

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
Fifth Judicial Circuit

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APR 18 2017

SC Court of Appeals

DeAndrea Benjamin, Circuit Court Judge

Appellate Case No. 2015-002260
Unpublished Opinion No. 2017-UP-145 (filed April 5, 2017)

CORY MCMILLAN,

Appellant,

v.

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

Respondents.

PETITION FOR REHEARING 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

Pursuant to Rule 221(a), SCACR, Appellant, Cory McMillan, respectfully petitions this Court for rehearing of its Opinion No. 2017-UP-145 issued on April 5, 2017, based upon the following points overlooked or misapprehended by the Court.

In affirming the decision of the trial court, this Court found that Appellant's complaint alleged medical malpractice and as a result that Appellant failed to comply with the statutory pre-litigation requirements for medical malpractice.

Respectfully, this Court may have overlooked the analysis put forth by the South Carolina Supreme Court in *Dawkins v. Union Hospital District*, 408 S.C. 171, 758 S.E. 2d 501 (2014). Appellant argued to this Court that the care received by Appellant was routine and therefore sounds in ordinary negligence. As a result, the pre-litigation requirements set forth in S.C. Code Ann. § 15-79-125 and § 15-36-100 were not necessary.

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)

The Supreme Court of South Carolina addressed the issue of routine 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.

It seems clear from this Court’s ruling that Appellant was a patient of Respondent. The word “patient” implies there must be a “doctor” or some other “medical professional” on the other side of the relationship. The Supreme Court in *Dawkins* carefully chose the term “patient” when it said “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.

Respectfully, this Court did not weigh the facts alleged by Appellant in his amended

complaint in a light most favorable to Appellant¹. Had this Court done so, it would have reached a different conclusion. The Appellant was asked to stand after starting in a seated position. The act of standing is as routine as it gets (for one able to do so). The South Carolina Supreme Court would not have taken the time to define four classifications of ordinary negligence versus medical malpractice if the South Carolina Supreme Court did not deem some allegations of negligence that occur in a hospital or doctor's office to potentially be something other than medical malpractice. This Court, like the trial judge in the case, should have ascertained if the allegedly negligent care administered to Appellant could be classified as routine care. The Court in *Dawkins* created a test that mandates that allegations of negligence that occur at a hospital or doctor's office are to be sifted through to determine if they could be classified as non-medical, administrative, ministerial, or routine care and thus ordinary negligence. Reasonable minds can differ as to whether failing to supervise one asked to stand from a seated position falls into one of the four classifications of ordinary negligence detailed in *Dawkins*.

If the Court in *Dawkins* did not expect the trial courts to analyze the facts of certain allegations of negligence that occur in a hospital or doctor's office to potentially be something other than medical malpractice as Appellant contends, then why would the South Carolina Supreme Court bother to detail four classifications of ordinary negligence (non-medical, administrative, ministerial, or routine care) in the *Dawkins* opinion? As stated in

¹ On appeal from a dismissal pursuant to Rule 12(b)(6), SCRCPP, this 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 entitle the Appellant to relief under any theory of the case.

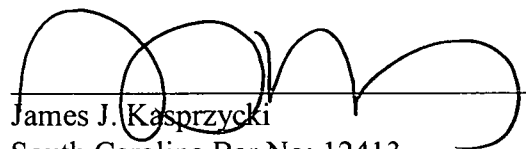
Dawkins “differentiating between the two types of claims ‘depends heavily on the facts of each individual case.’” *Id.* at 176. Prior to *Dawkins*, the trial courts determined that if a negligent act occurred at a hospital or doctor’s office the case was one of medical malpractice. Subsequent to *Dawkins*, that is no longer the standard applied. Routine care can occur at a hospital or doctor’s office and sounds in ordinary negligence.

Here, there are allegations that routine care was negligently administered to Appellant. Appellant’s injury occurred while he was not being properly supervised. The Appellant was seated while providing breathing maneuvers. Then Appellant was asked to stand while providing breathing maneuvers. As a result, Appellant fell to the ground. This is a case of routine care gone wrong.

CONCLUSION

Based on the reasons set forth herein and the arguments raised in the Final Brief of Appellant and Final Reply Brief of Appellant, Appellant, Cory McMillan, respectfully requests that this Court grant his petition for rehearing.

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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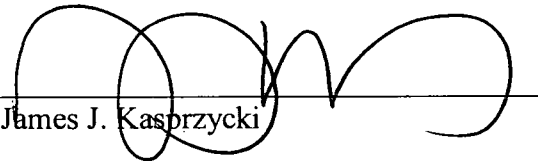
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DOCTORS CARE and JANE DOE,

Respondents.

CERTIFICATE OF SERVICE

The undersigned certifies that he is the attorney for Appellant in the within matter and that the Petition for Rehearing of Appellant, was served upon all parties, by depositing a copy of same in the United States Mail, with sufficient postage affixed thereto, addressed as follows:

D. Gary Lovell, Jr., Esq.
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401


James J. Kasprzycki

April 17, 2017

KENNETH S. NUGENT
JOHN T. RUFF
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ROBERT J. CAIRNS
SARAH E. MOSKOWITZ
CHRISTOPHER PITTS

KENNETH S. NUGENT, P.C.
ATTORNEYS AT LAW

ONE BULL STREET
SUITE 400
SAVANNAH, GEORGIA 31401
(912) 447-5984
FAX (912) 447-0192
WWW.ATTORNEYKENNUGENT.COM

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April 17, 2017

Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: *Cory McMillan v. UCI Medical Affiliates, Inc., d/b/a Doctors Care and Jane Doe*
In the South Carolina Court of Appeals
Appellate Case No. 2015-002260; Unpublished Opinion No. 2017-UP-145

Dear Clerk of Court:

Enclosed please find:

1. Original and six copies of Appellant's Petition for Rehearing.
2. Original and two copies of Certificate of Service.
3. Filing Fee of \$25.00.

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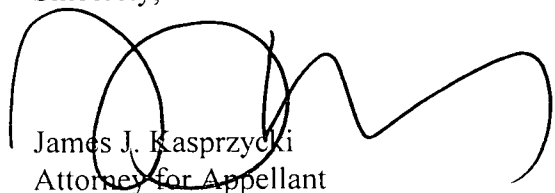
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Once the originals have been filed, please return the copies in the self-addressed, stamped envelope provided.

As always, thank you for your assistance with this matter.

Sincerely,


James J. Kasprzycki
Attorney for Appellant

JJK/tc

Enclosures

cc: D. Gary Lovell, Jr., Esq. (w/encl.)

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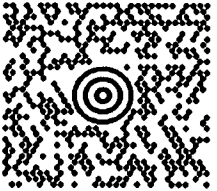


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