

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
Fifth Judicial Circuit

RECEIVED

DeAndrea Benjamin, Circuit Court Judge

APR 06 2016

SC Court of Appeals

Appellate Case No. 2015-002260

CORY MCMILLAN,

Appellant,

v.

UCI MEDICAL AFFILIATES, INC., d/b/a
DOCTORS CARE and JANE DOE,

Respondents.

RECORD ON APPEAL

James J. Kasprzycki
South Carolina Bar No: 12413
Kenneth S. Nugent, PC
One Bull Street, Suite 400
Savannah, GA 31401
(912) 790-5811 (Telephone)
(912) 629-9942 (Facsimile)
Attorney for Appellant

D. Gary Lovell, Jr.
William J. Farley, III
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307 (Telephone)
Attorneys for Respondents

INDEX

1.	Order of September 29, 2015 Granting Defendants' Motion to Dismiss	000002
2.	Civil Action Coversheet filed February 24, 2015	000003-000004
3.	Plaintiff's Complaint filed February 24, 2015	000005-000010
4.	Defendants' Answer to Complaint filed April 21, 2015	000011-000015
5.	Defendants' Motion to Dismiss filed April 21, 2015	000016-000017
6.	Plaintiff's Amended Complaint filed May 13, 2015	000018-000023
7.	Defendants' Answer to Plaintiff's Amended Complaint filed June 17, 2015	000024-000028
8.	Defendants' Memorandum in Support of Motion to Dismiss filed July 13, 2015	000029-000036
9.	Transcript of Hearing on July 14, 2015	000037-000047
10.	Certificate of Counsel	000048

Cory McMillan

FILED FOR RECORD Medical Affiliates Doctors Care d/b/a

PLAINTIFF(S) 2015 OCT - 1 AM DEFENDANT(S)

Submitted by: JOY E. COOPER
 Clerk of Court
 Kershaw County, S.C.

Action by: Plaintiff Defendant or Self-Represented Litigant

- DISPOSITION TYPE (CHECK ONE)
- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
 - DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
 - ACTION DISMISSED (CHECK REASON):
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other _____
 - ACTION STRICKEN (CHECK REASON):
 - Rule 40(j), SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
 - DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other _____

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: This matter came before the court on July 14, 2015 pursuant to Defendant's motion to dismiss. The Defendant moved to have the matter dismissed on the ground that Plaintiff failed to comply with the pre-litigation requirements set forth in S.C. Code Ann. § 15-79-125 and § 15-36-100. After hearing the arguments of the parties and reviewing the case law, I find that Plaintiff's claim is "medical" care, thus requiring expert testimony. The Plaintiff has failed to comply with the pre-litigation requirements set forth in S.C. Code Ann. § 15-79-125 and § 15-36-100.

INFORMATION FOR THE PUBLIC INDEX

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

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

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

Circuit Court Judge [Signature] Judge Code 2161 Date 9-29-15

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S) _____ ATTEST True, Correct & Certified
 Court Reporter _____ ATTORNEY(S) FOR THE DEFENDANT(S) _____
 Clerk of Court _____ Court
 Clerk of Court [Signature]
 Clerk of Court Kershaw County 000002

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS

Cory McMillan,

Plaintiff(s)

CIVIL ACTION COVERSHEET

2015-CP - 28- 174

vs.

UCI Medical Affiliates, Inc. d/b/a
Doctors Care and Jane Doe,

Defendant(s)

Submitted By: James J. Kasprzycki
Address: One Bull Street, Suite 400
Savannah, GA 31401

SC Bar #: 12413
Telephone #: 912-447-5984
Fax #: 800-836-3792
Other:

E-mail: jkasprzycki@attorneykannigent.com

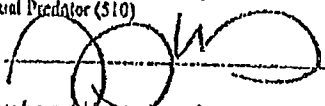
NOTE: This coversheet and information contained herea neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

- JURY TRIAL demanded in complaint.
- NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|---|---|--|
| <input type="checkbox"/> Contracts
<input type="checkbox"/> Construction (100)
<input type="checkbox"/> Debt Collection (110)
<input type="checkbox"/> Employment (120)
<input type="checkbox"/> General (130)
<input type="checkbox"/> Breach of Contract (140)
<input type="checkbox"/> Other (199) | <input type="checkbox"/> Torts - Professional Malpractice
<input type="checkbox"/> Dental Malpractice (200)
<input type="checkbox"/> Legal Malpractice (210)
<input type="checkbox"/> Medical Malpractice (220)
<input type="checkbox"/> Previous Notice of Intent Case # 20-CP-
<input type="checkbox"/> Notice/Filo Med Mal (230)
<input type="checkbox"/> Other (299) | <input type="checkbox"/> Torts - Personal Injury
<input type="checkbox"/> Assault/Stander Libel (300)
<input type="checkbox"/> Conversion (310)
<input type="checkbox"/> Motor Vehicle Accident (320)
<input checked="" type="checkbox"/> Premises Liability (330)
<input type="checkbox"/> Products Liability (340)
<input type="checkbox"/> Personal Injury (350)
<input type="checkbox"/> Wrongful Death (360)
<input type="checkbox"/> Other (399) | <input type="checkbox"/> Real Property
<input type="checkbox"/> Claim & Delivery (400)
<input type="checkbox"/> Condemnation (410)
<input type="checkbox"/> Foreclosure (420)
<input type="checkbox"/> Mechanic's Lien (430)
<input type="checkbox"/> Partition (440)
<input type="checkbox"/> Possession (450)
<input type="checkbox"/> Building Code Violation (460)
<input type="checkbox"/> Other (499) |
| <input type="checkbox"/> Intestate Petitions
<input type="checkbox"/> PCR (500)
<input type="checkbox"/> Mandamus (520)
<input type="checkbox"/> Habeas Corpus (530)
<input type="checkbox"/> Other (599) | <input type="checkbox"/> Administrative Law/Relief
<input type="checkbox"/> Reinstates Drv. License (600)
<input type="checkbox"/> Judicial Review (610)
<input type="checkbox"/> Relief (620)
<input type="checkbox"/> Permanent Injunction (630)
<input type="checkbox"/> Forfeiture-Petition (640)
<input type="checkbox"/> Forfeiture-Consent Order (650)
<input type="checkbox"/> Other (699) | <input type="checkbox"/> Judgments/Settlements
<input type="checkbox"/> Death Settlement (700)
<input type="checkbox"/> Foreign Judgment (710)
<input type="checkbox"/> Magistrate's Judgment (720)
<input type="checkbox"/> Minor Settlement (730)
<input type="checkbox"/> Transcript Judgment (740)
<input type="checkbox"/> Lis Pendens (750)
<input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760)
<input type="checkbox"/> Confession of Judgment (770)
<input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780)
<input type="checkbox"/> Other (799) | <input type="checkbox"/> Appeals
<input type="checkbox"/> Arbitration (800)
<input type="checkbox"/> Magistrate-Civil (910)
<input type="checkbox"/> Magistrate-Criminal (920)
<input type="checkbox"/> Municipal (930)
<input type="checkbox"/> Probate Court (940)
<input type="checkbox"/> SCDCOT (950)
<input type="checkbox"/> Worker's Comp (960)
<input type="checkbox"/> Zoning Board (970)
<input type="checkbox"/> Public Service Comm. (990)
<input type="checkbox"/> Employment Security Comm. (991)
<input type="checkbox"/> Other (999) |
| <input type="checkbox"/> Special/Complex /Other
<input type="checkbox"/> Environmental (600)
<input type="checkbox"/> Automobile Arb. (610)
<input type="checkbox"/> Medical (620)
<input type="checkbox"/> Other (699) | <input type="checkbox"/> Pharmaceuticals (630)
<input type="checkbox"/> Unfair Trade Practices (640)
<input type="checkbox"/> Out-of State Depositions (650)
<input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)
<input type="checkbox"/> Sexual Predator (610) | | |

Submitting Party Signature: 

Date: February 24, 2015.

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartauburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CORY McMILLAN,

Plaintiff,

vs.

UCI MEDICAL AFFILIATES, INC. d/b/a
DOCTORS CARE and JANE DOE,

Defendants.

COMPLAINT
(Jury Trial Demanded)

2015-CP-28-174

2015 FEB 24 AM 9:52
CLERK OF COURT
KERSHAW COUNTY, S.C.

FILED FOR RECORD

The Plaintiff would respectfully show unto the court and allego as follows:

PARTIES, JURISDICTION & VENUE

1. That the Plaintiff, Cory McMillan, is a citizen and resident of the County of Allendale, State of South Carolina.
2. That the Defendant, UCI Medical Affiliates, Inc. d/b/a Doctors Care, is a foreign corporation, organized and existing under the laws of the State of Delaware and is authorized to conduct business in the State of South Carolina.
3. Defendant, UCI Medical Affiliates, Inc. d/b/a Doctors Care will hereinafter be referred to as "Doctors Care."
4. That at all times relevant hereto, Defendant, Doctors Care, by and through its agents and/or employees, provided services to Plaintiff, Cory McMillan, at its healthcare facility located in the County of Kershaw, State of South Carolina.
5. That the Defendant, Jane Doe, is an agent and/or employee of Defendant, Doctors Care and at all times relevant hereto, provided services to Plaintiff, Cory McMillan, at the Doctors Care facility located in the County of Kershaw, State of South Carolina.

FACTS

6. Paragraphs 1 through 5 of Plaintiff's Complaint are incorporated herein by reference, as if fully set forth verbatim.
7. On June 29, 2012, Plaintiff, Cory McMillan, arrived at the Doctors Care facility to complete a pre-employment physical exam.
8. At all times relevant hereto, Plaintiff, Cory McMillan, was an invitee of Defendant, Doctors Care.
9. As part of the pre-employment physical exam, Plaintiff, Cory McMillan, was required to complete a respiratory clearance physical by providing different breathing maneuvers through a spirometer device.
10. At all times relevant hereto, during Plaintiff's initial pre-employment physical exam, Defendant, Doctors Care, did not have a licensed physician present.
11. Pursuant to a request by Doctors Care employee(s) and/or Defendant, Jane Doe, the Plaintiff, Cory McMillan, sat down in a chair placed adjacent to the spirometer device and began providing different breathing maneuvers.
12. Plaintiff is informed and believes that the chair was placed adjacent to the spirometer device as respiratory testing is a procedure that should not be conducted in a non-seated position.
13. During the respiratory testing, a Doctors Care employee(s) and/or Defendant, Jane Doe, requested that Plaintiff stand up.
14. In compliance with said request, Plaintiff, Cory McMillan, stood up and attempted to complete several breathing maneuvers.

15. While attempting to complete the breathing maneuvers, and still standing, Plaintiff, Cory McMillan, lost consciousness and fell to the ground.
16. Once Plaintiff, Cory McMillan, regained consciousness, he was escorted by employees and/or agents of Doctors Care to an exam room.
17. While in the exam room, Plaintiff complained of neck and back pain and was briefly examined by one of the Doctors Care physicians.
18. Upon completion of the exam, a physician supervised Plaintiff while he completed his pre-employment physical exam.
19. A couple days following the fall, Plaintiff began experiencing severe pain in his neck.
20. Plaintiff sought treatment for same.
21. Plaintiff was diagnosed with a cervical fracture and transferred to a nearby hospital for advanced treatment.

NEGLIGENCE AS TO DEFENDANT JANE DOE

22. Paragraphs 1 through 21 of Plaintiff's Complaint are incorporated herein by reference, as if fully set forth verbatim.
23. That, Defendant Jane Doe, was, at the time and place above-mentioned, negligent, careless, grossly negligent, reckless, wanton and willful in any one or more of the following particulars:
 - a. In that Defendant Jane Doe, failed to safely and properly supervise and/or monitor the Plaintiff while administering a pre-employment physical exam which is known or should have been known to cause dizziness and faintness;
 - b. By instructing Plaintiff to stand while administering the pre-employment physical exam;

- c. By instructing Plaintiff to stand without providing measures to ensure Plaintiff would not fall to the ground;
- d. By instructing Plaintiff to stand without seeking the assistance of a co-worker to supervise the Plaintiff;
- e. In that Defendant Jane Doe, failed to use the degree of caution and care that a reasonable and prudent person would have used under the circumstances then and there prevailing;
- f. In other ways and particulars that may be shown through discovery and trial;

any or all of which were the direct and proximate cause of the damages and injuries suffered by the Plaintiff herein, said acts being in violation of the statutory and common laws of the State of South Carolina.

24. That, as a direct and proximate result of the negligence, recklessness, willfulness, and wantonness, of Defendant, Jane Doe, as aforesaid, the Plaintiff, Cory McMillan, suffered great bodily injury, suffered personal injuries, incurred expensive medical, doctor, hospital, nursing, and drug bills, suffered pain and mental anguish, suffered lost wages, suffered impairment, anxiety, inconvenience and will continue to suffer same in the future; all to Plaintiff's general damages and detriment.

NEGLIGENCE AS TO DEFENDANT DOCTORS CARE

25. Paragraphs 1 through 24 of Plaintiff's Complaint are incorporated herein by reference, as if fully set forth verbatim.

26. Defendant Doctors Care, was, at the time and place above-mentioned, negligent, careless, grossly negligent, reckless, wanton and willful in any one or more of the following particulars:

- a. In that Defendant Doctors Care, failed to make inquiry as to the abilities of Defendant Jane Doe, to safely and properly supervise the Plaintiff;
- b. In that Defendant Doctors Care, failed to properly supervise Defendant, Jane Doe;
- c. In that Defendant Doctors Care, failed to properly train Defendant, Jane Doe;
- d. In failing to have a licensed physician present while administering the pre-employment physical exam;
- e. In failing to use the degree of care and caution that a reasonable and prudent employer would have used under the circumstances then and there prevailing;
- f. In other ways and particulars that may be shown through discovery and trial;

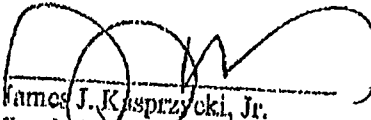
any or all of which were the direct and proximate cause of the damages and injuries suffered by the Plaintiff herein, said acts being in violation of the statutory and common laws of the State of South Carolina.

27. That, as a direct and proximate result of the negligence, recklessness, willfulness, and wantonness, of Defendant, Doctors Care, as aforesaid, the Plaintiff, Cory McMillan, suffered great bodily injury, suffered personal injuries, incurred expensive medical, doctor, hospital, nursing, and drug bills, suffered pain and mental anguish, suffered lost wages, suffered impairment, anxiety, inconvenience and will continue to suffer same in the future; all to Plaintiff's general damages and detriment.

28. As a result of the acts of Defendant, Doctors Care and Defendant, Jane Doe, which are chargeable against Defendant Doctors Care, under the doctrine of respondeat superior, as set forth above, Plaintiff is informed and believes that he is entitled to an award of actual damages.

WHEREFORE, the Plaintiff prays for judgment against the Defendants in an amount of actual damages to be determined by a jury, for the costs of this action, and for such other and further relief as this Court might deem just and proper.

February 20, 2015
Savannah, Georgia


James J. Kasprzycki, Jr.
South Carolina Bar No: 12413
Attorney for Plaintiff

One Bull Street, Suite 400
Savannah, GA 31401
(912) 447-5984 (Telephone)
(912) 447-0192 (Facsimile)
jkasprzycki@attorneykenugent.com

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

CORY McMILLAN,

Plaintiff,

vs.

UCI MEDICAL AFFILIATES, INC., d/b/a
DOCTORS CARE and JANE DOE,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL DISTRICT
) CASE NO.: 2015-CP-28-174

) DEFENDANTS' ANSWER TO PLAINTIFF'S
) COMPLAINT

FILED
FEB 21 AM 9:13
CLERK OF COURT
KERSHAW COUNTY, SC

NOW COMES Defendants UCI Medical Affiliates, Inc. ("Defendant UCI") and Jane Doe ("Defendant Doe") (collectively referred to as "Defendants"), by and through the undersigned counsel, and hereby present their Answer and show this Court as follows:

FIRST DEFENSE

At all times relevant to the matters complained of in the Complaint, Defendants exercised the degree of skill and care required of them by law.

SECOND DEFENSE

The non-economic damages claimed by Plaintiff are limited in amount under law.

THIRD DEFENSE

To the extent Plaintiff asserts a claim for punitive damages, such damages are limited in amount under South Carolina law. Further, the pleadings and evidence fail to support a claim for such damages.

FOURTH DEFENSE

Any alleged claim for punitive damages asserted against Defendants violates their rights as guaranteed under the Constitutions of the United States and the State of South Carolina.

FIFTH DEFENSE

To the extent shown by the evidence, the negligence of Plaintiff proximately caused his alleged injuries and damages.

SIXTH DEFENSE

The allegations set forth in the Complaint fail to state a claim upon which relief may be granted by this Court. Therefore, the Complaint must be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

SEVENTH DEFENSE

There is no causal connection between any alleged acts or omissions on the part of Defendants and the injuries and damages alleged by Plaintiff.

EIGHTH DEFENSE

The Complaint must be dismissed for failure to contemporaneously file an expert affidavit pursuant to S.C. Code Ann. §§ 15-79-125 and 15-36-100.

NINTH DEFENSE

The Complaint must be dismissed for failure to previously file a Notice of Intent to File Suit or participate in mandatory pre-litigation mediation as set forth in S.C. Code Ann. § 15-79-125.

TENTH DEFENSE

The injuries and damages alleged by Plaintiff were the result of his own negligence, and thus his claims are barred as matter of law in whole or in part. Any negligence of Defendants, which is explicitly denied, was less than that of Plaintiff's negligence.

ELEVENTH DEFENSE

Defendants respond to the number allegations of the Complaint as follows:

1. Defendants lack sufficient information to form a belief as to the truth of the allegations set forth in Paragraph 1. Therefore, those allegations can neither be admitted nor denied at this time.
2. In response to Paragraph 2, Defendants admit that UCI Medical Affiliates, Inc. is a foreign corporation, organized and existing under the laws of the State of Delaware and is authorized to conduct business in the State of South Carolina. All remaining allegations of Paragraph 2 are denied.
3. In response to Paragraphs 3 and 4, Defendants admit that some agents or employees of Defendant UCI provided medical services and care to Plaintiff at its facility in Kershaw County, South Carolina. All remaining allegations of Paragraphs 3 and 4 are denied.
4. In response to Paragraph 5, Defendants admit that a non-medical doctor healthcare professional, agent, or employee of Defendant UCI provided services to Plaintiff at its facility located in Kershaw County, South Carolina. All remaining allegations of Paragraph 5 are denied.
5. In response to Paragraph 6, Defendants re-allege their responses to Paragraphs 1-5 and incorporate the same as if fully set forth herein.
6. In response to Paragraph 7, Defendants admit that Plaintiff received medical care at a facility of Defendant UCI that included a pre-employment physical exam. All remaining allegations of Paragraph 7 are denied.
7. Defendants deny the allegations set forth in Paragraph 8.
8. Upon information and belief, Defendants admit the allegations set forth in Paragraph 9.
9. Defendants deny the allegations set forth in Paragraph 10.

10. Defendants lack sufficient information to form a belief as to the truth of the allegations set forth in Paragraph 11. Therefore, those allegations can neither be admitted nor denied at this time.
11. Defendants deny the allegations set forth in Paragraph 12.
12. Defendants lack sufficient information to form a belief as to the truth of the allegations set forth in Paragraphs 13, 14, 15, 16, 17, 18, 19, 20, and 21. Therefore, those allegations can neither be admitted nor denied at this time.
13. In response to Paragraph 22, Defendants re-allege their responses to Paragraphs 1-21 and incorporate the same as if fully set forth herein.
14. Defendants deny the allegations set forth in Paragraphs 23 and 24.
15. In response to Paragraph 25, Defendants re-allege their responses to Paragraphs 1-24 and incorporate the same as if fully set forth herein.
16. Defendants deny the allegations set forth in Paragraphs 26, 27, and 28.
17. Defendants deny each and every allegation not specifically responded to in the preceding paragraphs of this Answer.

WHEREFORE, having fully responded to the Complaint, Defendants respectfully request that they be dismissed with prejudice and that all costs be taxed against Plaintiff. Defendants further demand a jury trial at the appropriate time.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

Respectfully submitted,

CARLOCK, COPELAND & STAIR, L.L.P.

By: 

D. GARY LOVELL, JR.
State Bar No.: 69293

WILLIAM J. FARLEY, III
State Bar No.: 101033

*Attorneys for UCI Medical Affiliates, Inc. &
Jane Doe*

40 Calhoun Street, Suite 400
Charleston, South Carolina 29401-3531
843-727-0307

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

CORY McMILLAN,

Plaintiff,

vs.

UCI MEDICAL AFFILIATES, INC., d/b/a
DOCTORS CARE and JANE DOE,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL DISTRICT
) CASE NO.: 2015-CP-28-174

MOTION TO DISMISS

FILED FOR RECORD
2015 APR 21 AM 9:13
JONCE HAZARD
CLERK OF COURT
KERSHAW COUNTY, S.C.

TO: JAMES J. KASPRZYCKI, ESQ., ATTORNEY FOR PLAINTIFF

NOW COMES Defendants UCI Medical Affiliates, Inc. ("Defendant UCI") and Jane Doe ("Defendant Doe") (collectively referred to as "Defendants"), by and through the undersigned counsel, and hereby move this Court for an Order dismissing this case with prejudice pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. This Motion is based on the following grounds:

1. The Complaint fails to state a claim upon which relief can be granted;
2. The Complaint is based on claims of medical negligence and Plaintiff has failed to comply with the expert affidavit requirements set forth in S.C. Code Ann. §§ 15-79-125 and 15-36-100; and
3. Plaintiff has failed to comply with the Notice of Intent to File Suit and mandatory pre-litigation mediation requirements set forth in S.C. Code Ann. § 15-79-125 for claims arising from alleged medical negligence.

This Motion is supported by Plaintiff's pleadings, Defendants' Memorandum in Support to be submitted at a later date, and any other evidence which may be provided prior to the hearing on this Motion.

WHEREFORE, Defendants respectfully request that this Court grant their Motion to Dismiss with prejudice, that all costs be taxed against Plaintiff, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, L.L.P.

By: 

D. GARY LOVELL, JR.
State Bar No.: 69293

WILLIAM J. FARLEY, III
State Bar No.: 101033

*Attorneys for UCI Medical Affiliates, Inc. and
Jane Doe*

40 Calhoun Street, Suite 400
Charleston, South Carolina 29401-3531
843-727-0307

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

CORY McMILLAN,

Plaintiff,

vs.

UCI MEDICAL AFFILIATES, INC. d/b/a
DOCTORS CARE and JANE DOE,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2015-CP-28-174

AMENDED COMPLAINT
(Jury Trial Demanded)

FILED FOR RECORD
MAY 13 AM 11:13
CLERK OF COURT
KERSHAW COUNTY, S.C.

The Plaintiff would respectfully show unto the court and allege as follows:

PARTIES, JURISDICTION & VENUE

1. That the Plaintiff, Cory McMillan, is a citizen and resident of the County of Allendale, State of South Carolina.
2. That the Defendant, UCI Medical Affiliates, Inc. d/b/a Doctors Care, is a foreign corporation, organized and existing under the laws of the State of Delaware and is authorized to conduct business in the State of South Carolina.
3. Defendant, UCI Medical Affiliates, Inc. d/b/a Doctors Care will hereinafter be referred to as "Doctors Care."
4. That at all times relevant hereto, Defendant, Doctors Care, by and through its agents and/or employees, provided non-medical, administrative, ministerial, or routine care to Plaintiff, Cory McMillan, at its healthcare facility located in the County of Kershaw, State of South Carolina.
5. That the Defendant, Jane Doe, is an agent and/or employee of Defendant, Doctors Care, and at all times relevant hereto, provided non-medical, administrative, ministerial, or routine

care to Plaintiff, Cory McMillan, at the Doctors Care facility located in the County of Kershaw, State of South Carolina.

6. This is not an action for medical malpractice.

FACTS

7. Paragraphs 1 through 6 of Plaintiff's Complaint are incorporated herein by reference, as if fully set forth verbatim.

8. On June 29, 2012, Plaintiff, Cory McMillan, arrived at the Doctors Care facility to complete a pre-employment pulmonary function test ("PFT").

9. On June 29, 2012, Plaintiff, Cory McMillan, was not seeking medical treatment or medical care.

10. On June 29, 2012, Plaintiff, Cory McMillan, did not receive medical treatment or medical care.

11. On June 29, 2012, Plaintiff, Cory McMillan, was not a patient of Doctors Care.

12. At all times relevant hereto, Plaintiff, Cory McMillan, was an invitee of Defendant, Doctors Care.

13. As part of the pre-employment PFT, Plaintiff, Cory McMillan, was required to breathe into a spirometer.

14. A pre-employment PFT is not a medical procedure.

15. A pre-employment PFT is not required to be administered by a physician; therefore, none of the employees of Doctors Care present during the PFT were physicians nor was Defendant, Jane Doe.

16. Pursuant to a request by Doctors Care employee(s) and/or Defendant, Jane Doe, the Plaintiff, Cory McMillan, sat down in a chair placed adjacent to the spirometer and began providing breathing maneuvers.

17. During the respiratory testing, a Doctors Care employee(s) and/or Defendant, Jane Doe, requested that Plaintiff stand up to continue to provide breathing maneuvers.

18. In compliance with said request, Plaintiff, Cory McMillan, stood up and attempted to complete the additional breathing maneuvers.

19. None of the employees of Doctors Care nor Defendant, Jane Doe, assisted Plaintiff, Cory McMillan, in any way whatsoever, including but not limited to steadying him or providing for his safety.

20. While attempting to complete the additional breathing maneuvers, and still standing, Plaintiff, Cory McMillan, became light-headed and fell to the ground.

21. A couple days following the fall, Plaintiff began experiencing severe pain in his neck.

22. Plaintiff sought treatment for same.

23. Plaintiff was diagnosed with a cervical fracture.

NEGLIGENCE AS TO DEFENDANT JANE DOE

24. Paragraphs 1 through 23 of Plaintiff's Complaint are incorporated herein by reference, as if fully set forth verbatim.

25. That, Defendant, Jane Doe, was, at the time and place above-mentioned, negligent, careless, grossly negligent, reckless, wanton and willful in any one or more of the following particulars:

- a. In that Defendant, Jane Doe, failed to safely and properly supervise and/or monitor the Plaintiff while administering the pre-employment PFT;

- b. By instructing Plaintiff to stand while administering the pre-employment PFT after initially instructing Plaintiff to remain in a seated position;
- c. By instructing Plaintiff to stand without providing measures to insure Plaintiff would not fall to the ground;
- d. By instructing Plaintiff to stand without seeking the assistance of a co-worker to supervise the Plaintiff;
- e. In failing to take any precautionary actions, by any means, to insure Plaintiff's safety;
- f. In that Defendant, Jane Doe, failed to use the degree of caution and care that a reasonable and prudent person would have used under the circumstances then and there prevailing;
- g. In other ways and particulars that may be shown through discovery and trial;

any or all of which were the direct and proximate cause of the damages and injuries suffered by the Plaintiff herein, said acts being in violation of the statutory and common laws of the State of South Carolina.

26. That, as a direct and proximate result of the ordinary negligence, recklessness, willfulness, and wantonness of Defendant, Jane Doe, as aforesaid, the Plaintiff, Cory McMillan, suffered great bodily injury, suffered personal injuries, incurred expensive medical, doctor, hospital, nursing, and drug bills, suffered pain and mental anguish, suffered lost wages, suffered impairment, anxiety, inconvenience and will continue to suffer same in the future; all to Plaintiff's general damages and detriment.

NEGLIGENCE AS TO DEFENDANT DOCTORS CARE

27. Paragraphs 1 through 26 of Plaintiff's Complaint are incorporated herein by reference, as if fully set forth verbatim.

28. Defendant, Doctors Care, was, at the time and place above-mentioned, negligent, careless, grossly negligent, reckless, wanton and willful in any one or more of the following particulars:

- a. In that Defendant, Doctors Care, failed to make inquiry as to the abilities of Defendant, Jane Doe, to safely and properly supervise the Plaintiff;
- b. In that Defendant, Doctors Care, failed to properly supervise Defendant, Jane Doe;
- c. In that Defendant, Doctors Care, failed to properly train Defendant, Jane Doe;
- d. In that Defendant, Doctors Care, failed to safely and properly supervise and/or monitor the Plaintiff while administering the pre-employment PFT;
- e. By instructing Plaintiff to stand while administering the pre-employment PFT after initially instructing Plaintiff to remain in a seated position;
- f. By instructing Plaintiff to stand without providing measures to insure Plaintiff would not fall to the ground;
- g. By instructing Plaintiff to stand without seeking the assistance of other Doctors Care employees to supervise the Plaintiff;
- h. In failing to take any precautionary actions, by any means, to insure Plaintiff's safety;
- i. In failing to use the degree of care and caution that a reasonable and prudent employer and/or individual would have used under the circumstances then and there prevailing;
- j. In other ways and particulars that may be shown through discovery and trial;

any or all of which were the direct and proximate cause of the damages and injuries suffered by the Plaintiff herein, said acts being in violation of the statutory and common laws of the State of South Carolina.

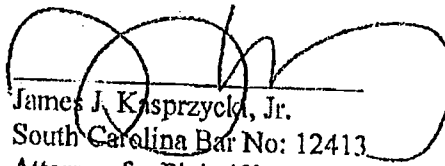
29. That, as a direct and proximate result of the ordinary negligence, recklessness, willfulness, and wantonness of Defendant, Doctors Care, as aforesaid, the Plaintiff, Cory McMillan,

suffered great bodily injury, suffered personal injuries, incurred expensive medical, doctor, hospital, nursing, and drug bills, suffered pain and mental anguish; suffered lost wages, suffered impairment, anxiety, inconvenience and will continue to suffer same in the future; all to Plaintiff's general damages and detriment.

30. As a result of the acts of Defendant, Doctors Care, and Defendant, Jane Doe, which are chargeable against Defendant, Doctors Care, under the doctrine of respondeat superior, as set forth above, Plaintiff is informed and believes that he is entitled to an award of actual damages.

WHEREFORE, the Plaintiff prays for judgment against the Defendants in an amount of actual damages to be determined by a jury, for the costs of this action, and for such other and further relief as this Court might deem just and proper.

May 12, 2015
Savannah, Georgia


James J. Kasprzycki, Jr.
South Carolina Bar No: 12413
Attorney for Plaintiff

One Bull Street, Suite 400
Savannah, GA 31401
(912) 447-5984 (Telephone)
(912) 447-0192 (Facsimile)
jkasprzycki@attorneykennugent.com

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

CORY McMILLAN,

Plaintiff,

vs.

UCI MEDICAL AFFILIATES, INC., d/b/a
DOCTORS CARE and JANE DOE,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL DISTRICT
) CASE NO.: 2015-CP-28-174

**DEFENDANTS' ANSWER TO PLAINTIFF'S
AMENDED COMPLAINT**

FILED
2015 OCT 17 AM 9:58
CLERK OF COURT
KERSHAW COUNTY, S.C.

NOW COME Defendants UCI Medical Affiliates, Inc. ("Defendant UCI") and Jane Doe ("Defendant Doe") (collectively referred to as "Defendants"), by and through the undersigned counsel, and hereby present their Answer to the Amended Complaint and show this Court as follows:

FIRST DEFENSE

At all times relevant to the matters complained of in the Amended Complaint, Defendants exercised the degree of skill and care required of them by law.

SECOND DEFENSE

The non-economic damages claimed by Plaintiff are limited in amount under law.

THIRD DEFENSE

To the extent Plaintiff asserts a claim for punitive damages, such damages are limited in amount under South Carolina law. Further, the pleadings and evidence fail to support a claim for such damages.

FOURTH DEFENSE

Any alleged claim for punitive damages asserted against Defendants violates their rights as guaranteed under the Constitutions of the United States and the State of South Carolina.

FIFTH DEFENSE

To the extent shown by the evidence, the negligence of Plaintiff proximately caused his alleged injuries and damages.

SIXTH DEFENSE

The allegations set forth in the Amended Complaint fall to state a claim upon which relief may be granted by this Court. Therefore, the Amended Complaint must be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

SEVENTH DEFENSE

There is no causal connection between any alleged acts or omissions on the part of Defendants and the injuries and damages alleged by Plaintiff.

EIGHTH DEFENSE

The Amended Complaint must be dismissed for failure to contemporaneously file an expert affidavit pursuant to S.C. Code Ann. §§ 15-79-125 and 15-36-100.

NINTH DEFENSE

The Amended Complaint must be dismissed for failure to previously file a Notice of Intent to File Suit or participate in mandatory pre-litigation mediation as set forth in S.C. Code Ann. § 15-79-125.

TENTH DEFENSE

The injuries and damages alleged by Plaintiff were the result of his own negligence, and thus his claims are barred as matter of law in whole or in part. Any negligence of Defendants, which is explicitly denied, was less than that of Plaintiff's negligence.

ELEVENTH DEFENSE

Defendants respond to the number allegations of the Amended Complaint as follows:

1. Defendants lack sufficient information to form a belief as to the truth of the allegations set forth in Paragraph 1. Therefore, those allegations can neither be admitted nor denied at this time.
2. In response to Paragraph 2, Defendants admit that UCI Medical Affiliates, Inc. is a foreign corporation, organized and existing under the laws of the State of Delaware and is authorized to conduct business in the State of South Carolina. All remaining allegations of Paragraph 2 are denied.
3. In response to Paragraphs 3 and 4, Defendants admit that some agents or employees of Defendant UCI provided medical services and care to Plaintiff at its facility in Kershaw County, South Carolina. All remaining allegations of Paragraphs 3 and 4 are denied.
4. In response to Paragraph 5, Defendants admit that a non-medical doctor healthcare professional, agent, or employee of Defendant UCI provided services to Plaintiff at its facility located in Kershaw County, South Carolina. All remaining allegations of Paragraph 5 are denied.
5. Defendants deny the allegations set forth in Paragraph 6.
6. In response to Paragraph 7, Defendants re-allege their responses to Paragraphs 1-6 and incorporate the same as if fully set forth herein.

7. In response to Paragraph 8, Defendants admit Plaintiff received medical care at a facility of Defendant UCI that included a pre-employment pulmonary function test. All remaining allegations of Paragraph 8 are denied.

8. Defendants deny the allegations set forth in Paragraphs 9, 10, 11, and 12.

9. Upon information and belief, Defendants admit the allegations set forth in Paragraph 13.

10. Defendants deny the allegations set forth in Paragraphs 14 and 15.

11. Defendants lack sufficient information to form a belief as to the truth of the allegations set forth in Paragraphs 16, 17, 18, 19, 20, 21, 22, and 23. Therefore, those allegations can neither be admitted nor denied at this time.

12. In response to Paragraph 24, Defendants re-allege their responses to Paragraphs 1-23 and incorporate the same as if fully set forth herein.

13. Defendants deny the allegations set forth in Paragraph 25 (including all subparts) and 26.

14. In response to Paragraph 27, Defendants re-allege their responses to Paragraphs 1-26 and incorporate the same as if fully set forth herein.

15. Defendants deny the allegations set forth in Paragraph 28 (including all subparts), 29, and 30.

16. Defendants deny each and every allegation not specifically responded to in the preceding paragraphs of this Answer to the Amended Complaint.

WHEREFORE, having fully responded to the Amended Complaint, Defendants respectfully request that they be dismissed with prejudice and that all costs be taxed against Plaintiff. Defendants further demand a jury trial at the appropriate time.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, L.L.P.

By: W-FJ
D. GARY LOVELL, JR.
State Bar No.: 69293

WILLIAM J. FARLEY, III
State Bar No.: 101033

*Attorneys for UCI Medical Affiliates, Inc. &
Jane Doe*

40 Calhoun Street, Suite 400
Charleston, South Carolina 29401-3531
843-727-0307

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

CORY McMILLAN,

Plaintiff,

vs.

UCI MEDICAL AFFILIATES, INC., d/b/a
DOCTORS CARE and JANE DOE.

Defendants.

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL DISTRICT

) CASE NO.: 2015-CP-28-174

DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS

FILED FOR RECORD
2015 JUN 13 AM 11:03
CLERK OF COURT
KERSHAW COUNTY, S.C.

NOW COME Defendants UCI Medical Affiliates, Inc. ("Defendant UCI") and Jane Doe ("Defendant Doe") (collectively referred to as the "Defendants"), by and through their undersigned counsel, and hereby submit this Memorandum in Support of their Motion to Dismiss. Defendants move this Court for an Order dismissing the above-captioned Complaint on the ground that Plaintiff Cory McMillan ("Plaintiff") has failed to comply with the pre-litigation requirements set forth in S.C. Code Ann. §§ 15-79-125 and 15-36-100.

BACKGROUND

On June 29, 2012, Plaintiff presented to a Doctors Care facility located in Lugoff, South Carolina to receive a pre-employment physical examination. As part of this examination, a pulmonary function test was utilized to assess Plaintiff's respiratory capacity and ensure he was physically capable of performing the duties required of his prospective employment. A spirometer is one device medical personnel frequently use to complete a pulmonary function test. Generally, a spirometer measures the rate at which an individual can inhale and exhale air.

In this case, a licensed health care professional was charged with administering and recording the results of Plaintiff's respiratory examination. While performing the pulmonary function test, Plaintiff allegedly lost consciousness and fell to the ground. Upon regaining consciousness, a licensed physician examined Plaintiff in response to complaints of neck and back pain. Compl. ¶ 17. Following this examination, a Doctors Care physician supervised Plaintiff's completion of the pre-employment physical. Compl. ¶ 18. A few days following his presentation to Doctors Care, Plaintiff allegedly began experiencing neck pain and sought treatment for the same. Compl. ¶¶ 19, 20. Plaintiff was allegedly diagnosed with a cervical fracture, which he now attributes to the June 29, 2012 incident at Doctors Care.

ARGUMENT

In filing the above-captioned lawsuit, Plaintiff is seeking the recovery of damages allegedly incurred as a result of the Defendants' professional negligence while administering the pulmonary function test. S.C. Code Ann. § 15-79-125 states that a Plaintiff must participate in mandatory pre-litigation mediation and file a Notice of Intent to File Suit prior to initiating a civil action alleging injury or death as a result of medical malpractice. S.C. Code Ann. § 15-79-125 further mandates that a Plaintiff must contemporaneously file an expert affidavit satisfying the requirements set forth in S.C. Code Ann. § 15-36-100. Finally, S.C. Code Ann. § 15-36-100(C)(1) provides that a failure to comply with the pre-litigation requirements warrants "dismissal for failure to state a claim."

- I. The allegations set forth in the Complaint seek recovery for damages allegedly incurred as a result of professional negligence. As such, Plaintiff's failure to comply with the pre-litigation requirements set forth in S.C. Code Ann. § 15-79-125 and S.C. Code Ann. § 15-36-100 warrant a dismissal pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

The primary issue presented in this case is whether the Defendants' conduct sounds in medical malpractice or ordinary negligence. South Carolina case law provides limited instruction in delineating between the two claims; however, the Supreme Court of South Carolina recently addressed the issue in *Dawkins v. Union Hosp. Dist.* 408 S.C. 171, 758 S.E.2d 501 (2014). In doing so, the Supreme Court began its analysis by "acknowledging that '[b]ecause medical malpractice is a category of negligence, the distinction between medical malpractice and negligence claims is subtle; there is no rigid analytical line separating the two causes of action.'" *Id.* at 176, 503-504 (quoting *Estate of French v. Stratford House*, 333 S.W.3d 546, 555 (Tenn. 2011)). Instead, the court must rely "heavily on the facts of each individual case" to make the distinction. *Id.* at 176, 504.

Expert testimony is generally required in a medical malpractice action to assist a 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.* at 177, 504. However, as the Supreme Court noted, expert testimony is not required for every injury sustained by a patient in a medical facility. *Id.* To support this contention, the Court cited claims against a hospital for injuries caused by falling ceiling tiles or improperly maintained parking lots or hallways as sounding in ordinary negligence, and specifically in premises liability. *Id.* In such cases, expert testimony is not required because a jury can "easily understand and evaluate the relevant facts and law merely by exercising their common knowledge." *Id.*

The Court further noted that "many states' courts distinguish between medical malpractice and ordinary negligence actions by determining whether expert testimony is necessary to aid the jury's determination of fault, particularly with respect to the 'duty' and 'causation' elements of the claim." *Id.* "Thus, 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.* at 178, 504.

As applied to this case, it is clear that the alleged act or omission of negligence occurred while Defendants administered a medical examination. The pulmonary function test examines an individual's respiratory capacity to determine whether an individual is capable of performing a defined set of tasks. A physical examination, by its very nature, is a medical evaluation of an individual. Interpreting the results of a physical, ensuring the multitude of tests are properly performed, and identifying health risks that an individual may exhibit are all necessary components of an accurate and thorough physical examination. This is precisely the reason why Plaintiff's prospective employer required that he obtain a physical from a health care facility such as Doctors Care. If a physical examination did not require some degree of professional knowledge and skill, any individual or any company could perform such testing.

Additionally, liability in this case clearly hinges on a determination as to whether the health care professional properly administered the pulmonary function test. A jury, therefore, must know exactly what a pulmonary function tests, how the test works, the proper mechanism for administering the test, whether the test subject should sit or stand during the test, and what other precautions a health care professional must consider while conducting the evaluation. Such issues clearly fall outside the scope of a jury's general knowledge or experience. Without such knowledge, a prospective jury would be unable to evaluate whether the health care professional

acted improperly or failed to adhere to the "duty of care" required of her by South Carolina law. This is precisely the reason, as explained in *Dawkins*, that expert testimony is necessary in medical malpractice cases. As applied to this case, a jury should be afforded the opportunity to utilize expert testimony to assist in their ultimate evaluation of Plaintiff's allegations.

Presumably, Plaintiff will argue that his Complaint is exempt from the pre-litigation requirements set forth in S.C. Code Ann. §§ 15-79-125 and 15-36-100 because the Complaint sounds in ordinary negligence and the jury is capable of properly evaluating Defendants' acts and omissions. Admittedly, some claims against health care professionals fall outside the intended scope of a 'medical malpractice' action. In such instances, the claims frequently arise from incidents that occur within a medical facility. When a patient falls on a poorly maintained parking lot or hallway, or is struck by a falling ceiling tile, the negligence of the medical entity bears absolutely no relationship to the testing or care being rendered by the medical professional. In this case, the allegations of negligence exclusively relate to the omissions of a medical provider administering the pulmonary function test. It is these omissions that allegedly caused Plaintiff's injuries - not that of a slippery floor or poorly-maintained facility.

Furthermore, to support his position that an expert affidavit is not required, Plaintiff will likely cite language from *Dawkins* and suggest that his claim relates to "nonmedical, administrative, ministerial, or routine care." In articulating the distinction between medical malpractice and ordinary negligence, the *Dawkins* Court explained that expert testimony is necessary to evaluate health care services unless they are "nonmedical, administrative, ministerial, or routine" in nature. In support of this distinction, the Court cited four cases from other jurisdictions. In *Kujawski v. Arbor View Health Care Ctr.*, the Supreme Court of Wisconsin held that ordinary negligence principles apply to injuries that occurred due to a

medical provider's failure to utilize a safety belt while transporting a patient in a wheelchair. 407 N.W.2d 249 (1987). In *Kastler v. Iowa Methodist Hosp.*, the Supreme Court of Iowa held that ordinary negligence principles apply to injuries that occurred while a medical provider is assisting a patient with showering. 193 N.W.2d 98, 101 (Iowa 1971). In *Bryant v. Oakpointe Villa Nursing Ctr., Inc.*, the Supreme Court of Michigan held that ordinary negligence principles applied to a medical provider's failure to protect a patient after discovering the patient was entangled between the bed rails and mattress. 684 N.W.2d 864, 871 (2004). Finally, in *Estate of French v. Stratford House*, the Supreme Court of Tennessee cited a series of cases in which courts have distinguished between a claim sounding in medical malpractice versus ordinary negligence. 333 S.W.3d at 556 n.9, 557 n.10, 559-60 (2011).

Ultimately, the factual scenarios underlying the cases cited in support of the "nonmedical, administrative, ministerial, or routine" exception are clearly distinguishable from the allegations of negligence presented in the Complaint. The cases cited above generally relate to a medical provider's negligence in assisting a patient with menial tasks such as pushing a wheelchair, assisting a patient in showering, or recognizing the risks associated with someone entangled between bed rails and a mattress. In this case, the administration of a pulmonary function test is not an everyday or menial task that a jury is capable of analyzing.

In fact, the administration of a pulmonary function test is comparable to many of the medical malpractice cases cited by the Supreme Court of Tennessee in footnote 9 of *Estate of French*. Footnote 9, which the Supreme Court of South Carolina specifically cited in *Dawkins*, referenced cases in which a nursing home's alleged failure to prevent an individual from falling and a nursing home's failure to properly restrain an individual by physical or chemical means both sounded in medical malpractice rather than ordinary negligence. In the former case, an

expert affidavit was necessary to establish what precautions a medical provider should have considered to protect an individual from falling. In the latter case, an expert affidavit was necessary to determine whether restraining an individual was necessary to mitigate the risk of further injury.

Among other allegations, the Complaint suggests that Defendants negligently "administered the pre-employment PFT", failed to "take precautionary actions, by any means, to insure Plaintiff's safety", failed to "safely and properly supervise and/or monitor the Plaintiff", and failed to properly "supervise" and "train" the medical professional administering the examination. See Amended Complaint, ¶ 28 (b, c, d, h). These allegations clearly assert Defendants were negligent in the exercising of some degree of medical judgment; therefore, this Court should require that Plaintiff file an expert affidavit to assist the jury with its ultimate evaluation of the same.

CONCLUSION

Based on the analysis above, it is clear that the allegations set forth in Plaintiff's Complaint sound in medical malpractice. As such, Plaintiff has failed to comply with the mandatory pre-litigation requirements set forth in S.C. Code Ann. §§ 15-79-125 and 15-36-100 and the Complaint must be dismissed.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, L.L.P.

By:

WFG

D. GARY LOVELL, JR.

State Bar No.: 69293

WILLIAM J. FARLEY, III

State Bar No.: 101033

*Attorneys for UCI Medical Affiliates, Inc. and
Jane Doe*

40 Calhoun Street, Suite 400
Charleston, South Carolina 29401-3531
843-727-0307

STATE OF SOUTH CAROLINA)	IN THE FIFTH JUDICIAL CIRCUIT
COUNTY OF KERSHAW)	IN THE COURT OF COMMON PLEAS
)	2015-CP-28-00174
CORY MCMILLAN,)	
)	
PLAINTIFF,)	
)	
VERSUS)	
)	
UCI MEDICAL AFFILIATES, INC.))	
d/b/a DOCTORS CARE AND)	
JANE DOE,)	
)	DATE: JULY 14, 2015
DEFENDANTS.)	PLACE: CAMDEN, SOUTH CAROLINA

MOTIONS HEARING

B E F O R E:

THE HONORABLE DEANDREA BENJAMIN

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

JAMES JOSEPH KASPRZYCKI, JR., ESQUIRE
ATTORNEY FOR THE PLAINTIFF

WILLIAM JOSEPH FARLEY, III, ESQUIRE
ATTORNEY FOR THE DEFENDANT

PROVIDED FOR: JAMES JOSEPH KASPRZYCKI, ESQUIRE

COURT REPORTER: JO RICE
jrice@sccourts.org
SOUTH CAROLINA JUDICIAL DEPARTMENT

1 THE COURT: This is Cory McMillan versus UCI Medical
2 Affiliates -- Oh, you might want to grab Ms. McDonald.

3 BAILIFF: I will get her, Your Honor.

4 THE COURT: All right. But we can go ahead and get
5 started. Yes. Let me get your names for the record.

6 MR. FARLEY: My name is William Farley, on behalf of the
7 Defendants.

8 MR. KASPRZYCKI: Jim Kasprzycki, on behalf of the
9 Plaintiff.

10 THE COURT: All right. And this is Mr. Farley's motion to
11 dismiss?

12 MR. FARLEY: That is correct, Your Honor.

13 THE COURT: All right. I'll be glad to hear from you.

14 MR. FARLEY: Thank you. The motion to dismiss before Your
15 Honor this afternoon is based upon the Plaintiff's failure
16 to comply with pre-litigation requirements set forth in
17 §15-79-125 and §15-36-100, basically requiring notice of
18 intent to file suit pre-litigation mediation and an expert
19 affidavit in a case involving medical malpractice.

20 I don't believe there is a dispute between the parties
21 regarding the substance of the statutes. The issue primarily
22 is one of application of the statute to the underlying facts
23 to determine whether or not this is a medical malpractice
24 case versus an ordinary negligence case. Obviously, our
25 position is that it is, in fact, a medical malpractice case

CORY MCMILLAN VERSUS UCI MEDICAL AFFILIATES INC, et al

1 which would trigger the statutory requirements for the
2 complaint.

3 The underlying facts of the case is that the Plaintiff
4 presented to the Doctors Care facility in Lugoff, South
5 Carolina for a pre-employment physical. That physical
6 included a pulmonary function test which is basically a
7 respiratory examination to evaluate an individual's ability
8 to inhale and exhale appropriately. That was one of several
9 procedures performed that day, that was included in that
10 pre-employment physical and I believe during the performance
11 or the administration of that pulmonary function test, the
12 Plaintiff lost consciousness, fell to the ground, and
13 suffered some cervical fractures and so the allegations set
14 forth in the complaint allege that Doctors Care and their
15 agents or employees were negligent in administering that
16 specific respiratory examination and that's sort of the
17 underlying facts that bring us here today.

18 And so, obviously, the issue would be whether or not the
19 administration of that particular respiratory examination
20 constituted medical care or medical treatment that warranted
21 a medical malpractice case versus a negligence or premises
22 liability action, which is how it is currently styled in the
23 complaint.

24 And so, I believe, if I can direct Your Honor to a
25 memorandum that I filed last week and also some case law. In

CORY MCMILLAN VERSUS UCI MEDICAL AFFILIATES INC, et al

1 South Carolina, it appears that Dawkins v. Union Hospital is
2 the controlling case law in distinguishing between an
3 ordinary negligence case and medical malpractice and if I can
4 read without having to go through the entire memo, but:
5 Expert testimony is generally required in a medical
6 malpractice action to assist a jury in making a more accurate
7 determination of fault regarding whether a physician's
8 negligence in rendering medical care proximately caused the
9 plaintiff's, the patient's, injury.

10 And so, basically, in explaining that distinction, the
11 Court cited cases from other jurisdictions in which they have
12 gone through a similar analysis and reached various
13 conclusions based on the underlying facts.

14 I wanted to point to a few specific cases cited in
15 Dawkins, which is a Supreme Court Opinion from 2014.
16 Basically, they walk through sort of the analysis and, I
17 guess, provide additional information they will get from
18 additional cases and they find a few cases. There's one of
19 ordinary negligence where a plaintiff is injured where a
20 ceiling tile falls from a medical facility or where a
21 plaintiff falls while walking through a parking lot or
22 hallway or is injured while he or she is showering with the
23 assistance of a medical provider and those cases, the Court
24 has basically stated those cases are of ordinary negligence
25 and no expert affidavit is necessary for a jury to evaluate

CORY MCMILLAN VERSUS UCI MEDICAL AFFILIATES INC, et al

1 the medical provider's care.

2 On the other hand, they cited several other cases in
3 which they determined they were, ultimately, medical
4 malpractice cases. Specifically, they cited two cases in
5 which an individual wasn't prevented from falling while a
6 specific test was administered, meaning that she was not
7 properly restrained or she wasn't properly supported by the
8 medical provider during that particular examination and
9 during that examination an injury occurred, and the Court, in
10 that case, determined that it was a medical malpractice case
11 because the jury needed to understand what was going through
12 the mind of the medical provider at the time of the test to
13 determine whether or not it was the appropriate act at that
14 time.

15 Another case, specifically, in which a medical
16 malpractice case was found is one in which the patient or the
17 individual receiving the care was not properly restrained
18 while providing treatment. In that case, she was lying in bed
19 and she wasn't properly held or sort or physically or
20 chemically induced to allow for specific testing to be
21 performed and that created some injuries on her part and the
22 Court determined that the level of restraint necessary to
23 perform specific tests was actually an issue of medical
24 malpractice.

25 And so, basically, before you today is the issue of

CORY MCMILLAN VERSUS UCI MEDICAL AFFILIATES INC, et al

1 whether or not this individual affiliated with Doctors Care
2 properly performed the respiratory examination that led to
3 the alleged injures of the Plaintiff and it would be our
4 contention that that issue falls more within the latter group
5 as to opposed to the former group which would warrant a
6 conclusion that this was actually a medical malpractice case
7 versus one of ordinary negligence or premises liability.

8 THE COURT: Yes, sir.

9 MR. KASPRZYCKI: May it please the Court, Your Honor.

10 THE COURT: Yes, sir.

11 MR. KASPRZYCKI: On the outset, we hold and agree that
12 Dawkins is probably the best roadmap for this case.
13 Subsequent to Dawkins, I think Dawkins actually set up the
14 rule and when we filed this complaint -- I think we filed
15 initially back in March -- I amended the complaint to clarify
16 some issues and in a part of that amendment we took the
17 language, quite frankly, right from the Dawkins case and that
18 is that my client, Mr. McMillan, was there, not because he
19 was infirmed or because he was ill, he was there because his
20 employer required that he take a pulmonary function test as a
21 term of his employment. And bottom line, we did allege that
22 he was provided non-medical, administrative, administerial or
23 routine care by the Defendant, Doctors Care.

24 To be honest, I think after Dawkins, as far as the
25 motion today is concerned, strictly on the pleadings, I think

CORY MCMILLAN VERSUS UCI MEDICAL AFFILIATES INC, et al

1 that would be enough to survive the motion to dismiss in the
2 light most favorable to the Plaintiff. That being said, since
3 I'm an attorney, I'm going to make some more arguments.

4 But the bottom line, Your Honor, is assuming the Court
5 is going to look at the pulmonary function test as being one
6 of routine versus non-routine or something along those lines,
7 I would simply point out that it is essentially, it's a
8 measurement tool, quite honestly. It would be no different
9 than somebody getting on a scale to take someone's weight. It
10 would be no difference than taking someone's height on their
11 entry to the doctor's office or the examination room, things
12 along those lines, but the reality is, someone was there to
13 have him breathe into a spirometer and I don't think there is
14 any expert testimony necessary for that. Quite frankly,
15 again, because it's routine, I don't think any expert
16 testimony is required to show duty owed and breach of care.
17 But it's simply something that he had to blow into that a
18 candy striper could have taken care of. I know as far as
19 these pulmonary function tests go, they are now available at
20 home. I know John's Hopkins University gives them out to
21 children, in fact, so that they can breathe into them at
22 their house and things along those lines.

23 And I'll just point out a couple of excerpts, Your
24 Honor, from the Dawkins' case. I'm sure the Court will read
25 it if you are not already familiar with it, Your Honor. It's

CORY MCMILLAN VERSUS UCI MEDICAL AFFILIATES INC, et al

1 a case from 2014.

2 THE COURT: I'm very familiar with it. That was my Dad's
3 case.

4 MR. KASPRZYCKI: I didn't know that. Maybe I don't need
5 to bore you with what I was going to read, but I'll just read
6 that ---

7 THE COURT: I need to re-read it.

8 MR. KASPRZYCKI: I will point this out. One of the main
9 things that I took from the case verbatim, it says: At all
10 times, the medical professional must exercise ordinary and
11 reasonable care to insure that no unnecessary harm befalls a
12 patient, and certainly, that's the crux of our complaint. We,
13 in fact, I put in the complaint that this is not an action
14 for medical malpractice, whatsoever. It is in fact, a case
15 for ordinary negligence.

16 THE COURT: Well, let me ask you this, though. With some
17 allegations, and I'm familiar with -- when the General
18 Assembly passed the requirement, we began to get all these
19 motions to dismiss. Some were people falling because there
20 was water on the ground and I think Dawkins made that real
21 clear, that that is not -- I guess maybe I'm missing this,
22 but what is your client alleging?

23 MR. KASPRZYCKI: The allegation is, Your Honor, that he
24 was initially given a chair and was told to do these
25 breathing maneuvers while seated. Then, the chair was removed

CORY MCMILLAN VERSUS UCI MEDICAL AFFILIATES INC, et al

1 or he was told to stand up and do it and that's when he,
2 apparently, got lightheaded and fell to the ground. So,
3 basically, he was given a chair and the chair was taken away
4 and so the allegation is, no one supervised him. They thought
5 it was, initially, it was something he needed to be seated to
6 do and then later they said, well, we changed our mind, let's
7 have him stand up and they should have taken precautions.
8 That's the main point of our complaint, the precautions to
9 make sure that something like this didn't happen to him.

10 THE COURT: All right. Yes, sir.

11 MR. FARLEY: I think the key to keep in mind is, the
12 allegations, as he just said, are specifically related to how
13 the test was administered. It's not the simplicity of the
14 test. It's not someone just merely being there while this
15 patient, this individual, is blowing into the spirometer.
16 It's specifically what the individual did or did not do or
17 did or did not instruct the Plaintiff to do while the
18 specific test was being performed. And so, that distinguishes
19 it from somebody stepping on a scale and me walking over and
20 reading the weight or somebody giving their height and me
21 pulling the tape to see what the actual height is. You know,
22 it's clearly something where somebody had to be taking a more
23 active role based on the allegations of negligence beyond
24 just being there and being present. I think if that were the
25 case, then this certainly would be an ordinary negligence or

CORY MCMILLAN VERSUS UCI MEDICAL AFFILIATES INC, et al

1 premises liability action, which is how it's currently
2 styled, but to the extent the allegations are specifically
3 related to what an individual did or did not do, I don't
4 think that's beyond the scope of me or anybody else as far as
5 common knowledge or general ability to understand what should
6 or should not be done and I think that that would be the main
7 reason an expert affidavit would be necessary to clarify
8 those issues for a potential jury to make sure that they are
9 properly evaluating what was or was not done during that
10 specific test and the administration of that test.

11 THE COURT: All right. Thank you. I'm going to take it
12 under advisement and I will get something back to you all.

13 MR. FARLEY: Thank you.

14 MR. KASPRZYCKI: Thank you, Your Honor.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF FLORENCE) CERTIFICATE

BE IT KNOWN THAT I, THE UNDERSIGNED JO RICE, OFFICIAL COURT REPORTER FOR THE TWELFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT REPRESENTS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE HEARING IN THE CAPTIONED CASE, RELATIVE TO APPEAL, BEFORE THE CIRCUIT COURT FOR KERSHAW COUNTY, SOUTH CAROLINA, SO GIVEN ON JULY 14, 2015 TO THE BEST OF MY SKILL AND ABILITY;

THAT I AM NOT RELATED TO NOR AN EMPLOYEE OF ANY OF THE PARTIES HERETO, NOR A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES HERETO, NOR INTERESTED IN THE OUTCOME OF THIS ACTION.

IN WITNESS WHEREOF I HAVE HERE UNTO SET MY HAND AND SEAL THIS 11TH DAY OF NOVEMBER, 2015.

Jo Rice

 JO RICE
 OFFICIAL COURT REPORTER

CORY MCMILLAN VERSUS UCI MEDICAL AFFILIATES INC, et al

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
Fifth Judicial Circuit

DeAndrea Benjamin, Circuit Court Judge

Appellate Case No. 2015-002260

RECEIVED

APR 06 2016

SC Court of Appeals

CORY MCMILLAN,

Appellant,

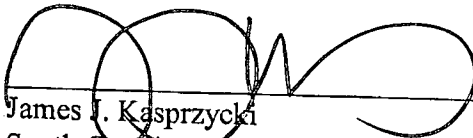
v.

UCI MEDICAL AFFILIATES, INC., d/b/a
DOCTORS CARE and JANE DOE,

Respondents.

CERTIFICATE OF COUNSEL

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


James J. Kasprzycki
South Carolina Bar No: 12413
Kenneth S. Nugent, PC
One Bull Street, Suite 400
Savannah, GA 31401
(912) 447-5811 (Telephone)
(912) 447-0192 (Facsimile)
Attorney for Appellant

Savannah, Georgia
March 18, 2016