Laws of South Carolina* in failing to submit an affidavit of an expert specifying a negligent act or omission in a professional negligence claim against a medical doctor and licensed healthcare facility?

STATEMENT OF THE CASE

On August 28, 2023, Appellant Donna S. Ard (“Appellant”) filed a Notice of Intent to File a Lawsuit against Respondents Willie S. Edwards, MD, a practicing orthopedic spine surgeon and McLeod Spine Center, a licensed health care facility (“Respondents”). In summary, the Appellant’s Notice of Intent alleged “failure to properly diagnose, treat and/or perform corrective spinal surgical measures in a timely manner, being inadequately prepared for the third spinal surgery.”

On September 26, 2023, Respondents’ filed a response to Appellant’s Notice of Intent and Notice of Appearance on behalf of Willie S. Edwards, MD and McLeod Spine Center specifically providing that Respondents’ were not waiving any defenses, objections, jurisdictional arguments or available statutory or common law defenses. Further responding, the Respondents’ denied all allegations of the Appellant’s Notice of Intent.

Appellant and Respondents proceeded to the required pre-suit mediation which was held on December 19, 2023 by court appointed mediator Everett A. Kendall, II. The pre-suit mediation resulted in an impasse as referenced by the Proof of ADR filed with the Court of Common Pleas for the County of Florence on December 28, 2023.

On February 16, 2024, Appellant filed a Summons and Complaint against Respondents, in summary, alleging “ failure to properly diagnose, treat and/or perform corrective spinal surgical measures in a timely manner, being inadequately prepared for the third spinal surgery.” As the Appellant’s Complaint alleges, Respondent Edwards performed a second spinal surgery on the Appellant on October 28, 2019. According to the Appellant’s Complaint, a third spinal surgery was performed on October 14, 2020. Upon information and belief, it is these two

procedures the Appellant alleges are the basis of her medical malpractice Complaint against Respondent Edwards, a medical doctor and Respondent McLeod, a licensed health care facility.

The Summons and Complaint were served upon the Respondents on February 28, 2024.

On March 20, 2024, Respondents' filed a responsive pleading to the Appellant's Complaint and contemporaneously filed a Motion to Dismiss the Complaint, with prejudice, pursuant to Rules 12(b)(4), (6) and (c) of the *South Carolina Rules of Civil Procedure*. In particular, as stated in the Respondents' responsive pleading and motion, the Appellant failed to comply with § 15-36-100, *et. seq.* (2005) of the *Code of Laws of the State of South Carolina*. Specifically, the Appellant failed to file an affidavit of an expert witness with her Complaint alleging a negligent act or omission in support of her professional negligence claim against a medical doctor and licensed health care facility.

On June 18, 2024 Appellant and Respondents appeared before the Honorable Robert J. Bonds for the purpose of the Respondents' Motion to Dismiss. The Court heard from both Respondents and Appellant and granted the Respondents' Motion to Dismiss, with prejudice. The trial court issued an Order granting Respondents' Motion to Dismiss and Dismissal of Appellant's Complaint with prejudice on June 20, 2024.

The Appellant subsequently filed her Initial Brief with this Court on October 7, 2024.

STANDARD OF REVIEW

On appeal from a dismissal pursuant to Rule 12(b)(6) of the *South Carolina Rules of Civil Procedure*, the Appellate Court applies the same standard of review as the trial court—whether the Defendant demonstrates the Plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Grimsley v. S.C. Law Enforcement Division*, 396 S.C. 276 281, 721 S.E.2d 423, 426 (2012). The court is required to view the allegations in the Complaint in the light most favorable to the Plaintiff and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitle the Plaintiff to relief under any theory of the case. *Grimsley* at 281. The court may sustain the dismissal when “the facts alleged in the Complaint do not support relief under any theory of law. *Flateau v. Harrelson*, 355 S.C. 197 201-03, 584 S.E.2d 413, 415-16 (Ct. App. 2003).

Further, any party may move for a judgment on the pleadings under Rule 12(c) of the *South Carolina Rules of Civil Procedure*. If, on a motion for judgement on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. *SCRCP* Rule 12(c).

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), *SCRCP*." *Fleming v. Rose* 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a

judgment as a matter of law." Rule 56(c), SCRPC. "In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Medical Univ. of S.C. v. Arnaud* , 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004). Our supreme court has established "[t]he plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof." *Hansson v. Scalise Builders of S.C.* , 374 S.C. 352, 357-58, 650 S.E.2d 68, 71 (2007) (quoting *Baughman v. Amer. Tel. & Tel. Co.* , 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991)). *Lusk v Verderosa*, 431 S.C 1, 846 S.E.2d 596 (Ct. App. 2020).

ARGUMENT

- I. The trial court properly granted the Respondents' Motion to Dismiss because the Appellant failed to comply with § 15-36-100 *et. seq.* (2005) of the *Code of Laws of South Carolina* as she did not submit an affidavit of an expert specifying a negligent act or omission in a professional negligence claim against a medical doctor and licensed healthcare facility.

To establish a cause of action for medical malpractice, the plaintiff must prove the following facts by a preponderance of the evidence: (1) the presence of a doctor-patient relationship between the parties; (2) recognized and generally accepted standards, practices, and procedures which are exercised by competent physicians in the same branch of medicine under similar circumstances; (3) the medical or health professionals negligence, deviating from generally accepted standards, practices and procedures; (4) such negligence being a proximate cause of the plaintiff's injuries; and (5) an injury to the plaintiff. *Brouwer v. Sisters of Charity Providence Hospitals*, 409 S.C. 514, 763, S.E.2d 200 (2014). A plaintiff in a medical malpractice case must establish by expert testimony both the standard of care and the defendant's failure to conform to the required standard, unless the subject matter is of common knowledge or experience so that no special learning is needed to evaluate the defendant's conduct. *Id.* "The application of the common knowledge exception is in proving negligence in a case involving medical malpractice depends on the particular facts of the case." *Id.*

In an action brought against a medical doctor and/or licensed healthcare provider the plaintiff must comply with the following statute:

§ 15-36-100. Complaint in actions for damages alleging professional negligence; Contemporaneous Affidavit of Expert specifying negligent act or omission.

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

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

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

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

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

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

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

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

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

the time of the filing of the affidavit.

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

...

(F) If a Plaintiff fails to file an affidavit as required by this section, and the Defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the Complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the Plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is a result of a mistake...

(G) This section applies to the following professions:

...

(7) Medical doctors;

...

Appellant has alleged medical negligence in her Complaint against Respondents. Appellant seeks damages alleging professional negligence based upon the allegations of actions and/or inactions of a health care professional and has failed to file, as required, an affidavit of an

expert witness specifying a negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit as required by Section (B) of the applicable statute. In further response to Appellant's Complaint, Respondents assert the applicable statute of limitations as a complete bar to Appellant's Complaint.

Appellant alleges a second surgical procedure was performed in October of 2019 and then a third and final surgical procedure was performed on October 14, 2020. Appellant's Complaint was pending in excess of forty-five (45) days and Appellant did not file a Motion seeking an extension of time nor did Appellant file the required affidavit subsequent to the filing of the original Summons and Complaint. Pursuant to Section (F), the Respondents' assert Appellant's Complaint is not subject to renewal since the expiration of the applicable period on limitation has now expired.

The Court questioned Appellant at the hearing to determine if she understood the basis of the Respondents' Motion to which Appellant confirmed. Appellant is proceeding Pro Se but the Court is obligated to treat a Pro Se Plaintiff in the same manner as an attorney when a Pro Se party chooses to proceed without representation. "A party has a duty to monitor the progress of the case. Lack of familiarity with legal proceedings is unacceptable and the Court will not hold a layman to any lesser standard than is applied to an attorney." *Cohen v. Cohen*, 881 S.E.2d 650 (Ct. App. 2022).

The Appellant asserts two arguments in support of her position. First, the Appellant alleges Respondents have not produced any supporting evidence or material to dispute the allegations in the Appellant's original Complaint. However, in response, Respondents' asserted a general denial in its responsive pleading and also asserted a number of affirmative defenses. In

particular, the Respondents' asserted the Appellant's Complaint should be dismissed pursuant to Rule 12(b)(6) and (c) of the *South Carolina Rules of Civil Procedure* on the specific grounds the Appellant failed to submit an affidavit with her Complaint. As fully addressed above, § 15-36-100 *et. seq.* of the *Code of Laws of the State of South Carolina*, requires an affidavit of an expert in a medical malpractice claim against a physician and/or licensed medical care facility.

Second, the Appellant argues her allegations fall within the "common knowledge exception" and that an expert witness is not required to support her claims.

First, this issue was not preserved on appeal by the Appellant as this issue was not raised before the trial court at the Motion to Dismiss hearing. Because this issue was neither raised to nor ruled upon by the circuit court, it is not preserved for Appellate review. *Wilder Corp v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "It is axiomatic 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 for Appellate review." *Covil Corp v. Pennsylvania National Mutual Casualty Insurance Company*, 436 S.C. 85, 870, S.E.2d 191 (Ct. App. 2022).

Should the court entertain the Appellant's argument, the Appellant's Complaint clearly asserts negligence in a medical malpractice claim. "In medical malpractice actions, expert testimony is required to establish both the duty owed to the patient and the breach of that duty, unless the subject matter of the claim falls within a layman's common knowledge or experience." *Dawkins v. Union Hospital District*, 408 S.C. 171, 758, S.E.2d 501 (2014). "Because medical knowledge is generally outside of the jurors common knowledge, the requisite expert testimony assists the jury in making a more accurate determination of fault regarding whether a physician's negligence in rendering medical care proximately caused the patient's

injury.” *Id.* In *Dawkins*, our Supreme Court differentiated between claims against medical care providers for injuries that sounded in ordinary negligence as compared to professional negligence. In particular, the court cited cases from other jurisdictions which primarily and specifically related to premises liability actions. The court noted that many other states’ courts distinguish between medical malpractice and ordinary negligence actions by determining whether testimony is necessary to aid the jury’s determination of fault, particularly with respect to the “duty” and “causation” elements of the claim. In general, if the patient receives allegedly negligent professional medical care, then expert testimony as to the standard of that type of care is necessary, and the action sounds in medical malpractice. *Id.* citing *Kujawski v. Arbor View Health Care Center*, 139 Wis.2d 455 407 N.W.2d 249, 252 (Wis. 1987).

The Appellant’s Complaint clearly sounds in medical malpractice based upon the first sentence which alleges the Respondents’ failed “to properly diagnose, treat and/or perform corrective spinal surgical measures.” To prove duty and causation in failing to comply with an appropriate standard of care, the Appellant would be required to support her claims with expert testimony. The allegations in the Appellant’s Complaint are not ones that meet the common knowledge exception.

CONCLUSION

Appellant filed a Notice of Intent and proceeded to participate in pre-suit mediation, both in compliance with § 15-36-100 *et. seq* of the *Code of Laws of South Carolina* (2005). However, when Appellant filed her medical malpractice lawsuit against Respondents she failed to submit an affidavit of an expert specifying a negligent act or omission in a professional negligence claim against a medical doctor and licensed healthcare facility, as required by the same statute.

Further, Appellant filed her lawsuit on February 16, 2024 alleging medical negligence as a result of surgeries performed in October of 2019 and October 14, 2020. When Appellant filed, without the requisite affidavit, she did not seek additional time for submission of the expert affidavit. The time for submitting the affidavit subsequently expired and Respondents moved the trial court for dismissal for failure to state a claim.

For the reasons set forth more fully above, this court should find the Circuit Court properly dismissed Appellant's claims against Respondents, with prejudice, and affirm the Circuit Court's Order granting Respondents' motion to dismiss.

October 25, 2024

s/J. David Banner
J. David Banner
Aiken, Bridges, Elliott, Tyler
& Saleeby, P. A.
P. O. Drawer 1931
Florence, South Carolina 29503
(843) 669-8787
jdb@aikenbridges.com
Attorney for the Respondents