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 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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2. Did the court below err in dismissing Appellant's case pursuant to Rule 12(b)(6), SCRCP, by failing to find that if Appellant was receiving medical care from Respondents that such medical care was routine?

3. Did the court below err in dismissing Appellant's case pursuant to Rule 12(b)(6), SCRCP, by failing to find that Appellant's claim against Respondents sounded in ordinary negligence rather than medical negligence and thereby finding that Appellant was required to comply with the pre-litigation requirements set for in S.C. Code Ann. § 15-79-125 and § 15-36-100?

STATEMENT OF THE CASE

On February 24, 2015, Appellant commenced his action with the filing of a summons and complaint for personal injuries seeking actual and compensatory damages for an injury sustained while on the premises of the Respondent due to the negligence of Respondent and its employees. Appellant characterized his action as one in "tort-personal injury" as reflected on the civil action cover sheet filed February 24, 2015. Service was perfected on March 15, 2015.

Respondents served their answer on April 15, 2015. Simultaneously with their answer, Respondents served a motion to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure to include allegations that Appellant's complaint was based on medical negligence and that Appellant failed to comply with S.C. Code Ann. §15-79-125 and § 15-36-100.

On May 13, 2015, Appellant filed an amended complaint for personal injuries seeking actual damages for an injury sustained while on the premises of the Respondent due to the ordinary negligence of Respondent and its employees. Appellant's amended complaint alleged ordinary negligence on the part of Respondents and further stated in paragraph six (6) that "this is not an action for medical malpractice." Appellant alleges he incurred medical bills totaling approximately $12,734.00 and seeks compensatory damages from Respondents.

Respondents served their answer to the amended complaint on June 15, 2015, essentially realleging their previous defenses.

A hearing on Respondents' motion to dismiss was held on July 14, 2015. The trial court issued a final order on September 29, 2015, granting Respondents' motion and dismissing the action stating that Appellant's claim is "medical" care, thus requiring expert testimony. Appellant received written notice of the entry of the order on October 3, 2015.

Appellant served his appeal on October 27, 2015, and it was filed on October 30, 2015. Appellant appeals the decision of the court below dismissing his action on the basis that Appellant's action is one of ordinary negligence and not medical negligence, that Appellant was not receiving medical care when his injury occurred or, in the alternative, that if it can be construed that Appellant was receiving medical care, that such care was routine. As a result, the pre-litigation requirements set forth in S.C. Code Ann. § 15-79-125 and § 15-36-100 would not be necessary.

FACTS

In an effort to obtain employment with a prospective employer, Appellant, Cory McMillan (McMillan), was required to pass a routine physical. Appellant was sent by his prospective employer to Respondents' (Doctors Care) facility to undergo same. While the routine physical presumably consisted of several parts, McMillan alleges he was injured during the pulmonary function test (PFT). More specifically, Appellant was required to breath into a spirometer as part of the PFT. A spirometer is "an instrument for measuring the air entering and leaving the lungs." *Merriam-webster.com/dictionary.* McMillan alleges in his amended complaint that "Pursuant to a request by Doctors Care employee(s) and/or Respondent Jane Doe, McMillan sat down in a chair placed adjacent to the spirometer and began providing breathing maneuvers. During the respiratory testing, a Doctors Care employee and/or Respondent, Jane Doe, requested that McMillan stand up to continue to provide breathing maneuvers. In compliance with said request, McMillan stood up and attempted to complete the additional breathing maneuvers. None of the employees of Doctors Care nor Respondent Jane Doe, assisted McMillan in any way whatsoever, including but not limited to steadying him or providing for his safety. While attempting to complete the additional breathing maneuvers, and still standing, McMillan became light-headed and fell to the ground." (R. p. 000020, line 12)

ARGUMENT

I. APPELLANT WAS NOT RECEIVING MEDICAL CARE FROM RESPONDENTS WHEN HIS INJURY OCCURRED.

When Appellant arrived at Doctors Care, he was not there for the purpose of treatment or diagnosis. He did not present to Doctors Care complaining of pain, dizziness, malady, sickness or any other ailment for which one might seek medical care. His sole purpose for visiting Doctors Care was to undergo a routine physical. The results of which would play a role in his prospective employer's decision to offer him a position. Appellant made same clear in his amended complaint. (R. p. 000019).

Further, Appellant made clear in his amended complaint that this is not an action for medical malpractice. (R. p. 000019, line 3) Appellant's allegations of negligence in his amended complaint focus on the conduct of Respondents' employees insofar as they failed to take any precautionary actions, by any means, to insure Appellant's safety. (R. p. 000021, lines 7-8). While Appellant contends the PFT is not medical care because the Appellant was not seeking treatment, it is clear that when he grew dizzy and fell to the ground that he was not undergoing medical care at that moment.

Because Appellant was not receiving medical care or treatment, the requirements established in S.C. Code Ann. § 15-36-100 and § 15-79-125 do not apply. Appellant submits that the court below should have ended its inquiry at this point based on the good faith allegations in Appellant's amended complaint and the reasonable inferences drawn from them and denied Respondents' motion to dismiss.

II. IF IT CAN BE CONSTRUED THAT APPELLANT WAS RECEIVING MEDICAL CARE FROM RESPONDENTS AT THE TIME OF HIS INJURY, SUCH CARE WAS ROUTINE AND THEREFORE CONSTITUTES ORDINARY NEGLIGENCE.

When the court below issued its order, it stated "I find that Plaintiff's claim is medical care . . . ." (R. p. 000002) The Supreme Court of South Carolina recently addressed the issue of routine medical care in the case of *Dawkins v. Union Hospital District*, 408 S.C. 171, 758 S.E. 2d 501 (2014). 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.' Rather, differentiating between the two types of claims 'depends heavily on the facts of each individual case.'" *Id.* at 176. The *Dawkins* case specifically goes on to state "However, if the patient instead receives non-medical, administrative, ministerial, or routine care, expert testimony establishing the standard of care is not required and the action instead sounds in ordinary negligence." *Id.* at 177 -178. "Thus we emphasize that not every action taken by a medical professional in a hospital or doctor's office necessarily implicates medical malpractice and consequently, the requirements of § 15-79-125." *Id.* at 178.

Appellant's amended complaint in no way alleges that Respondents' employees, who Appellant also alleges were not medical professionals, negligently administered professional medical care to Appellant. In fact, Appellant states (see argument 1) that Appellant was not receiving medical care. If it can be construed that the PFT was medical in nature, it is apparent that it was routine care.

A PFT requires an individual to breath into a spirometer. Breathing is a routine function. A spirometer is in no way a complicated device. But for the fact that his prospective employer required Appellant to undergo a routine physical with Respondents, the Appellant could have performed a self-PFT at home. Children with cystic fibrosis at John's Hopkins are provided with "take-home" spirometers so they can log their own lung capacities on a day-to-day basis.

A PFT is a routine test that registers lung capacity. The spirometer is the device that measures air. It is no different than providing a urine sample, the ultimate goal of which is to register what is in the urine. It used to be that women had to go to a medical facility to find out if they were pregnant. For decades now, women can test for pregnancy "at-home." Breathing into a spirometer is no different than asking an individual to step on a scale at a doctor's office to measure their weight. Individuals can step on a scale "at-home" to measure their weight. Taking one's pulse is a method used at a medical clinic to measure how many times per minute one's heart beats. Again, this is something that can be done "at-home." Another example is the taking of one's blood pressure. This is something that can now be done using a machine at a grocery store such as Walmart. Taking one's temperature is done at a healthcare facility. A parent can take a child's temperature at home as can the child depending on the age of that child. Technological improvements in the medical field have rendered many things obsolete or routine. That is the case here. What was once thought to be strictly in the purview of a physician at her office is now able to be done in the comfort of one's own home. If it can be done "at-home" it is routine. If children can do it, it is routine. Appellant has not alleged that results were misinterpreted.

Appellant's amended complaint alleges that Respondent, among other things, failed to take any precautionary actions, by any means, to insure Appellant's safety. This is one of the allegations made by Dawkins in her amended complaint. *Id.* at 173. Appellant's mechanism of injury is similar to that of the Plaintiff in *Dawkins.* The Supreme Court in *Dawkins* found that her claim was based in ordinary negligence. Dawkins was left unmonitored when she fell. Appellant in this case was not sufficiently monitored or supervised when he fell. The Court in footnote number two *(Dawkins* at 178) mentions the case of *Graham v. Whitaker*, 282 S.C. 393, 321 S.E. 2d 40 (1984), which involves an ophthalmologist's patient who was given eye drops and left unsupervised, where she subsequently attempted to stand and fell and injured herself. It was mentioned to support the fact that medical providers are still subject to clams sounding in ordinary negligence. Other cases cited by the Supreme Court in *Dawkins* demonstrating routine care involved falls while being unsupervised. *Dawkins* at 179.

Here, there are no allegations that professional medical care was negligently administered to Appellant. Appellant's injury occurred while he was not being properly supervised. The Appellant was merely standing while providing breathing maneuvers. Appellant has not alleged any negligence, ordinary or otherwise, with regard to how he was instructed to provide the breathing maneuvers into the spirometer or how the test was administered.

III. APPELLANT'S CLAIM AGAINST RESPONDENTS SOUNDS IN ORDINARY NEGLIGENCE RATHER THAN MEDICAL NEGLIGENCE AS EXPERT TESTIMONY IS NOT REQUIRED TO ESTABLISH APPELLANT'S CLAIM AS JURORS CAN EASILY UNDERSTAND AND EVALUATE THE RELEVANT FACTS AND LAW MERELY BY EXERCISING THEIR COMMON KNOWLEDGE.

Dawkins reiterated a tenet of South Carolina law that was not being applied previously to negligence claims involving injuries that occurred in hospitals pre-*Dawkins*: expert testimony is not required in cases involving ordinary negligence. "In medical malpractice actions, expert testimony is required to establish both the duty owed to the patient and the breach of the duty, unless the subject matter of the claim falls within a layman's common knowledge or experience." *Id.* at 176. "However, not every injury that occurs in a hospital results from medical malpractice or requires expert testimony to establish the claim." *Id.* at 177. "The Plaintiff in ordinary negligence cases does not need to produce expert testimony to establish his claim because the jurors can easily understand and evaluate the relevant facts and law by exercising their common knowledge." *Id.* at 177. So the question to ask in this case is whether or not a jury needs expert testimony to determine fault. Appellant has not alleged that he received negligent professional medical care. Appellant has alleged that Respondent's employees failed to supervise him. More specifically, Appellant has alleged in his amended complaint that Respondent failed to take any precautionary actions, by any means, to insure Appellant's safety. (R. p. 000021, lines 7-8).

Appellant submits that an expert does not need to be called to the witness stand to prove Appellant's allegations as to the elements of duty and causation against Respondents

as the issues are well within a layman's common knowledge. Appellant was initially instructed to sit in a chair while providing breathing maneuvers. At some point he was instructed to stand while providing breathing maneuvers. The employee that instructed Appellant to stand can testify as to her reasons for requesting that Appellant stand. That same employee can also testify as to what occurred while Appellant was standing. That employee or any other employee that was present when the injury occurred can testify that no employee supervised or steadied Appellant while standing. Appellant can testify that he became dizzy during the breathing maneuvers while standing and fell to the ground. It is well within a layman's common knowledge that when one inhales or exhales air at a pace different than normal, there is a likelihood one will become light-headed. Some examples include anyone who has blown up balloons for a party, blown up a beach ball, or blown up a raft for a swimming pool. Anyone who has hyperventilated knows that one becomes light-headed. Certainly even if a particular juror has not personally experienced any of the above events, he or she would know someone who has or witnessed it first hand. With that being the case, a juror can make the determination as to whether or not the employees present should have, at a minimum, supervised the Appellant or if Respondents failed to take any precautionary actions, by any means, to insure Appellant's safety while he was standing and if so, if their failure to do so caused his injury.

Not surprisingly, there are other situations where individuals are requested to breathe into devices. The South Carolina Law Enforcement Division is charged with performing DataMaster tests on operators of motor vehicles suspected of driving under the influence of alcohol. Hypothetically, if Appellant's injury occurred while he was blowing into the

DataMaster to provide a breath sample, the same allegations of negligence made against Respondents would be raised as to lack of supervision and failing to take any precautionary actions, by any means, to insure Appellant's safety while he was standing on the part of the SLED employees. More importantly to Appellant's case here, no expert testimony would be required to prove the hypothetical allegations against SLED as a layperson can grasp the issues. Appellant should not be held to a different standard of proof simply because Appellant's injury occurred at a healthcare facility. Appellant's case does not require the testimony of an expert. Appellant has not alleged any negligence, ordinary or otherwise, with regard to how he was instructed to provide the breathing maneuvers into the spirometer or how the test was administered.

CONCLUSION

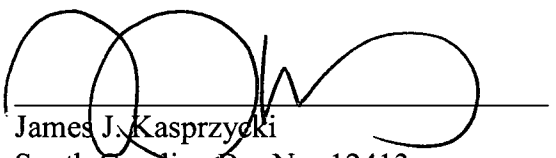
On appeal from a dismissal pursuant to Rule 12(b)(6), SCRCP, the appellate court is required to view the allegations in Appellant's amended complaint in a light most favorable to the Appellant and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitled the Appellant to relief under any theory of the case.

Appellant submits that the court below erred by finding that Appellant was receiving medical care, when he was not; by failing to find that in the event it can be construed that Appellant was receiving medical care, that such care was, in fact, routine; by finding that expert testimony is required when Appellant's claim sounds in ordinary negligence and thereby finding that Appellant failed to comply with the pre-litigation requirements set forth in S.C. Code Ann. § 15-79-125 and § 15-36-100 as expert testimony is not required because

Appellant's claim sounds in ordinary negligence.

This Court should reverse the decision of the trial court and remand the case.

Respectfully submitted,



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

Savannah, Georgia

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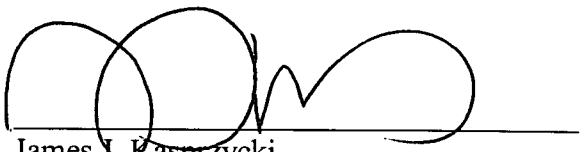
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final 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
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