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 RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether claims against medical providers for injuries allegedly sustained as a result of the negligent administration of a medical test are claims for medical malpractice subject to the pre-filing Notice of Intent to File Suit and expert affidavit requirements set forth in South Carolina Code §§ 15-79-125 and 15-36-100.

STATEMENT OF THE CASE

Appellant Cory McMillan ("Appellant") filed this action on February 24, 2015 in the Kershaw County Court of Common Pleas against Respondents UCI Medical Affiliates Inc. ("UCI Medical") and Jane Doe ("Nurse Doe") (hereinafter referenced individually or collectively as "Respondents") seeking to recover damages for injuries allegedly sustained when he lost consciousness and fell during the administration of a pulmonary function test at a UCI Medical facility on June 29, 2012. (R. p. 7).

The Complaint alleged the following facts: UCI Medical and Nurse Doe provided services to Appellant at a healthcare facility in Kershaw County. (R. p. 5). As part of a pre-employment physical examination, Appellant was required to complete a respiratory clearance physical by performing different breathing maneuvers through a spirometer device. (R. p. 6). The test was administered by Nurse Doe without a licensed physician present. (R. p. 6). Appellant was instructed to sit down in a chair adjacent to the spirometer and begin performing different breathing maneuvers. (R. p. 6). While the test was being administered, Nurse Doe instructed Appellant to stand up and complete additional breathing maneuvers. (R. p. 6). Appellant stood up and was attempting to complete the additional breathing maneuvers when he lost consciousness and fell to the ground. (R. p. 6). Appellant was then examined by a UCI Medical physician, after which he completed the pre-employment physical exam under the physician's supervision. (R. p. 7).

According to the Complaint, the respiratory testing that Appellant underwent was known or should have been known to cause dizziness and faintness, and the procedure should not have been conducted in a non-seated position. (R. pp. 6-7). The Complaint alleged that Nurse Doe was negligent in instructing Appellant to stand during the test, and in failing to properly supervise

him during the test, and that UCI Medical was negligent in failing to properly supervise and train Nurse Doe, and in failing to have a physician present during the test. (R. p. 8).

The Summons and Complaint were served on Respondents on March 16, 2015. On April 15, 2015, Respondents moved to dismiss the Complaint for failure 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 and expert affidavit requirement set forth in S.C. Code Ann. § 15-36-100. (R. pp. 16-17). Respondents filed an Answer to the Complaint with the Motion to Dismiss. (R. pp. 11-15).

On May 12, 2015, Appellant filed an Amended Complaint on the same facts, but asserting that his claims were not for medical malpractice. Respondents submitted an Answer to the Amended Complaint on June 15, 2015. (R. pp. 18-23). On July 14, 2015, the Honorable DeAndrea Benjamin held a hearing on Respondents' Motion to Dismiss. (R. pp. 37-47). On October 1, 2015, Judge Benjamin entered an Order granting Respondents' Motion to Dismiss and dismissing the Complaint. (R. p. 2). In the Order, Judge Benjamin found that "Plaintiff's claim is 'medical' care, thus requiring expert testimony" and that Plaintiff "failed to comply with the pre-litigation requirements set forth in S.C. Code Ann. § 15-79-125 and § 15-36-100." (R. p. 2). Appellant served Respondents with his Notice of Appeal on October 27, 2015.

STANDARD

On appeal from a dismissal pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court – whether the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Grimsley v. S.C. Law Enforcement Div., 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012); Flateau v. Harrelson, 355 S.C. 197, 201-03, 584 S.E.2d 413, 415-16 (Ct. App. 2003). The appellate court is required to view the allegations in the complaint in the light most favorable to the plaintiff and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief under any theory of the case. Grimsley, 396 S.C. at 281, 721 S.E.2d at 426. The court may sustain the dismissal when "the facts alleged in the complaint do not support relief under any theory of law." Flateau, 355 S.C. at 202, 584 S.E.2d at 416.

ARGUMENT

I. The trial court correctly found that claims against medical professionals for injuries allegedly sustained as a result of the negligent administration of a medical test are claims for medical malpractice subject to the pre-filing Notice of Intent to File Suit and expert affidavit requirements set forth in S.C. Code Ann. §§ 15-79-125 and 15-36-100.

This appeal turns on the distinction between claims for ordinary negligence and medical malpractice, which is an issue our Supreme Court recently addressed in Dawkins v. Union Hosp. Dist., 408 S.C. 171, 758 S.E.2d 501 (2014). In Dawkins, the court held that while medical malpractice claims are subject to the mandatory pre-litigation requirements set forth in S.C. Code Ann. §§ 15-79-125 and 15-36-100, claims against medical providers that sound in ordinary negligence are not.

The plaintiff in Dawkins filed suit against a hospital for injuries she sustained when she fell while attempting to use the restroom in the emergency department waiting room. Id. at 174, 502. At the time of the fall, the plaintiff had been admitted by the hospital, but was unattended and unmonitored, and had not begun receiving treatment. Id. Although the Dawkins court found that the particular claims in that case sounded in ordinary negligence rather than medical malpractice, the court observed that the distinction between the two types of claims is subtle, and that differentiating between them "depends heavily on the facts of each individual case." Id. at 176, 504 (*quoting* Estate of French v. Stratford House, 333 S.W.3d 546, 556 (Tenn. 2011)).

The facts of this case are markedly different from those in Dawkins. This case does not involve an unsupervised fall that occurred in the waiting room prior to receiving any medical care. Rather, Appellant alleges that he lost consciousness and fell during a medical test conducted under the supervision of a licensed health care professional, and that the fall and his ensuing injuries were caused by the health care professional's negligence in administering the

test. Appellant further alleges Nurse Doe's employer was negligent in supervising and training her to properly administer the test.

A. Claims for injuries that occurred in the course of medical care that were allegedly caused by the negligent administration of a medical test are claims for medical malpractice.

Although the Dawkins court did not articulate a test for determining whether a claim sounds in ordinary negligence or medical malpractice, the two determinative factors that can be gleaned from the decision are: (1) whether the plaintiff had begun receiving medical care at the time of the injury; and (2) whether it is alleged that the medical provider negligently administered medical care. *See* id. at 178-79, 504-05 ("Here, we find that Appellant's claim sounds in ordinary negligence . . . Appellant's complaint makes clear that she had not begun receiving medical care at the time of her injury, nor does it allege the Hospital's employees negligently administered medical care. Rather, the complaint states that Appellant's injury occurred when she attempted to use the restroom unsupervised, prior to receiving medical care. . . . Accordingly, the circuit court improperly classified Appellant's claim as one sounding in medical malpractice . . . .").

In contrast to Dawkins, Appellant's Complaint makes clear that the injury occurred during the administration of a medical test, and the Complaint alleges negligence on the part of UCI Medical and Nurse Doe in administering the test. (R. pp. 8-9). Simply put, a pulmonary function test performed by a licensed health care professional as part of a pre-employment physical examination to assess the patient's physical condition and capabilities is a medical service. It does not fall within the category of administrative, ministerial, or routine care that the Dawkins court indicated would give rise to a claim of ordinary negligence. *See* Kujawski v. Arbor View Health Care Ctr., 139 Wis.2d 455, 407 N.W.2d 249, 252 (1987) (claim alleging

injury resulting from medical provider's failure to use a safety belt while transporting plaintiff via wheelchair sounded in ordinary negligence); Kastler v. Iowa Methodist Hosp., 193 N.W.2d 98, 101 (1971) (claim alleging medical provider negligently assisted plaintiff while showering sounded in ordinary negligence); Bryant v. Oakpointe Villa Nursing Ctr., Inc., 471 Mich. 411, 684 N.W.2d 864 (2004) (ordinary negligence principles applied to claim arising from medical provider's failure to protect a patient from getting entangled between the bed rails and mattress).

The above cases cited by Dawkins discuss the distinction between ordinary negligence and medical malpractice within the context of unsupervised falls that occurred while the patient was either not receiving care, or was receiving nonmedical, administrative, ministerial, or routine care. *See* id. at 178, 504. While these cases were instructive for the facts presented in Dawkins, other courts have addressed the distinction between ordinary negligence and medical malpractice in cases involving facts more akin to those presented in this case, *i.e.*, those involving injuries that occurred during medical testing where the plaintiff's claims arose from the performance of medical services.

For example, in Jackson v. Chicago Classic Janitorial & Cleaning Serv., Inc., 355 Ill. App. 3d 906, 823 N.E.2d 1055 (2005), the court found that claims against an occupational therapist for injuries sustained during a Functional Capacity Examination (FCE) sounded in medical malpractice rather than ordinary negligence. The plaintiff in Jackson was referred to an occupational therapist for testing to determine her fitness to return to work. Id. at 908, 1057. As part of the testing, the occupational therapist instructed and supervised various exercises to assess her physical abilities. Id. The plaintiff alleged that she sustained a back injury during the testing as a result of the therapist's failure to properly administer the test, and the therapist's employer's failure to properly supervise and train the therapist. Id. The therapist moved to

dismiss the complaint for failure to file an expert affidavit as required by Illinois law in malpractice cases. The plaintiff asserted that her claims were for ordinary negligence rather than medical malpractice, and that the purpose of the FCE was not to provide diagnosis or treatment. Id. at 909, 471.

The Jackson court found that the plaintiff's allegations – that the therapist was negligent in how she conducted, supervised and warned the plaintiff throughout the test – raised questions of medical judgment, sounded in medical malpractice, and required expert testimony. Id. at 1060-61, 474-75. In making this determination, the court noted that decisions regarding the administration of an FCE inherently involve questions of medical judgment, and that analyzing the standard of care requires the application of distinctively medical knowledge and principles. Id. at 1060, 474. The Jackson court noted that this analysis of medical knowledge and principles, however basic, triggers compliance with the statutory requirements for medical malpractice actions. Id.

A number of other courts have addressed claims against medical providers for injuries that occurred during medical testing and found that the claims sounded in malpractice rather than ordinary negligence, notwithstanding that the plaintiff couched the allegations in terms of ordinary negligence. In Moore v. Jackson Cardiology Assoc., P.A., --- So.3d ---, 2015 WL 7729358 (Miss Ct. App. Dec. 1, 2015), the court held that the plaintiff's claims against a cardiology practice for an injury sustained when the plaintiff fell from a treadmill during a stress test sounded in medical malpractice rather than ordinary negligence. The plaintiff couched the complaint in terms of premises liability involving a nonmedical device, but the court found that this did not change the fact that the allegations involved the professional judgment of the

cardiology practice and its nurses, and therefore, sounded in medical malpractice and required expert testimony. Id. at *2-3.

Similarly, in Harris v. Sternberg, 819 So.2d 1134, 1138-39 (La. Ct. App. 2002), the court found that the plaintiff's claims for injuries he sustained when he fell from a scale at a doctor's office sounded in medical malpractice rather than general negligence. The plaintiff alleged that the doctor and his nurse were negligent in instructing him to stand on the scale without properly securing it, despite knowledge that the scale had the capability to roll. Id. In applying six factors used by Louisiana courts in distinguishing between ordinary negligence and medical malpractice, the court observed that the plaintiff was being treated for obesity, which required weighing the plaintiff to assess his response to treatment, and the incident arose out of plaintiff's professional relationship with the doctor and would not have occurred had he not sought treatment. Id. at 1139-40. *See also* Williams-Ali v. Mountain States Health Alliance, No. E2012-00724-COA-R3CV, 2013 WL 357580, *4-5 (Tenn. Ct. App. Jan. 30, 2013) (plaintiff's claims for injuries sustained in fall from an exam table while undergoing a nuclear stress test sounded in medical malpractice rather than ordinary negligence where alleged negligence occurred during the administration of the test and involved technician's decision to position, secure, and monitor the patient); Grossman v. Barke, 2005 PA Super 45, 868 A.2d 561, 570-71 (2005) (plaintiff's claims for injuries sustained after she became dizzy and fell from an exam table during a pre-examination for a knee replacement sounded in medical malpractice rather than ordinary negligence).

B. Appellant's claims against Nurse Doe and UCI Medical would require expert testimony on the standard of care.

A pulmonary function test examines an individual's respiratory capacity to determine whether he or she 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 an individual may exhibit are all necessary components of an accurate and thorough physical examination. This is precisely the reason why Appellant's prospective employer required that he obtain a physical from a health care facility such as UCI Medical. If a physical examination did not require some degree of professional knowledge and skill, any individual or any company could perform such testing.

The assignment of any liability to Respondents in this case clearly hinges on determinations as to whether the health care professional properly administered the pulmonary function test, and whether her employer properly trained and supervised her in the administration of the test. A jury, therefore, must know exactly what a pulmonary function test evaluates, how the test works, the proper mechanism for administering the test, whether the patient should sit or stand during the test, and any other precautions a health care professional must consider while conducting the evaluation.

Appellant contends that expert testimony would not be required in this case because Appellant and Nurse Doe will be able to testify about their personal observations during the pulmonary function test, and Nurse Doe will be able to explain why she instructed Appellant to stand during the test. According to Appellant, this testimony, coupled with the jurors' personal experiences of becoming lightheaded or witnessing someone else become lightheaded while blowing up a balloon, will enable a jury to competently decide whether Nurse Doe and UCI Medical complied with the applicable standard of care in the administration, training and supervision of the pulmonary function test.

What Appellant leaves out of this analysis is that the pulmonary function test is a medical test that is conducted under the supervision of a licensed medical professional who relies on her training and knowledge to make judgment calls about such things as how the patient should be positioned during the test, whether the patient's position should be changed during the test, whether and when the breathing exercises should be paused, resumed or discontinued, whether the patient should be instructed to exert more or less effort during the breathing exercises, how closely the patient should be monitored and supervised, whether the patient has any physical limitations that may impact the test or make the patient more or less prone to fainting, and so on.

Indeed, Appellant attributes his fall and resulting injury to Nurse Doe's decision to ask him to stand and continue the breathing exercises during the test, and UCI Medical's failure to properly train and supervise Nurse Doe regarding the administration of the test. A layman simply would not have any means of judging the decisions made by Nurse Doe in administering the test, or the decisions made by UCI Medical in training and supervising Nurse Doe.

These issues clearly fall outside the scope of a jury's general knowledge or experience. Without such information, 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.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the trial court's order dismissing the Complaint.

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PROOF OF SERVICE

I certify that on the date indicated below, I served the *Final Brief of Respondents* upon Appellant by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

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This 7 day of April, 2016.

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The undersigned hereby certifies that the following Final Brief of Respondent complies with Rule 211(b), of the South Carolina Appellate Court Rules.

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