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

CORY MCMILLAN, Appellant,

v.

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

FINAL REPLY BRIEF OF APPELLANT

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

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RULES AND STATUTES

STATEMENT OF THE CASE

Appellant adopts and incorporates by reference the Statement of the Case and Facts presented in his initial brief.[1]

ARGUMENT

I. RESPONDENTS' ARGUMENT THAT APPELLANT WAS UNDERGOING A MEDICAL TEST WHILE INJURED AND THEREFORE ANY ASSOCIATED NEGLIGENCE IS MEDICAL MALPRACTICE IS AN OVERLY BROAD GENERALIZATION AND FAILS

As addressed fully in Appellant's Initial Brief, Appellant was not receiving medical care when his injury occurred. Even if it can be construed that Appellant was receiving medical care at the time of his injury, such care was routine and therefore ordinary negligence.

Respondents predicate much of their Statement of the Case and their Argument on allegations made in Appellant's complaint. As Respondents correctly mention near the end of their Statement of the Case, Appellant filed an amended complaint in a timely manner. Rule 15, SCRCP makes it clear that the amendment relates back to the date of the original pleading and therefore this Court should confine their review to the allegations in Appellant's amended complaint.

There is no merit to the assertion that a pulmonary function test must be performed by a licensed healthcare professional as Respondents contend. There are several different

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[1] Similarly, under the Argument section of this Reply Brief, Appellant adopts and incorporates by reference those arguments raised in his Initial Brief. For the sake of brevity, Appellant offers the arguments herein as a limited reply to those issues presented in the Respondents' Initial Brief.

types of pulmonary function tests. Spirometry is the most common lung function test and the type used in the case at bar. Spirometry measures how much and how quickly one can move air out of one's lungs. One breathes into a mouthpiece attached to a machine called a spirometer. The machine records the results. Spirometry can measure many different things about the way one breathes. Spirometry tests are also performed at home without the need or aid of a licensed healthcare professional. Appellant takes exception to the moniker of Respondent Doe as "Nurse Doe." Appellant has no knowledge that Respondent Doe was a nurse or a licensed healthcare professional.

Respondents cite cases from other states in an effort to sway the Court. *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 758 S.E. 2d 501 (2014) was decided by The South Carolina Supreme Court less than two years ago. The South Carolina Supreme Court cited cases within *Dawkins* from other jurisdictions which it found relevant. This Court should not look to these out-of-state cases cited by Respondents for guidance as surely, if relevant, they would have been cited in *Dawkins*. *Dawkins* marked a major evolution regarding the law of negligence in South Carolina when it occurs at a medical facility. This Court cannot be certain that the jurisdictions referred to by Respondents are as enlightened in their treatment of negligence cases as South Carolina, nor can the Court be certain that the statutes promulgated in these states are identical to those in South Carolina regarding medical negligence versus ordinary negligence.

Notwithstanding, in the event the Court delves into the cases cited by Respondents, it will find them difficult to reconcile with the current law in South Carolina particularly after the *Dawkins* decision. The case of *Jackson v. Chicago Classic Janitorial & Cleaning*

Service, Inc., 355 III. App. 3d 906, 823 N.E.2d 1055 (2005) relied upon by Respondents begins its analysis by stating that the term "medical, hospital or other healing art malpractice" must be construed broadly. *Id.* at 1058. *Dawkins* sets forth no such requirement in South Carolina. *Dawkins* says the opposite and narrows the definition of medical negligence by stating that routine medical care does not give rise to medical negligence, but instead ordinary negligence. The Court would be ill-advised to take this case as being persuasive.

The case of *Moore v. Jackson Cardiology Assoc. P.A.*,--So.3d--, 2015 WL 7729358 (Miss. Ct. App. Dec. 1, 2015) provides no guidance either. The above case, involved a motion for summary judgment rather than a motion on the pleadings. While it may be a subtle distinction, as a result of discovery being conducted, the Plaintiff provided specific interrogatory responses that provided a factual basis for a motion for summary judgment by the Defendant. *Id.* at *2. Absent the discovery responses referred to by the Appeals Court, the outcome could have been different. The court stated that the facts used to reach its conclusion were undisputed. In the case at bar, the facts are clearly in dispute.

Harris v. Sternberg, 819 So.2d 1134 (La. Ct. App. 2002) should be disregarded by this court as it states that "we are cognizant of the principle that limitations on the liability of a health care provider are special legislation in derogation of the rights of tort victims and as such, the coverage of the act should be strictly construed." *Id.* at 1137. The *Dawkins* case makes no such assertion.

Respondents also rely on *Grossman v. Barke*, 2005 PA Super 45, 868 A.2d 561 (2005) to back their position. *Grossman* actually bolsters Appellant's position regarding ordinary negligence in a medical setting. It states, in part, that expert testimony is not always

required if the alleged negligence is obvious or within the realm of a layperson's understanding. Nor is expert testimony as to causation required "where there is an obvious causal relationship" between the injury complained of and the alleged negligent act. *Id.* at 567.

II. RESPONDENTS' ARGUMENT THAT APPELLANT'S CLAIMS REQUIRE EXPERT TESTIMONY ON THE STANDARD OF CARE IS SPECIOUS AND WITHOUT MERIT

Appellant does not dispute that portions of a physical examination require some degree of professional knowledge and skill. However, there are several parts to a physical examination, many of which are routine and do not require a medical professional. Taking one's height, weight, temperature, and blood pressure do not require professional knowledge. Those services render a result which a medical professional can interpret using his knowledge and skill. A layperson can understand the standard of care and grasp the efforts taken to obtain readings of height, weight, temperature and blood pressure when explained by the individual performing the task.

Respondents are lobbying this Court to view a pulmonary function test as a grandiose medical test requiring professional skill. It is far from it. It is a simple exercise wherein an individual blows into a mouthpiece. The spirometer reads the results. Because this incident occurred at a medical facility, someone employed by Respondent provided a mouthpiece and a chair. A pulmonary function test that utilizes spirometry can be done at home. Some musical instruments have mouthpieces. A jury can grasp the concept of putting one's mouth around the mouthpiece and asked to blow. Appellant has not left anything out of his analysis in his initial brief as to this issue as Respondents contend. The pulmonary function test

utilized by Respondents is not a medical test that must be conducted under the supervision of a licensed medical professional.[2]

Respondent Doe clearly had Appellant seated in a chair to begin the test because there is a risk of dizziness when blowing into a mouthpiece. She then asked Appellant to stand. Respondent Doe can testify about her reasons for having Appellant sit in the chair. Appellant can testify as to what Respondent Doe told him as such testimony would be an exception to the hearsay rule. Had Respondent Doe not originally put Appellant in the chair, which demonstrated she knew the risks associated with providing breathing maneuvers while standing, then Respondents might have had a valid argument as to the necessity of an expert to detail the standard of care. When she asked Appellant to stand, she removed the precautionary measure (the chair) and failed to take any precautionary actions, by any means, to insure Appellant's safety. For reasons that had nothing to do with medical knowledge or judgement, she chose to ask him to stand. The standard of care will be established by Respondent Doe by virtue of the fact that she first had Appellant sitting in the chair because she knew he could get dizzy providing breathing maneuvers into the mouthpiece. Expert testimony is not required to establish the standard of care if the alleged negligence is obvious or within the realm of a layperson's understanding. Nor is expert testimony as to causation required where there is an obvious causal relationship between the injury complained of and the alleged negligent act.

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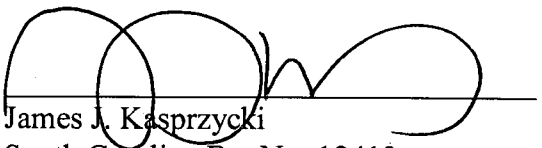
[2]Appellant submits that the Court should take judicial notice of this issue.

CONCLUSION

For these reasons, as well as those addressed in the Appellant's Initial Brief to this Court, the trial court's decision should be reversed.

Respectfully submitted,



James J. Kasprzycki
South Carolina Bar No: 12413
Kenneth S. Nugent, PC
One Bull Street, Suite 400
Savannah, GA 31401
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Savannah, Georgia

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief of Appellant complies with Rule 211(b), S.C.A.C.R.

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
April 4, 2016