

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

RECEIVED

JUN 15 2017

S.C. SUPREME COURT

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

CORY MCMILLAN,

Petitioner,

v.

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

Respondents.

AMENDED APPENDIX

James J. Kasprzycki
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Attorneys for Respondents

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
Fifth Judicial Circuit

RECEIVED

DeAndrea Benjamin, Circuit Court Judge

APR 06 2016

SC Court of Appeals

Appellate Case No. 2015-002260

CORY MCMILLAN,

Appellant,

v.

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

Respondents.

RECORD ON APPEAL

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CASE NUMBER: 2015CP2800174

Cory McMillan

FILED FOR RECORD

Medical Affiliates Doctors Care d/b/a

PLAINTIFF(S)

2015 OCT - 1 AM 10:50
 DEFENDANT(S)

Submitted by:

JOYCE A. JOHNSON
 CLERK OF COURT
 KERSHAW COUNTY, S.C.

Plaintiff Defendant or Self-Represented Litigant

- DISPOSITION TYPE (CHECK ONE)**
- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
 - DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
 - ACTION DISMISSED (CHECK REASON):**
 - Rule 43(k), SCRPC (Settled); Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 - Other _____
 - ACTION STRICKEN (CHECK REASON):**
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Bankruptcy;
 - Rule 40(j), SCRPC; Other _____
 - DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court;

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk:

This matter came before the court on July 14, 2015 pursuant to Defendant's motion to dismiss. The Defendant moved to have the matter dismissed on the ground that Plaintiff failed to comply with the pre-litigation requirements set forth in S.C. Code Ann. § 15-79-125 and § 15-36-100. After hearing the arguments of the parties and reviewing the case law, I find that Plaintiff's claim is "medical" care, thus requiring expert testimony. The Plaintiff has failed to comply with the pre-litigation requirements set forth in S.C. Code Ann. § 15-79-125 and § 15-36-100.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

[Signature]

Judge Code 2161

Date 9-29-15

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

Court Reporter

SCRPC Form 4C (10/2011)

ATTEST True, Correct & Certified

ATTORNEY(S) FOR THE DEFENDANT(S)
 Court

Clerk of Court

Amended Appendix 003

[Signature]
 Clerk of Court

Kershaw County

000002

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS

Cory McMillan,

Plaintiff(s)

CIVIL ACTION COVERSHEET

vs.

2015-CP - 20- 174

UCI Medical Associates, Inc. d/b/a
Doctors Care and June Doe,

Defendant(s)

Submitted By: Jasasa J. Kasprzycki
Address: One Bull Street, Suite 400
Savannah, GA 31401

SC Bar #: 12413
Telephone #: 912-447-5984
Fax #: 800-886-3792
Other:

E-mail: jkasprzycki@attorneykoningent.com

NOTE: This coversheet and information contained hereon neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filed out and filed, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

- JURY TRIAL demanded in complaint.
- NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|---|---|---|
| <input type="checkbox"/> Continuals | <input type="checkbox"/> Torts - Professional Malpractice | <input type="checkbox"/> Torts - Personal Injury | <input type="checkbox"/> Real Property |
| <input type="checkbox"/> Construction (100) | <input type="checkbox"/> Dental Malpractice (200) | <input type="checkbox"/> Assault/Battery (300) | <input type="checkbox"/> Ejectment (400) |
| <input type="checkbox"/> Debt Collection (110) | <input type="checkbox"/> Legal Malpractice (210) | <input type="checkbox"/> Conversion (310) | <input type="checkbox"/> Condominium (410) |
| <input type="checkbox"/> Employment (120) | <input type="checkbox"/> Medical Malpractice (220) | <input type="checkbox"/> Motor Vehicle Accident (320) | <input type="checkbox"/> Easements (420) |
| <input type="checkbox"/> General (130) | Previous Notice of Intent Case # | <input checked="" type="checkbox"/> Premises Liability (330) | <input type="checkbox"/> Eminent Domain (430) |
| <input type="checkbox"/> Breach of Contract (140) | 20-174 | <input type="checkbox"/> Products Liability (340) | <input type="checkbox"/> Partition (440) |
| <input type="checkbox"/> Other (199) | <input type="checkbox"/> Notice/ Bill Med Mal (230) | <input type="checkbox"/> Personal Injury (350) | <input type="checkbox"/> Possession (450) |
| | <input type="checkbox"/> Other (299) | <input type="checkbox"/> Wrongful Death (360) | <input type="checkbox"/> Building Code Violation (460) |
| | | <input type="checkbox"/> Other (399) | <input type="checkbox"/> Other (499) |
| <input type="checkbox"/> Intestate Estates | <input type="checkbox"/> Administrative Law/Writ | <input type="checkbox"/> Judgments/Attachments | <input type="checkbox"/> Appeals |
| <input type="checkbox"/> FCR (500) | <input type="checkbox"/> Revoke Dr. License (600) | <input type="checkbox"/> Death Settlement (700) | <input type="checkbox"/> Arbitration (900) |
| <input type="checkbox"/> Mandamus (520) | <input type="checkbox"/> Judicial Review (610) | <input type="checkbox"/> Foreign Judgment (710) | <input type="checkbox"/> Statute-Civil (910) |
| <input type="checkbox"/> Habeas Corpus (530) | <input type="checkbox"/> Relief (620) | <input type="checkbox"/> Magistrate's Judgment (720) | <input type="checkbox"/> Magistrate-Criminal (920) |
| <input type="checkbox"/> Other (599) | <input type="checkbox"/> Permanent Injunction (630) | <input type="checkbox"/> Minor Settlement (730) | <input type="checkbox"/> Municipal (930) |
| | <input type="checkbox"/> Particular-Petition (640) | <input type="checkbox"/> Taxpayer Judgment (740) | <input type="checkbox"/> Probate Court (940) |
| | <input type="checkbox"/> Forfeiture-Corpus Order (650) | <input type="checkbox"/> Lis Pendens (750) | <input type="checkbox"/> SCOT (950) |
| | <input type="checkbox"/> Other (899) | <input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760) | <input type="checkbox"/> Worker's Comp (960) |
| <input type="checkbox"/> Special/Complex/Other | <input type="checkbox"/> Pharmaceuticals (630) | <input type="checkbox"/> Confession of Judgment (770) | <input type="checkbox"/> Zoning Ord (970) |
| <input type="checkbox"/> Environmental (600) | <input type="checkbox"/> Unfair Trade Practices (640) | <input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780) | <input type="checkbox"/> Public Service Comm. (980) |
| <input type="checkbox"/> Automobile Acc. (610) | <input type="checkbox"/> Out-of-State Depositions (650) | <input type="checkbox"/> Other (799) | <input type="checkbox"/> Employment Security Comm (991) |
| <input type="checkbox"/> Medical (620) | <input type="checkbox"/> Motion to Quash Subpoena in out-of-County Action (660) | | <input type="checkbox"/> Other (999) |
| <input type="checkbox"/> Other (699) | <input type="checkbox"/> Sexual Predator (670) | | |

Submitting Party Signature:

Date: February 20, 2015.

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

CORY McMILLAN,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

COMPLAINT
(Jury Trial Demanded)

2015-CP-28-174

JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

FILED FOR RECORD
FEB 24 AM 9:52

The Plaintiff would respectfully show unto the court and allego as follows:

PARTIES, JURISDICTION & VENUE

1. That the Plaintiff, Cory McMillan, is a citizen and resident of the County of Allendale, State of South Carolina.
2. That the Defendant, UCI Medical Affiliates, Inc. d/b/a Doctors Care, is a foreign corporation, organized and existing under the laws of the State of Delaware and is authorized to conduct business in the State of South Carolina.
3. Defendant, UCI Medical Affiliates, Inc. d/b/a Doctors Care will hereinafter be referred to as "Doctors Care."
4. That at all times relevant hereto, Defendant, Doctors Care, by and through its agents and/or employees, provided services to Plaintiff, Cory McMillan, at his healthcare facility located in the County of Kershaw, State of South Carolina.
5. That the Defendant, Jane Doe, is an agent and/or employee of Defendant, Doctors Care and at all times relevant hereto, provided services to Plaintiff, Cory McMillan, at the Doctors Care facility located in the County of Kershaw, State of South Carolina.

FACTS

6. Paragraphs 1 through 5 of Plaintiff's Complaint are incorporated herein by reference, as if fully set forth verbatim.
7. On June 29, 2012, Plaintiff, Cory McMillan, arrived at the Doctors Care facility to complete a pre-employment physical exam.
8. At all times relevant hereto, Plaintiff, Cory McMillan, was an invitee of Defendant, Doctors Care.
9. As part of the pre-employment physical exam, Plaintiff, Cory McMillan, was required to complete a respiratory clearance physical by providing different breathing maneuvers through a spirometer device.
10. At all times relevant hereto, during Plaintiff's initial pre-employment physical exam, Defendant, Doctors Care, did not have a licensed physician present.
11. Pursuant to a request by Doctors Care employee(s) and/or Defendant, Jane Doe, the Plaintiff, Cory McMillan, sat down in a chair placed adjacent to the spirometer device and began providing different breathing maneuvers.
12. Plaintiff is informed and believes that the chair was placed adjacent to the spirometer device as respiratory testing is a procedure that should not be conducted in a non-seated position.
13. During the respiratory testing, a Doctors Care employee(s) and/or Defendant, Jane Doe, requested that Plaintiff stand up.
14. In compliance with said request, Plaintiff, Cory McMillan, stood up and attempted to complete several breathing maneuvers.

15. While attempting to complete the breathing maneuvers, and still standing, Plaintiff, Cory McMillan, lost consciousness and fell to the ground.
16. Once Plaintiff, Cory McMillan, regained consciousness, he was escorted by employees and/or agents of Doctors Care to an exam room.
17. While in the exam room, Plaintiff complained of neck and back pain and was briefly examined by one of the Doctors Care physicians.
18. Upon completion of the exam, a physician supervised Plaintiff while he completed his pre-employment physical exam.
19. A couple days following the fall, Plaintiff began experiencing severe pain in his neck.
20. Plaintiff sought treatment for same.
21. Plaintiff was diagnosed with a cervical fracture and transferred to a nearby hospital for advanced treatment.

NEGLIGENCE AS TO DEFENDANT JANE DOE

22. Paragraphs 1 through 21 of Plaintiff's Complaint are incorporated herein by reference, as if fully set forth verbatim.
23. That, Defendant Jane Doe, was, at the time and place above-mentioned, negligent, careless, grossly negligent, reckless, wanton and willful in any one or more of the following particulars:
 - a. In that Defendant Jane Doe, failed to safely and properly supervise and/or monitor the Plaintiff while administering a pre-employment physical exam which is known or should have been known to cause dizziness and faintness;
 - b. By instructing Plaintiff to stand while administering the pre-employment physical exam;

- c. By instructing Plaintiff to stand without providing measures to ensure Plaintiff would not fall to the ground;
- d. By instructing Plaintiff to stand without seeking the assistance of a co-worker to supervise the Plaintiff;
- e. In that Defendant Jane Doe, failed to use the degree of caution and care that a reasonable and prudent person would have used under the circumstances then and there prevailing;
- f. In other ways and particulars that may be shown through discovery and trial;

any or all of which were the direct and proximate cause of the damages and injuries suffered by the Plaintiff herein, said acts being in violation of the statutory and common laws of the State of South Carolina.

24. That, as a direct and proximate result of the negligence, recklessness, willfulness, and wantonness, of Defendant, Jane Doe, as aforesaid, the Plaintiff, Cory McMillan, suffered great bodily injury, suffered personal injuries, incurred expensive medical, doctor, hospital, nursing, and drug bills, suffered pain and mental anguish, suffered lost wages, suffered impairment, anxiety, inconvenience and will continue to suffer same in the future; all to Plaintiff's general damages and detriment.

NEGLIGENCE AS TO DEFENDANT DOCTORS CARE

25. Paragraphs 1 through 24 of Plaintiff's Complaint are incorporated herein by reference, as if fully set forth verbatim.

26. Defendant Doctors Care, was, at the time and place above-mentioned, negligent, careless, grossly negligent, reckless, wanton and willful in any one or more of the following particulars:

- a. In that Defendant Doctors Care, failed to make inquiry as to the abilities of Defendant Jane Doe, to safely and properly supervise the Plaintiff;
- b. In that Defendant Doctors Care, failed to properly supervise Defendant, Jane Doe;
- c. In that Defendant Doctors Care, failed to properly train Defendant, Jane Doe;
- d. In failing to have a licensed physician present while administering the pre-employment physical exam;
- e. In failing to use the degree of care and caution that a reasonable and prudent employer would have used under the circumstances then and there prevailing;
- f. In other ways and particulars that may be shown through discovery and trial;

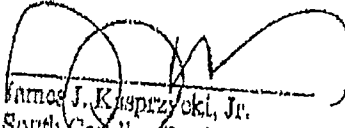
any or all of which were the direct and proximate cause of the damages and injuries suffered by the Plaintiff herein, said acts being in violation of the statutory and common laws of the State of South Carolina.

27. That, as a direct and proximate result of the negligence, recklessness, willfulness, and wantonness, of Defendant, Doctors Care, as aforesaid, the Plaintiff, Cory McMillan, suffered great bodily injury, suffered personal injuries, incurred expensive medical, doctor, hospital, nursing, and drug bills, suffered pain and mental anguish, suffered lost wages, suffered impairment, anxiety, inconvenience and will continue to suffer same in the future; all to Plaintiff's general damages and detriment.

28. As a result of the acts of Defendant, Doctors Care and Defendant, Jane Doe, which are chargeable against Defendant Doctors Care, under the doctrine of respondent superior, as set forth above, Plaintiff is informed and believes that he is entitled to an award of actual damages.

WHEREFORE, the Plaintiff prays for judgment against the Defendants in an amount of actual damages to be determined by a jury, for the costs of this action, and for such other and further relief as this Court might deem just and proper.

February 20, 2015
Savannah, Georgia


James J. Kasprzycki, Jr.
South Carolina Bar No: 12413
Attorney for Plaintiff

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Savannah, GA 31401
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(912) 447-0192 (Facsimile)
jkasprzycki@attorneykenugent.com

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

CORY McMILLAN,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL DISTRICT
CASE NO.: 2015-CP-28-174

DEFENDANTS' ANSWER TO PLAINTIFF'S
COMPLAINT

FILED
JAN 21 AM 9:33
CLERK OF COURT
JAMES H. HANCOCK

NOW COMES Defendants UCI Medical Affiliates, Inc. ("Defendant UCI") and Jane Doe ("Defendant Doe") (collectively referred to as "Defendants"), by and through the undersigned counsel, and hereby present their Answer and show this Court as follows:

FIRST DEFENSE

At all times relevant to the matters complained of in the Complaint, Defendants exercised the degree of skill and care required of them by law.

SECOND DEFENSE

The non-economic damages claimed by Plaintiff are limited in amount under law.

THIRD DEFENSE

To the extent Plaintiff asserts a claim for punitive damages, such damages are limited in amount under South Carolina law. Further, the pleadings and evidence fail to support a claim for such damages.

FOURTH DEFENSE

Any alleged claim for punitive damages asserted against Defendants violates their rights as guaranteed under the Constitutions of the United States and the State of South Carolina.

FIFTH DEFENSE

To the extent shown by the evidence, the negligence of Plaintiff proximately caused his alleged injuries and damages.

SIXTH DEFENSE

The allegations set forth in the Complaint fail to state a claim upon which relief may be granted by this Court. Therefore, the Complaint must be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

SEVENTH DEFENSE

There is no causal connection between any alleged acts or omissions on the part of Defendants and the injuries and damages alleged by Plaintiff.

EIGHTH DEFENSE

The Complaint must be dismissed for failure to contemporaneously file an expert affidavit pursuant to S.C. Code Ann. §§ 15-79-125 and 15-36-100.

NINTH DEFENSE

The Complaint must be dismissed for failure to previously file a Notice of Intent to File Suit or participate in mandatory pre-litigation mediation as set forth in S.C. Code Ann. § 15-79-125.

TENTH DEFENSE

The injuries and damages alleged by Plaintiff were the result of his own negligence, and thus his claims are barred as matter of law in whole or in part. Any negligence of Defendants, which is explicitly denied, was less than that of Plaintiff's negligence.

ELEVENTH DEFENSE

Defendants respond to the number allegations of the Complaint as follows:

1. Defendants lack sufficient information to form a belief as to the truth of the allegations set forth in Paragraph 1. Therefore, those allegations can neither be admitted nor denied at this time.
2. In response to Paragraph 2, Defendants admit that UCI Medical Affiliates, Inc. is a foreign corporation, organized and existing under the laws of the State of Delaware and is authorized to conduct business in the State of South Carolina. All remaining allegations of Paragraph 2 are denied.
3. In response to Paragraphs 3 and 4, Defendants admit that some agents or employees of Defendant UCI provided medical services and care to Plaintiff at its facility in Kershaw County, South Carolina. All remaining allegations of Paragraphs 3 and 4 are denied.
4. In response to Paragraph 5, Defendants admit that a non-medical doctor healthcare professional, agent, or employee of Defendant UCI provided services to Plaintiff at its facility located in Kershaw County, South Carolina. All remaining allegations of Paragraph 5 are denied.
5. In response to Paragraph 6, Defendants re-allege their responses to Paragraphs 1-5 and incorporate the same as if fully set forth herein.
6. In response to Paragraph 7, Defendants admit that Plaintiff received medical care at a facility of Defendant UCI that included a pre-employment physical exam. All remaining allegations of Paragraph 7 are denied.
7. Defendants deny the allegations set forth in Paragraph 8.
8. Upon information and belief, Defendants admit the allegations set forth in Paragraph 9.
9. Defendants deny the allegations set forth in Paragraph 10.

10. Defendants lack sufficient information to form a belief as to the truth of the allegations set forth in Paragraph 11. Therefore, those allegations can neither be admitted nor denied at this time.

11. Defendants deny the allegations set forth in Paragraph 12.

12. Defendants lack sufficient information to form a belief as to the truth of the allegations set forth in Paragraphs 13, 14, 15, 16, 17, 18, 19, 20, and 21. Therefore, those allegations can neither be admitted nor denied at this time.

13. In response to Paragraph 22, Defendants re-allege their responses to Paragraphs 1-21 and incorporate the same as if fully set forth herein.

14. Defendants deny the allegations set forth in Paragraphs 23 and 24.

15. In response to Paragraph 25, Defendants re-allege their responses to Paragraphs 1-24 and incorporate the same as if fully set forth herein.

16. Defendants deny the allegations set forth in Paragraphs 26, 27, and 28.

17. Defendants deny each and every allegation not specifically responded to in the preceding paragraphs of this Answer.

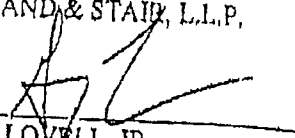
WHEREFORE, having fully responded to the Complaint, Defendants respectfully request that they be dismissed with prejudice and that all costs be taxed against Plaintiff. Defendants further demand a jury trial at the appropriate time.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

Respectfully submitted,

CARLOCK, COPELAND & STAIR, L.L.P.

By:


D. GARY LOVELL, JR.
State Bar No.: 69293

WILLIAM J. FARLEY, III
State Bar No.: 101033

*Attorneys for UCI Medical Affiliates, Inc. &
Jane Doe*

40 Calhoun Street, Suite 400
Charleston, South Carolina 29401-3531
843-727-0307

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

CORY McMILLAN,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL DISTRICT
CASE NO.: 2015-CP-28-174

MOTION TO DISMISS

FILED FOR RECORD
2015 APR 21 AM 9:13
JAMES H. HOSKINS
CLERK OF COURT
KERSHAW COUNTY, S.C.

TO: JAMES J. KASPRZYCKI, ESQ., ATTORNEY FOR PLAINTIFF

NOW COMES Defendants UCI Medical Affiliates, Inc. ("Defendant UCI") and Jane Doe ("Defendant Doe") (collectively referred to as "Defendants"), by and through the undersigned counsel, and hereby move this Court for an Order dismissing this case with prejudice pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. This Motion is based on the following grounds:

1. The Complaint fails to state a claim upon which relief can be granted;
2. The Complaint is based on claims of medical negligence and Plaintiff has failed to comply with the expert affidavit requirements set forth in S.C. Code Ann. §§ 15-79-125 and 15-36-100; and
3. Plaintiff has failed 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 for claims arising from alleged medical negligence.

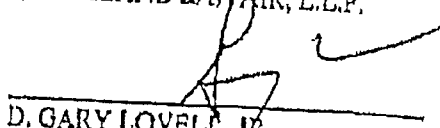
This Motion is supported by Plaintiff's pleadings, Defendants' Memorandum in Support to be submitted at a later date, and any other evidence which may be provided prior to the hearing on this Motion.

WHEREFORE, Defendants respectfully request that this Court grant their Motion to Dismiss with prejudice, that all costs be taxed against Plaintiff, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, L.L.P.

By:


D. GARY LOVELL, JR.
State Bar No.: 69293

WILLIAM J. FARLEY, III
State Bar No.: 101033

*Attorneys for UCI Medical Affiliates, Inc. and
Jane Doe*

40 Calhoun Street, Suite 400
Charleston, South Carolina 29401-3531
843-727-0307

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

CORY McMILLAN,
Plaintiff,

vs.

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

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2015-CP-28-174

AMENDED COMPLAINT
(Jury Trial Demanded)

FILED FOR RECORD
MAY 13 AM 11:13
CLERK OF COURT
KERSHAW COUNTY, S.C.

The Plaintiff would respectfully show unto the court and allege as follows:

PARTIES, JURISDICTION & VENUE

1. That the Plaintiff, Cory McMillan, is a citizen and resident of the County of Allendale, State of South Carolina.
2. That the Defendant, UCI Medical Affiliates, Inc. d/b/a Doctors Care, is a foreign corporation, organized and existing under the laws of the State of Delaware and is authorized to conduct business in the State of South Carolina.
3. Defendant, UCI Medical Affiliates, Inc. d/b/a Doctors Care will hereinafter be referred to as "Doctors Care."
4. That at all times relevant hereto, Defendant, Doctors Care, by and through its agents and/or employees, provided non-medical, administrative, ministerial, or routine care to Plaintiff, Cory McMillan, at its healthcare facility located in the County of Kershaw, State of South Carolina.
5. That the Defendant, Jane Doe, is an agent and/or employee of Defendant, Doctors Care, and at all times relevant hereto, provided non-medical, administrative, ministerial, or routine

care to Plaintiff, Cory McMillan, at the Doctors Care facility located in the County of Kershaw, State of South Carolina.

6. This is not an action for medical malpractice.

FACTS

7. Paragraphs 1 through 6 of Plaintiff's Complaint are incorporated herein by reference, as if fully set forth verbatim.

8. On June 29, 2012, Plaintiff, Cory McMillan, arrived at the Doctors Care facility to complete a pre-employment pulmonary function test ("PFT").

9. On June 29, 2012, Plaintiff, Cory McMillan, was not seeking medical treatment or medical care.

10. On June 29, 2012, Plaintiff, Cory McMillan, did not receive medical treatment or medical care.

11. On June 29, 2012, Plaintiff, Cory McMillan, was not a patient of Doctors Care.

12. At all times relevant hereto, Plaintiff, Cory McMillan, was an invitee of Defendant, Doctors Care.

13. As part of the pre-employment PFT, Plaintiff, Cory McMillan, was required to breathe into a spirometer.

14. A pre-employment PFT is not a medical procedure.

15. A pre-employment PFT is not required to be administered by a physician; therefore, none of the employees of Doctors Care present during the PFT were physicians nor was Defendant, Jane Doe.

16. Pursuant to a request by Doctors Care employee(s) and/or Defendant, Jane Doe, the Plaintiff, Cory McMillan, sat down in a chair placed adjacent to the spirometer and began providing breathing maneuvers.

17. During the respiratory testing, a Doctors Care employee(s) and/or Defendant, Jane Doe, requested that Plaintiff stand up to continue to provide breathing maneuvers.

18. In compliance with said request, Plaintiff, Cory McMillan, stood up and attempted to complete the additional breathing maneuvers.

19. None of the employees of Doctors Care nor Defendant, Jane Doe, assisted Plaintiff, Cory McMillan, in any way whatsoever, including but not limited to steadying him or providing for his safety.

20. While attempting to complete the additional breathing maneuvers, and still standing, Plaintiff, Cory McMillan, became light-headed and fell to the ground.

21. A couple days following the fall, Plaintiff began experiencing severe pain in his neck.

22. Plaintiff sought treatment for same.

23. Plaintiff was diagnosed with a cervical fracture.

NEGLIGENCE AS TO DEFENDANT JANE DOE

24. Paragraphs 1 through 23 of Plaintiff's Complaint are incorporated herein by reference, as if fully set forth verbatim.

25. That, Defendant, Jane Doe, was, at the time and place above-mentioned, negligent, careless, grossly negligent, reckless, wanton and willful in any one or more of the following particulars:

- a. In that Defendant, Jane Doe, failed to safely and properly supervise and/or monitor the Plaintiff while administering the pre-employment PFT;

- b. By instructing Plaintiff to stand while administering the pre-employment PFT after initially instructing Plaintiff to remain in a seated position;
- c. By instructing Plaintiff to stand without providing measures to insure Plaintiff would not fall to the ground;
- d. By instructing Plaintiff to stand without seeking the assistance of a co-worker to supervise the Plaintiff;
- e. In failing to take any precautionary actions, by any means, to insure Plaintiff's safety;
- f. In that Defendant, Jane Doe, failed to use the degree of caution and care that a reasonable and prudent person would have used under the circumstances then and there prevailing;
- g. In other ways and particulars that may be shown through discovery and trial;

any or all of which were the direct and proximate cause of the damages and injuries suffered by the Plaintiff herein, said acts being in violation of the statutory and common laws of the State of South Carolina.

26. That, as a direct and proximate result of the ordinary negligence, recklessness, willfulness, and wantonness of Defendant, Jane Doe, as aforesaid, the Plaintiff, Cory McMillan, suffered great bodily injury, suffered personal injuries, incurred expensive medical, doctor, hospital, nursing, and drug bills, suffered pain and mental anguish, suffered lost wages, suffered impairment, anxiety, inconvenience and will continue to suffer same in the future; all to Plaintiff's general damages and detriment.

NEGLIGENCE AS TO DEFENDANT DOCTORS CARE

27. Paragraphs 1 through 26 of Plaintiff's Complaint are incorporated herein by reference, as if fully set forth verbatim.

28. Defendant, Doctors Care, was, at the time and place above-mentioned, negligent, careless, grossly negligent, reckless, wanton and willful in any one or more of the following particulars:

- a. In that Defendant, Doctors Care, failed to make inquiry as to the abilities of Defendant, Jane Doe, to safely and properly supervise the Plaintiff;
- b. In that Defendant, Doctors Care, failed to properly supervise Defendant, Jane Doe;
- c. In that Defendant, Doctors Care, failed to properly train Defendant, Jane Doe;
- d. In that Defendant, Doctors Care, failed to safely and properly supervise and/or monitor the Plaintiff while administering the pre-employment PFT;
- e. By instructing Plaintiff to stand while administering the pre-employment PFT after initially instructing Plaintiff to remain in a seated position;
- f. By instructing Plaintiff to stand without providing measures to insure Plaintiff would not fall to the ground;
- g. By instructing Plaintiff to stand without seeking the assistance of other Doctors Care employees to supervise the Plaintiff;
- h. In failing to take any precautionary actions, by any means, to insure Plaintiff's safety;
- i. In failing to use the degree of care and caution that a reasonable and prudent employer and/or individual would have used under the circumstances then and there prevailing;
- j. In other ways and particulars that may be shown through discovery and trial;

any or all of which were the direct and proximate cause of the damages and injuries suffered by the Plaintiff herein, said acts being in violation of the statutory and common laws of the State of South Carolina.

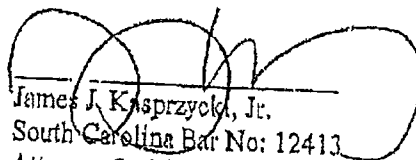
29. That, as a direct and proximate result of the ordinary negligence, recklessness, willfulness, and wantonness of Defendant, Doctors Care, as aforesaid, the Plaintiff, Cory McMillan,

suffered great bodily injury, suffered personal injuries, incurred expensive medical, doctor, hospital, nursing, and drug bills, suffered pain and mental anguish; suffered lost wages, suffered impairment, anxiety, inconvenience and will continue to suffer same in the future; all to Plaintiff's general damages and detriment.

30. As a result of the acts of Defendant, Doctors Care, and Defendant, Jane Doe, which are chargeable against Defendant, Doctors Care, under the doctrine of respondeat superior, as set forth above, Plaintiff is informed and believes that he is entitled to an award of actual damages.

WHEREFORE, the Plaintiff prays for judgment against the Defendants in an amount of actual damages to be determined by a jury, for the costs of this action, and for such other and further relief as this Court might deem just and proper.

May 12, 2015
Savannah, Georgia


James J. Kasprzycki, Jr.
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Attorney for Plaintiff

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STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

CORY McMILLAN,

Plaintiff,

vs.

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

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL DISTRICT
) CASE NO.: 2015-CP-28-174

DEFENDANTS' ANSWER TO PLAINTIFF'S
AMENDED COMPLAINT

FILED
2015 OCT 17 AM 8:58
CLERK OF COURT

NOW COME Defendants UCI Medical Affiliates, Inc. ("Defendant UCI") and Jane Doe ("Defendant Doe") (collectively referred to as "Defendants"), by and through the undersigned counsel, and hereby present their Answer to the Amended Complaint and show this Court as follows:

FIRST DEFENSE

At all times relevant to the matters complained of in the Amended Complaint, Defendants exercised the degree of skill and care required of them by law.

SECOND DEFENSE

The non-economic damages claimed by Plaintiff are limited in amount under law.

THIRD DEFENSE

To the extent Plaintiff asserts a claim for punitive damages, such damages are limited in amount under South Carolina law. Further, the pleadings and evidence fail to support a claim for such damages.

FOURTH DEFENSE

Any alleged claim for punitive damages asserted against Defendants violates their rights as guaranteed under the Constitutions of the United States and the State of South Carolina.

FIFTH DEFENSE

To the extent shown by the evidence, the negligence of Plaintiff proximately caused his alleged injuries and damages.

SIXTH DEFENSE

The allegations set forth in the Amended Complaint fail to state a claim upon which relief may be granted by this Court. Therefore, the Amended Complaint must be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

SEVENTH DEFENSE

There is no causal connection between any alleged acts or omissions on the part of Defendants and the injuries and damages alleged by Plaintiff.

EIGHTH DEFENSE

The Amended Complaint must be dismissed for failure to contemporaneously file an expert affidavit pursuant to S.C. Code Ann. §§ 15-79-125 and 15-36-100.

NINTH DEFENSE

The Amended Complaint must be dismissed for failure to previously file a Notice of Intent to File Suit or participate in mandatory pre-litigation mediation as set forth in S.C. Code Ann. § 15-79-125.

TENTH DEFENSE

The injuries and damages alleged by Plaintiff were the result of his own negligence, and thus his claims are barred as matter of law in whole or in part. Any negligence of Defendants, which is explicitly denied, was less than that of Plaintiff's negligence.

ELEVENTH DEFENSE

Defendants respond to the number allegations of the Amended Complaint as follows:

1. Defendants lack sufficient information to form a belief as to the truth of the allegations set forth in Paragraph 1. Therefore, those allegations can neither be admitted nor denied at this time.
2. In response to Paragraph 2, Defendants admit that UCI Medical Affiliates, Inc. is a foreign corporation, organized and existing under the laws of the State of Delaware and is authorized to conduct business in the State of South Carolina. All remaining allegations of Paragraph 2 are denied.
3. In response to Paragraphs 3 and 4, Defendants admit that some agents or employees of Defendant UCI provided medical services and care to Plaintiff at its facility in Kershaw County, South Carolina. All remaining allegations of Paragraphs 3 and 4 are denied.
4. In response to Paragraph 5, Defendants admit that a non-medical doctor healthcare professional, agent, or employee of Defendant UCI provided services to Plaintiff at its facility located in Kershaw County, South Carolina. All remaining allegations of Paragraph 5 are denied.
5. Defendants deny the allegations set forth in Paragraph 6.
6. In response to Paragraph 7, Defendants re-allege their responses to Paragraphs 1-6 and incorporate the same as if fully set forth herein.

7. In response to Paragraph 8, Defendants admit Plaintiff received medical care at a facility of Defendant UCI that included a pre-employment pulmonary function test. All remaining allegations of Paragraph 8 are denied.
8. Defendants deny the allegations set forth in Paragraphs 9, 10, 11, and 12.
9. Upon information and belief, Defendants admit the allegations set forth in Paragraph 13.
10. Defendants deny the allegations set forth in Paragraphs 14 and 15.
11. Defendants lack sufficient information to form a belief as to the truth of the allegations set forth in Paragraphs 16, 17, 18, 19, 20, 21, 22, and 23. Therefore, those allegations can neither be admitted nor denied at this time.
12. In response to Paragraph 24, Defendants re-allege their responses to Paragraphs 1-23 and incorporate the same as if fully set forth herein.
13. Defendants deny the allegations set forth in Paragraph 25 (including all subparts) and 26.
14. In response to Paragraph 27, Defendants re-allege their responses to Paragraphs 1-26 and incorporate the same as if fully set forth herein.
15. Defendants deny the allegations set forth in Paragraph 28 (including all subparts), 29, and 30.
16. Defendants deny each and every allegation not specifically responded to in the preceding paragraphs of this Answer to the Amended Complaint.

WHEREFORE, having fully responded to the Amended Complaint, Defendants respectfully request that they be dismissed with prejudice and that all costs be taxed against Plaintiff. Defendants further demand a jury trial at the appropriate time.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, L.L.P.

By: W-FJ
D. GARY LOVELL, JR.
State Bar No.: 69293

WILLIAM J. FARLEY, III
State Bar No.: 101033

*Attorneys for UCI Medical Affiliates, Inc. &
Jane Doe*

40 Calhoun Street, Suite 400
Charleston, South Carolina 29401-3531
843-727-0307

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

CORY McMILLAN,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL DISTRICT
CASE NO.: 2015-CP-28-174

DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS

FILED FOR RECORD
2015 JUN 13 AM 11:03
CLERK OF COURT
KERSHAW COUNTY, SC

NOW COME Defendants UCI Medical Affiliates, Inc. ("Defendant UCI") and Jane Doe ("Defendant Doe") (collectively referred to as the "Defendants"), by and through their undersigned counsel, and hereby submit this Memorandum in Support of their Motion to Dismiss. Defendants move this Court for an Order dismissing the above-captioned Complaint on the ground that Plaintiff Cory McMillan ("Plaintiff") has failed to comply with the pre-litigation requirements set forth in S.C. Code Ann. §§ 15-79-125 and 15-36-100.

BACKGROUND

On June 29, 2012, Plaintiff presented to a Doctors Care facility located in Lugoff, South Carolina to receive a pre-employment physical examination. As part of this examination, a pulmonary function test was utilized to assess Plaintiff's respiratory capacity and ensure he was physically capable of performing the duties required of his prospective employment. A spirometer is one device medical personnel frequently use to complete a pulmonary function test. Generally, a spirometer measures the rate at which an individual can inhale and exhale air.

In this case, a licensed health care professional was charged with administering and recording the results of Plaintiff's respiratory examination. While performing the pulmonary function test, Plaintiff allegedly lost consciousness and fell to the ground. Upon regaining consciousness, a licensed physician examined Plaintiff in response to complaints of neck and back pain. Compl. ¶ 17. Following this examination, a Doctors Care physician supervised Plaintiff's completion of the pre-employment physical. Compl. ¶ 18. A few days following his presentation to Doctors Care, Plaintiff allegedly began experiencing neck pain and sought treatment for the same. Compl. ¶¶ 19, 20. Plaintiff was allegedly diagnosed with a cervical fracture, which he now attributes to the June 29, 2012 incident at Doctors Care.

ARGUMENT

In filing the above-captioned lawsuit, Plaintiff is seeking the recovery of damages allegedly incurred as a result of the Defendants' professional negligence while administering the pulmonary function test. S.C. Code Ann. § 15-79-125 states that a Plaintiff must participate in mandatory pre-litigation mediation and file a Notice of Intent to File Suit prior to initiating a civil action alleging injury or death as a result of medical malpractice. S.C. Code Ann. § 15-79-125 further mandates that a Plaintiff must contemporaneously file an expert affidavit satisfying the requirements set forth in S.C. Code Ann. § 15-36-100. Finally, S.C. Code Ann. § 15-36-100(C)(1) provides that a failure to comply with the pre-litigation requirements warrants "dismissal for failure to state a claim."

- I. The allegations set forth in the Complaint seek recovery for damages allegedly incurred as a result of professional negligence. As such, Plaintiff's failure to comply with the pre-litigation requirements set forth in S.C. Code Ann. § 15-79-125 and S.C. Code Ann. § 15-36-100 warrant a dismissal pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

The primary issue presented in this case is whether the Defendants' conduct sounds in medical malpractice or ordinary negligence. South Carolina case law provides limited instruction in delineating between the two claims; however, the Supreme Court of South Carolina recently addressed the issue in *Dawkins v. Union Hosp. Dist.* 408 S.C. 171, 758 S.E.2d 501 (2014). In doing so, 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.'" *Id.* at 176, 503-504 (quoting *Estate of French v. Stratford House*, 333 S.W.3d 546, 555 (Tenn, 2011)). Instead, the court must rely "heavily on the facts of each individual case" to make the distinction. *Id.* at 176, 504.

Expert testimony is generally required in a medical malpractice action to assist a jury in "making a more accurate determination of fault regarding whether a physician's negligence in rendering medical care proximately caused the patient's injury." *Id.* at 177, 504. However, as the Supreme Court noted, expert testimony is not required for every injury sustained by a patient in a medical facility. *Id.* To support this contention, the Court cited claims against a hospital for injuries caused by falling ceiling tiles or improperly maintained parking lots or hallways as sounding in ordinary negligence, and specifically in premises liability. *Id.* In such cases, expert testimony is not required because a jury can "easily understand and evaluate the relevant facts and law merely by exercising their common knowledge." *Id.*

The Court further noted that "many states' courts distinguish between medical malpractice and ordinary negligence actions by determining whether expert testimony is necessary to aid the jury's determination of fault, particularly with respect to the 'duty' and 'causation' elements of the claim." *Id.* "Thus, while providing medical services to a patient, the medical professional acts in his professional capacity and must meet the professional standard of care, as established by expert testimony." *Id.* at 178, 504.

As applied to this case, it is clear that the alleged act or omission of negligence occurred while Defendants administered a medical examination. The pulmonary function test examines an individual's respiratory capacity to determine whether an individual 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 that an individual may exhibit are all necessary components of an accurate and thorough physical examination. This is precisely the reason why Plaintiff's prospective employer required that he obtain a physical from a health care facility such as Doctors Care. If a physical examination did not require some degree of professional knowledge and skill, any individual or any company could perform such testing.

Additionally, liability in this case clearly hinges on a determination as to whether the health care professional properly administered the pulmonary function test. A jury, therefore, must know exactly what a pulmonary function tests, how the test works, the proper mechanism for administering the test, whether the test subject should sit or stand during the test, and what other precautions a health care professional must consider while conducting the evaluation. Such issues clearly fall outside the scope of a jury's general knowledge or experience. Without such knowledge, 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. As applied to this case, a jury should be afforded the opportunity to utilize expert testimony to assist in their ultimate evaluation of Plaintiff's allegations.

Presumably, Plaintiff will argue that his Complaint is exempt from the pre-litigation requirements set forth in S.C. Code Ann. §§ 15-79-125 and 15-36-100 because the Complaint sounds in ordinary negligence and the jury is capable of properly evaluating Defendants' acts and omissions. Admittedly, some claims against health care professionals fall outside the intended scope of a 'medical malpractice' action. In such instances, the claims frequently arise from incidents that occur within a medical facility. When a patient falls on a poorly maintained parking lot or hallway, or is struck by a falling ceiling tile, the negligence of the medical entity bears absolutely no relationship to the testing or care being rendered by the medical professional. In this case, the allegations of negligence exclusively relate to the omissions of a medical provider administering the pulmonary function test. It is these omissions that allegedly caused Plaintiff's injuries - not that of a slippery floor or poorly-maintained facility.

Furthermore, to support his position that an expert affidavit is not required, Plaintiff will likely cite language from *Dawkins* and suggest that his claim relates to "nonmedical, administrative, ministerial, or routine care." In articulating the distinction between medical malpractice and ordinary negligence, the *Dawkins* Court explained that expert testimony is necessary to evaluate health care services unless they are "nonmedical, administrative, ministerial, or routine" in nature. In support of this distinction, the Court cited four cases from other jurisdictions. In *Kujawski v. Arbor View Health Care Ctr.*, the Supreme Court of Wisconsin held that ordinary negligence principles apply to injuries that occurred due to a

medical provider's failure to utilize a safety belt while transporting a patient in a wheelchair, 407 N.W.2d 249 (1987). In *Kastler v. Iowa Methodist Hosp.*, the Supreme Court of Iowa held that ordinary negligence principles apply to injuries that occurred while a medical provider is assisting a patient with showering. 193 N.W.2d 98, 101 (Iowa 1971). In *Bryant v. Oakpointe Villa Nursing Ctr., Inc.*, the Supreme Court of Michigan held that ordinary negligence principles applied to a medical provider's failure to protect a patient after discovering the patient was entangled between the bed rails and mattress. 684 N.W.2d 864, 871 (2004). Finally, in *Estate of French v. Stratford House*, the Supreme Court of Tennessee cited a series of cases in which courts have distinguished between a claim sounding in medical malpractice versus ordinary negligence. 333 S.W.3d at 556 n.9, 557 n.10, 559-60 (2011).

Ultimately, the factual scenarios underlying the cases cited in support of the "nonmedical, administrative, ministerial, or routine" exception are clearly distinguishable from the allegations of negligence presented in the Complaint. The cases cited above generally relate to a medical provider's negligence in assisting a patient with menial tasks such as pushing a wheelchair, assisting a patient in showering, or recognizing the risks associated with someone entangled between bed rails and a mattress. In this case, the administration of a pulmonary function test is not an everyday or menial task that a jury is capable of analyzing.

In fact, the administration of a pulmonary function test is comparable to many of the medical malpractice cases cited by the Supreme Court of Tennessee in footnote 9 of *Estate of French*. Footnote 9, which the Supreme Court of South Carolina specifically cited in *Dawkins*, referenced cases in which a nursing home's alleged failure to prevent an individual from falling and a nursing home's failure to properly restrain an individual by physical or chemical means both sounded in medical malpractice rather than ordinary negligence. In the former case, an

expert affidavit was necessary to establish what precautions a medical provider should have considered to protect an individual from falling. In the latter case, an expert affidavit was necessary to determine whether restraining an individual was necessary to mitigate the risk of further injury.

Among other allegations, the Complaint suggests that Defendants negligently "administered the pre-employment PFT", failed to "take precautionary actions, by any means, to insure Plaintiff's safety", failed to "safely and properly supervise and/or monitor the Plaintiff", and failed to properly "supervise" and "train" the medical professional administering the examination. See Amended Complaint, ¶ 28 (b, c, d, h). These allegations clearly assert Defendants were negligent in the exercising of some degree of medical judgment; therefore, this Court should require that Plaintiff file an expert affidavit to assist the jury with its ultimate evaluation of the same.

CONCLUSION

Based on the analysis above, it is clear that the allegations set forth in Plaintiff's Complaint sound in medical malpractice. As such, Plaintiff has failed to comply with the mandatory pre-litigation requirements set forth in S.C. Code Ann. §§ 15-79-125 and 15-36-100 and the Complaint must be dismissed.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, L.L.P.

By:

W-F-S

D. GARY LOVELL, JR.

State Bar No.: 69293

WILLIAM J. FARLEY, III

State Bar No.: 101033

*Attorneys for UCI Medical Affiliates, Inc. and
Jane Doe*

40 Calhoun Street, Suite 400
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843-727-0307

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

CORY MCMILLAN,

PLAINTIFF,

VERSUS

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

DEFENDANTS.

) IN THE FIFTH JUDICIAL CIRCUIT
) IN THE COURT OF COMMON PLEAS
2015-CP-28-00174

) DATE: JULY 14, 2015
) PLACE: CAMDEN, SOUTH CAROLINA

MOTIONS HEARING

B E F O R E:

THE HONORABLE DEANDREA BENJAMIN

A P P E A R A N C E S:

JAMES JOSEPH KASPRZYCKI, JR., ESQUIRE
ATTORNEY FOR THE PLAINTIFF

WILLIAM JOSEPH FARLEY, III, ESQUIRE
ATTORNEY FOR THE DEFENDANT

PROVIDED FOR: JAMES JOSEPH KASPRZYCKI, ESQUIRE

COURT REPORTER: JO RICE
jrice@sccourts.org
SOUTH CAROLINA JUDICIAL DEPARTMENT

1 THE COURT: This is Cory McMillan versus UCI Medical
2 Affiliates -- Oh, you might want to grab Ms. McDonald.

3 BAILIFF: I will get her, Your Honor.

4 THE COURT: All right. But we can go ahead and get
5 started. Yes. Let me get your names for the record.

6 MR. FARLEY: My name is William Farley, on behalf of the
7 Defendants.

8 MR. KASPRZYCKI: Jim Kasprzycki, on behalf of the
9 Plaintiff.

10 THE COURT: All right. And this is Mr. Farley's motion to
11 dismiss?

12 MR. FARLEY: That is correct, Your Honor.

13 THE COURT: All right. I'll be glad to hear from you.

14 MR. FARLEY: Thank you. The motion to dismiss before Your
15 Honor this afternoon is based upon the Plaintiff's failure
16 to comply with pre-litigation requirements set forth in
17 §15-79-125 and §15-36-100, basically requiring notice of
18 intent to file suit pre-litigation mediation and an expert
19 affidavit in a case involving medical malpractice.

20 I don't believe there is a dispute between the parties
21 regarding the substance of the statutes. The issue primarily
22 is one of application of the statute to the underlying facts
23 to determine whether or not this is a medical malpractice
24 case versus an ordinary negligence case. Obviously, our
25 position is that it is, in fact, a medical malpractice case

CORY McMILLAN VERSUS UCI MEDICAL AFFILIATES INC, et al

1 which would trigger the statutory requirements for the
2 complaint.

3 The underlying facts of the case is that the Plaintiff
4 presented to the Doctors Care facility in Lugoff, South
5 Carolina for a pre-employment physical. That physical
6 included a pulmonary function test which is basically a
7 respiratory examination to evaluate an individual's ability
8 to inhale and exhale appropriately. That was one of several
9 procedures performed that day, that was included in that
10 pre-employment physical and I believe during the performance
11 or the administration of that pulmonary function test, the
12 Plaintiff lost consciousness, fell to the ground, and
13 suffered some cervical fractures and so the allegations set
14 forth in the complaint allege that Doctors Care and their
15 agents or employees were negligent in administering that
16 specific respiratory examination and that's sort of the
17 underlying facts that bring us here today.

18 And so, obviously, the issue would be whether or not the
19 administration of that particular respiratory examination
20 constituted medical care or medical treatment that warranted
21 a medical malpractice case versus a negligence or premises
22 liability action, which is how it is currently styled in the
23 complaint.

24 And so, I believe, if I can direct Your Honor to a
25 memorandum that I filed last week and also some case law. In

CORY MCMILLAN VERSUS UCI MEDICAL AFFILIATES INC, et al

1 South Carolina, it appears that Dawkins v. Union Hospital is
2 the controlling case law in distinguishing between an
3 ordinary negligence case and medical malpractice and if I can
4 read without having to go through the entire memo, but:
5 Expert testimony is generally required in a medical
6 malpractice action to assist a jury in making a more accurate
7 determination of fault regarding whether a physician's
8 negligence in rendering medical care proximately caused the
9 plaintiff's, the patient's, injury.

10 And so, basically, in explaining that distinction, the
11 Court cited cases from other jurisdictions in which they have
12 gone through a similar analysis and reached various
13 conclusions based on the underlying facts.

14 I wanted to point to a few specific cases cited in
15 Dawkins, which is a Supreme Court Opinion from 2014.
16 Basically, they walk through sort of the analysis and, I
17 guess, provide additional information they will get from
18 additional cases and they find a few cases. There's one of
19 ordinary negligence where a plaintiff is injured where a
20 ceiling tile falls from a medical facility or where a
21 plaintiff falls while walking through a parking lot or
22 hallway or is injured while he or she is showering with the
23 assistance of a medical provider and those cases, the Court
24 has basically stated those cases are of ordinary negligence
25 and no expert affidavit is necessary for a jury to evaluate

CORY MCMILLAN VERSUS UCI MEDICAL AFFILIATES INC, et al

1 the medical provider's care.

2 On the other hand, they cited several other cases in
3 which they determined they were, ultimately, medical
4 malpractice cases. Specifically, they cited two cases in
5 which an individual wasn't prevented from falling while a
6 specific test was administered, meaning that she was not
7 properly restrained or she wasn't properly supported by the
8 medical provider during that particular examination and
9 during that examination an injury occurred, and the Court, in
10 that case, determined that it was a medical malpractice case
11 because the jury needed to understand what was going through
12 the mind of the medical provider at the time of the test to
13 determine whether or not it was the appropriate act at that
14 time.

15 Another case, specifically, in which a medical
16 malpractice case was found is one in which the patient or the
17 individual receiving the care was not properly restrained
18 while providing treatment. In that case, she was lying in bed
19 and she wasn't properly held or sort or physically or
20 chemically induced to allow for specific testing to be
21 performed and that created some injuries on her part and the
22 Court determined that the level of restraint necessary to
23 perform specific tests was actually an issue of medical
24 malpractice.

25 And so, basically, before you today is the issue of

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1 whether or not this individual affiliated with Doctors Care
 2 properly performed the respiratory examination that led to
 3 the alleged injuries of the Plaintiff and it would be our
 4 contention that that issue falls more within the latter group
 5 as to opposed to the former group which would warrant a
 6 conclusion that this was actually a medical malpractice case
 7 versus one of ordinary negligence or premises liability.

8 THE COURT: Yes, sir.

9 MR. KASPRZYCKI: May it please the Court, Your Honor.

10 THE COURT: Yes, sir.

11 MR. KASPRZYCKI: On the outset, we hold and agree that
 12 Dawkins is probably the best roadmap for this case.
 13 Subsequent to Dawkins, I think Dawkins actually set up the
 14 rule and when we filed this complaint -- I think we filed
 15 initially back in March -- I amended the complaint to clarify
 16 some issues and in a part of that amendment we took the
 17 language, quite frankly, right from the Dawkins case and that
 18 is that my client, Mr. McMillan, was there, not because he
 19 was infirmed or because he was ill, he was there because his
 20 employer required that he take a pulmonary function test as a
 21 term of his employment. And bottom line, we did allege that
 22 he was provided non-medical, administrative, administerial or
 23 routine care by the Defendant, Doctors Care.

24 To be honest, I think after Dawkins, as far as the
 25 motion today is concerned, strictly on the pleadings, I think

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1 that would be enough to survive the motion to dismiss in the
2 light most favorable to the Plaintiff. That being said, since
3 I'm an attorney, I'm going to make some more arguments.

4 But the bottom line, Your Honor, is assuming the Court
5 is going to look at the pulmonary function test as being one
6 of routine versus non-routine or something along those lines,
7 I would simply point out that it is essentially, it's a
8 measurement tool, quite honestly. It would be no different
9 than somebody getting on a scale to take someone's weight. It
10 would be no difference than taking someone's height on their
11 entry to the doctor's office or the examination room, things
12 along those lines, but the reality is, someone was there to
13 have him breathe into a spirometer and I don't think there is
14 any expert testimony necessary for that. Quite frankly,
15 again, because it's routine, I don't think any expert
16 testimony is required to show duty owed and breach of care.
17 But it's simply something that he had to blow into that a
18 candy striper could have taken care of. I know as far as
19 these pulmonary function tests go, they are now available at
20 home. I know John's Hopkins University gives them out to
21 children, in fact, so that they can breathe into them at
22 their house and things along those lines.

23 And I'll just point out a couple of excerpts, Your
24 Honor, from the Dawkins' case. I'm sure the Court will read
25 it if you are not already familiar with it, Your Honor. It's

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1 a case from 2014.

2 THE COURT: I'm very familiar with it. That was my Dad's
3 case.

4 MR. KASPRZYCKI: I didn't know that. Maybe I don't need
5 to bore you with what I was going to read, but I'll just read
6 that ---

7 THE COURT: I need to re-read it.

8 MR. KASPRZYCKI: I will point this out. One of the main
9 things that I took from the case verbatim, it says: At all
10 times, the medical professional must exercise ordinary and
11 reasonable care to insure that no unnecessary harm befalls a
12 patient, and certainly, that's the crux of our complaint. We,
13 in fact, I put in the complaint that this is not an action
14 for medical malpractice, whatsoever. It is in fact, a case
15 for ordinary negligence.

16 THE COURT: Well, let me ask you this, though. With some
17 allegations, and I'm familiar with -- when the General
18 Assembly passed the requirement, we began to get all these
19 motions to dismiss. Some were people falling because there
20 was water on the ground and I think Dawkins made that real
21 clear, that that is not -- I guess maybe I'm missing this,
22 but what is your client alleging?

23 MR. KASPRZYCKI: The allegation is, Your Honor, that he
24 was initially given a chair and was told to do these
25 breathing maneuvers while seated. Then, the chair was removed

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1 or he was told to stand up and do it and that's when he,
2 apparently, got lightheaded and fell to the ground. So,
3 basically, he was given a chair and the chair was taken away
4 and so the allegation is, no one supervised him. They thought
5 it was, initially, it was something he needed to be seated to
6 do and then later they said, well, we changed our mind, let's
7 have him stand up and they should have taken precautions.
8 That's the main point of our complaint, the precautions to
9 make sure that something like this didn't happen to him.

10 THE COURT: All right. Yes, sir.

11 MR. FARLEY: I think the key to keep in mind is, the
12 allegations, as he just said, are specifically related to how
13 the test was administered. It's not the simplicity of the
14 test. It's not someone just merely being there while this
15 patient, this individual, is blowing into the spirometer.
16 It's specifically what the individual did or did not do or
17 did or did not instruct the Plaintiff to do while the
18 specific test was being performed. And so, that distinguishes
19 it from somebody stepping on a scale and me walking over and
20 reading the weight or somebody giving their height and me
21 pulling the tape to see what the actual height is. You know,
22 it's clearly something where somebody had to be taking a more
23 active role based on the allegations of negligence beyond
24 just being there and being present. I think if that were the
25 case, then this certainly would be an ordinary negligence or

CORY MCMILLAN VERSUS UCI MEDICAL AFFILIATES INC, et al

1 premises liability action, which is how it's currently
2 styled, but to the extent the allegations are specifically
3 related to what an individual did or did not do, I don't
4 think that's beyond the scope of me or anybody else as far as
5 common knowledge or general ability to understand what should
6 or should not be done and I think that that would be the main
7 reason an expert affidavit would be necessary to clarify
8 those issues for a potential jury to make sure that they are
9 properly evaluating what was or was not done during that
10 specific test and the administration of that test.

11 THE COURT: All right. Thank you. I'm going to take it
12 under advisement and I will get something back to you all.

13 MR. FARLEY: Thank you.

14 MR. KASPRZYCKI: Thank you, Your Honor.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF FLORENCE) CERTIFICATE

BE IT KNOWN THAT I, THE UNDERSIGNED JO RICE, OFFICIAL COURT REPORTER FOR THE TWELFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT REPRESENTS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE HEARING IN THE CAPTIONED CASE, RELATIVE TO APPEAL, BEFORE THE CIRCUIT COURT FOR KERSHAW COUNTY, SOUTH CAROLINA, SO GIVEN ON JULY 14, 2015 TO THE BEST OF MY SKILL AND ABILITY;

THAT I AM NOT RELATED TO NOR AN EMPLOYEE OF ANY OF THE PARTIES HERETO, NOR A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES HERETO, NOR INTERESTED IN THE OUTCOME OF THIS ACTION.

IN WITNESS WHEREOF I HAVE HERE UNTO SET MY HAND AND SEAL THIS 11TH DAY OF NOVEMBER, 2015.

Jo Rice
 JO RICE
 OFFICIAL COURT REPORTER

CORY MCMILLAN VERSUS UCI MEDICAL AFFILIATES INC, et al

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MAR 21 2016

SC Court of Appeals

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.

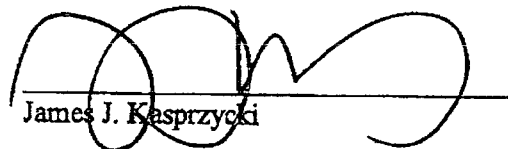
UCI MEDICAL AFFILIATES, INC., d/b/a
DOCTORS CARE and JANE DOE,

Respondents.

CERTIFICATE OF SERVICE

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

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March 18, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
Fifth Judicial Circuit

APR 06 2016

SC Court of Appeals

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.

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STATEMENT OF ISSUES ON APPEAL

1. Did the court below err in dismissing Appellant's case pursuant to Rule 12(b)(6), SCRCF, by finding that Appellant was receiving medical care from Respondents when his injury occurred?
2. Did the court below err in dismissing Appellant's case pursuant to Rule 12(b)(6), SCRCF, 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), SCRCF, 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 claims 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), SCRPC, 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 entitle 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,



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April 4, 2016

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

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APR 06 2016

SC Court of Appeals

Appellate Case No. 2015-002260

CORY MCMILLAN,

Appellant,

v.

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

Respondents.

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



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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

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APR 06 2016

SC Court of Appeals

Appellate Case No. 2015-002260

CORY MCMILLAN,

Appellant,

v.

UCI MEDICAL AFFILIATES, INC., d/b/a
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 Final Brief, was served upon all parties, by depositing a copy of same in the United States Mail, with sufficient postage affixed thereto, addressed as follows:

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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

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SC Court of Appeals

Cory McMillan,.....Appellant,

v.

UCI Medical Affiliates, Inc., d/b/a
Doctors Care and Jane Doe,.....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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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

DeAndrea G. 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.

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:

James J. Kasprzycki, Jr., Esq.
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This 7 day of April, 2016.



William J. Farley, III

RECEIVED

APR 11 2016

SC Court of Appeals

CERTIFICATE OF COUNSEL

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

Respectfully submitted,

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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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DeAndrea Benjamin, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2015-002260

CORY MCMILLAN,

Appellant,

v.

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

Respondents.

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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, SCRCR 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

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 Ill. 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

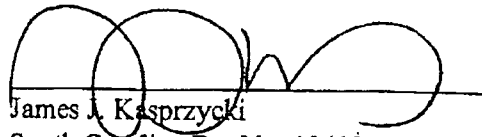
Respondent Doe clearly had Appellant seated in a chair to begin the test because there is a risk of dizziness when blowing into a mouthpiece. She then asked Appellant to stand. Respondent Doe can testify about her reasons for having Appellant sit in the chair. Appellant can testify as to what Respondent 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.

²Appellant 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,



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April 4, 2016

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

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SC Court of Appeals

Appellate Case No. 2015-002260

CORY MCMILLAN,

Appellant,

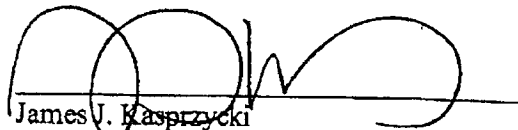
v.

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

Respondents.

CERTIFICATE OF COUNSEL

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



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM KERSHAW COUNTY
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DeAndrea Benjamin, Circuit Court Judge

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Appellant,

v.

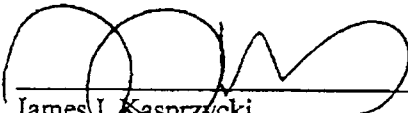
UCI MEDICAL AFFILIATES, INC., d/b/a
DOCTORS CARE and JANE DOE,

Respondents.

CERTIFICATE OF SERVICE

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

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James J. Kasprzycki

April 4, 2016

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Cory McMillan, Appellant,

v.

UCI Medical Affiliates, Inc. d/b/a Doctors Care and Jane
Doe, Respondents.

Appellate Case No. 2015-002260

Appeal From Kershaw County
DeAndrea G. Benjamin, Circuit Court Judge

Unpublished Opinion No. 2017-UP-145
Submitted January 1, 2017 – Filed April 5, 2017

AFFIRMED

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both of Carlock Copeland & Stair, LLP, of Charleston,
for Respondents.

PER CURIAM: Cory McMillan appeals the circuit court's order granting UCI Medical Affiliates, Inc.'s (UCI Medical's) motion to dismiss, arguing the circuit court erred in dismissing his claim for failing to comply with the pre-litigation

requirements for medical malpractice cases under section 15-79-125 of the South Carolina Code (Supp. 2016). McMillan argues he was not required to comply with the statutory pre-litigation requirements because his complaint did not allege medical malpractice; rather, he contends his action is an ordinary negligence action because he was not receiving medical care when he fell during the administration of a pulmonary function test (PFT). We affirm.¹

McMillan argues the factual allegations in his complaint are similar to those in *Dawkins v. Union Hospital District*, in which the Supreme Court of South Carolina held a plaintiff's claim was an ordinary negligence claim because she alleged she was injured when she fell on the way to the restroom while at the hospital prior to receiving treatment. 408 S.C. 171, 178-79, 758 S.E.2d 501, 504-05 (2014). In *Dawkins*, the court noted the plaintiff's complaint "ma[de] clear that she had not begun receiving medical care at the time of her injury" and did not allege she received "negligently administered medical care." *Id.* at 178, 758 S.E.2d at 505. In contrast, McMillan alleged in his complaint he was injured because the employee was negligent in failing to "safely and properly supervise and/or monitor [him] while administering the pre-employment PFT" and UCI Medical was negligent in failing to properly train her. Therefore, the circuit court properly found McMillan's complaint alleged medical malpractice. *See id.* at 177, 758 S.E.2d at 504 ("[I]f the patient receives allegedly negligent professional medical care . . . the action sounds in medical malpractice."). Because McMillan failed to comply with the statutory pre-litigation requirements for medical malpractice, the circuit court properly dismissed the action. *See* S.C. Code Ann. § 15-36-100(C)(1) (Supp. 2016) (providing failure to contemporaneously file an expert affidavit in a medical malpractice action subjects the plaintiff's complaint to dismissal for failure to state a claim).

AFFIRMED.

LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

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

RECEIVED

APR 18 2017

SC Court of Appeals

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
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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), SCRCP, 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.

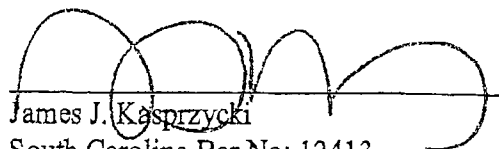
Dawkins “differentiating between the two types of claims ‘depends heavily on the facts of each individual case.’” *Id.* at 176. Prior to *Dawkins*, the trial courts determined that if a negligent act occurred at a hospital or doctor’s office the case was one of medical malpractice. Subsequent to *Dawkins*, 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,



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April 17, 2017

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

RECEIVED

APR 18 2017

SC Court of Appeals

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

CORY MCMILLAN,

Appellant,

v.

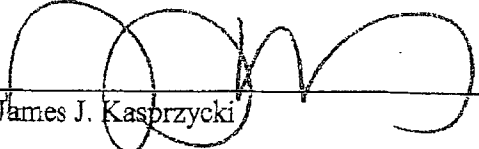
UCI MEDICAL AFFILIATES, INC., d/b/a
DOCTORS CARE and JANE DOE,

Respondents.

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.
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40 Calhoun Street, Suite 400
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James J. Kasprzycki

April 17, 2017

The South Carolina Court of Appeals

Cory McMillan, Appellant,

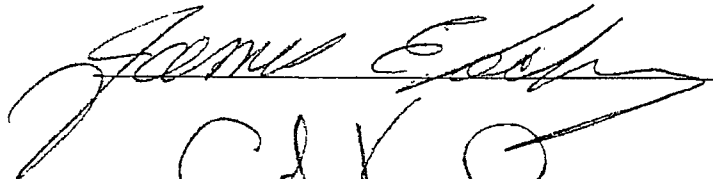

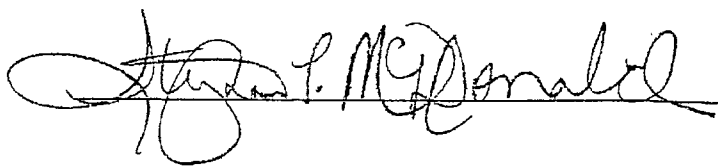
v.

UCI Medical Affiliates, Inc. d/b/a Doctors Care and Jane
Doe, Respondents.

Appellate Case No. 2015-002260

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

James Joseph Kasprzycki, Jr., Esquire
Dennis Gary Lovell, Jr., Esquire
William Joseph Farley, III, Esquire
The Honorable DeAndrea G. Benjamin

FILED

May 19, 2017