

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
Fifth Judicial Circuit

DeAndrea Benjamin, Circuit Court Judge

Appellate Case No. 2015-002260
Court of Appeals Order filed April 5, 2017

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SC Court of Appeals

CORY MCMILLAN,

Petitioner,

v.

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

Respondents.

PETITION FOR A WRIT OF CERTIORARI

James J. Kasprzycki
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CERTIFICATE OF COUNSEL

Counsel for Petitioner, Cory McMillan (“McMillan”), certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on May 19, 2017.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the dismissal of Petitioner’s case pursuant to Rule 12(b)(6), SCRCF, by finding that Petitioner was receiving medical care from Respondents when his injury occurred?
2. Did the Court of Appeals err in affirming the dismissal of Petitioner’s case pursuant to Rule 12(b)(6), SCRCF, by failing to find that the care Petitioner received from Respondents was routine?
3. Did the Court of Appeals err in affirming the dismissal of Petitioner’s case pursuant to Rule 12(b)(6), SCRCF, by failing to find that Petitioner’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, McMillan 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 (“Doctors Care”) due to the negligence of Doctors Care and its employees. McMillan 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.

Doctors Care served its answer on April 15, 2015. Simultaneously with its answer, Doctors

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

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

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

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

McMillan filed his Notice of Appeal on October 30, 2015. The Court of Appeals filed its order on April 5, 2017, affirming the decision of the trial court. McMillan filed his Petition for Rehearing on April 18, 2017. On May 19, 2017, the Court of Appeals denied the Petition for Rehearing. McMillan seeks a Writ of Certiorari to review the decision of the Court of Appeals.

STATEMENT OF THE FACTS

In an effort to obtain employment with a prospective employer, McMillan was required to pass a routine physical. McMillan was sent by his prospective employer to Doctors Care's facility

to undergo same. McMillan alleges he was injured during the pulmonary function test (“PFT”). McMillan was required to breathe 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 “[p]ursuant to a request by Doctors Care employee(s) and/or 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 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 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

The primary legal issue presented by this appeal concerns the distinction between medical malpractice and ordinary negligence in the wake of *Dawkins v. Union Hospital District*, 408 S.C. 171, 758 S.E. 2d 501 (2014). McMillan contends that when viewed in a light most favorable to him, the facts of his individual case demonstrate that his case sounds in ordinary negligence even though his injury occurred at a medical facility.

1. MCMILLAN WAS NOT RECEIVING MEDICAL CARE FROM DOCTORS CARE WHEN HIS INJURY OCCURRED

When McMillan arrived at Doctors Care, he was not there for the purpose of treatment or diagnosis. 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. McMillan made same clear in his amended complaint. (R. p. 000019).

Further, McMillan made clear in his amended complaint that this is not an action for medical malpractice. (R. p. 000019, line 3). McMillan's allegations of negligence in his amended complaint focus on the conduct of Doctors Care's employees insofar as they failed to take any precautionary actions, by any means, to insure McMillan's safety. (R. p. 000021, lines 7-8). When McMillan grew dizzy and fell to the ground he was not undergoing medical care.

Because McMillan 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. Based on the good faith allegations in McMillan's amended complaint and the reasonable inferences drawn from them, the case should not have been dismissed.

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

When the trial court issued its order, it stated, "I find that Plaintiff's claim is medical care" (R. p. 000002). This Court recently 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). This 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.

A PFT is a routine test that registers lung capacity by requiring an individual to breath into a spirometer. Breathing is a routine function. A spirometer, which measures air, is not a complicated device. McMillan could have performed a self-PFT “at-home.”

McMillan’s blowing into a spirometer to measure lung capacity is analogous to a person providing a urine sample for a drug test or an individual stepping on a scale to measure their weight. The taking of one’s pulse, one’s blood pressure, and one’s temperature is routinely done at healthcare facilities, yet all are also done “at-home.” Technological improvements in the medical field have rendered many practices obsolete or routine. That is the case here. What was once thought to be strictly in the purview of a physician at his office is now able to be done in the comfort of one’s own home. If it can be done “at-home” it is as routine as it gets.

McMillan’s amended complaint alleges that Doctors Care, among other things, failed to take any precautionary actions, by any means, to insure McMillan’s safety. (R. p. 000021, lines 7-8). This is one of the allegations made by Dawkins in her amended complaint. *Id.* at 173. McMillan, like the plaintiff in *Dawkins*, fell after being admitted. The Court in *Dawkins* found that her claim was based in ordinary negligence. Dawkins as a patient was left unmonitored when she fell. Likewise, McMillan was not sufficiently monitored or supervised when he fell. This 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 claims sounding in ordinary negligence. *Dawkins* at 179.

Here, the injury to McMillan occurred while he was not being properly supervised. McMillan was standing while providing breathing maneuvers into a spirometer. McMillan has not alleged that the PFT was negligently administered nor has he alleged that results were negligently interpreted.

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

Dawkins clarified a tenet of South Carolina law that was not being applied to negligence claims involving injuries that occurred at medical facilities 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 is: "does a jury require expert testimony to determine fault on the part of Doctors Care in failing to supervise McMillan?" The answer is "no." McMillan alleged that Doctors Care's employees failed to supervise him. More specifically, McMillan alleged in his amended complaint that Doctors Care failed to take any precautionary actions, by any means, to insure McMillan's

safety. (R. p. 000021, lines 7-8).

An expert does not need to be called to the witness stand to prove the allegations as to the elements of duty, breach of that duty, and causation against Doctors Care as the issues are well within a layman's common knowledge. McMillan was initially instructed to sit in a chair. At some point he was instructed to stand. The employee that instructed McMillan to stand can testify as to her reasons for requesting that he stand. That same employee can also testify as to what occurred while McMillan was standing. That employee or any other employee that was present when the injury occurred can testify that no employee supervised or steadied McMillan while standing. McMillan 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 common 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. A juror can make the determination as to whether or not the employees present should have, at a minimum, supervised McMillan or if Doctors Care failed to take any precautionary actions, by any means, to insure McMillan's safety while he was standing and if so, if their failure to do so caused his injury.

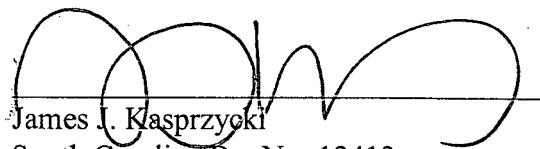
There are other situations where individuals are requested to breathe into devices. The South Carolina Law Enforcement Division ("SLED") is charged with performing DataMaster tests on operators of motor vehicles suspected of driving under the influence of alcohol. Hypothetically, if an injury from a fall occurred while one suspected of DUI was blowing into the DataMaster, the same allegations of negligence would be raised as to lack of supervision and failing to take any

precautionary actions, by any means, to insure one's safety on the part of the SLED employees. No expert testimony would be required to prove the aforementioned hypothetical allegations against SLED as a layperson can grasp the issues. McMillan should not be held to a different (expert) standard simply because McMillan's injury occurred at a healthcare facility rather than a police station. McMillan's case does not require the testimony of an expert.

CONCLUSION

For the reasons stated above, Petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,



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Savannah, Georgia
June 8, 2017

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DOCTORS CARE and JANE DOE,

Respondents.

PROOF OF SERVICE

I certify that I have filed the Petition for Writ of Certiorari and Appendix and served these documents on the Respondents UCI Medical Affiliates, Inc., d/b/a Doctors Care and Jane Doe, by depositing a copy of same in the United States Mail, postage prepaid, on June 8, 2017, addressed to the Clerk of the Supreme Court, the Clerk of the Court of Appeals and the Respondents attorney of record as follows:

D. Gary Lovell, Jr., Esq.
Carlock, Copeland & Stair, LLP
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Charleston, South Carolina 29401

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- ALSO ADMITTED IN NC
- ALSO ADMITTED IN TX

June 8, 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

Dear Clerk of Court:

Enclosed please find a copy of the Petition for Writ of Certiorari, Appendix and Proof of Service in the above referenced case.

Thank you.

Sincerely,


James J. Kasprzycki
Attorney for Petitioner

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

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JUN 12 2017

SC Court of Appeals

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June 8, 2017

Clerk of Court
Supreme Court of South Carolina
PO Box 11330
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

Dear Clerk of Court:

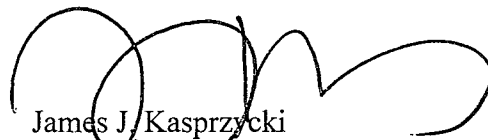
Enclosed please find:

1. Original and six copies of Petition for Writ of Certiorari.
2. Two copies of the Appendix (one bound and one unbound).
3. Original and two copies of Proof of Service.
4. Filing Fee of \$100.00.

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 Petitioner

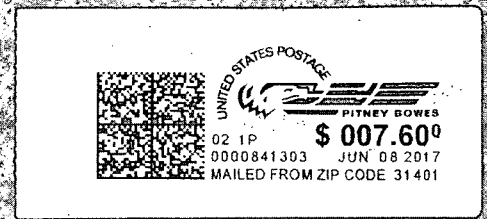
JJK/tc

Enclosures

cc: ✓ Court of Appeals (w/encl.)
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