

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. 2017-001327

RECEIVED

JUL 11 2017

SC Court of Appeals

Cory McMillan,.....Appellant,

v.

UCI Medical Affiliates, Inc., d/b/a

Doctors Care and Jane Doe Respondents.

**RESPONDENTS' RETURN IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

This the 7 day of July, 2017.

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QUESTIONS PRESENTED

- I. Should this Court issue a Writ of Certiorari to review a unanimous decision of the Court of Appeals when Petitioner fails to cite any reasons favoring review pursuant to Rule 242(b), SCACR?
- II. Did the Court of Appeals properly affirm the Circuit Court's ruling that claims against Respondents sounded in medical malpractice and were properly dismissed for failure to comply with 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 encompasses Petitioner's Questions 1, 2, and 3).

COUNTER-STATEMENT OF THE CASE

Petitioner Cory McMillan ("Petitioner") 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. (Am. Appx. 6-11).

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 the expert affidavit requirement provided in S.C. Code Ann. § 15-36-100. (Am. Appx. 17-18). Respondents also filed an Answer to the Complaint with the Motion to Dismiss. (Am. Appx. 12-16).

On May 12, 2015, Petitioner filed an Amended Complaint on the same facts, but asserting that his claims were not for medical malpractice. (Am. Appx. 19-24). Respondents submitted an Answer to the Amended Complaint on June 15, 2015. (Am. Appx. 25-29). On July 14, 2015, the Honorable DeAndrea Benjamin held a hearing on Respondents' Motion to

Dismiss. Respondents filed a Memorandum in Support of the Motion to Dismiss in advance of this hearing. (Am. Appx. 30-37). On October 1, 2015, Judge Benjamin entered an Order granting Respondent's Motion to Dismiss and dismissing the Complaint. (Am. Appx. 3). In the Order, Judge Benjamin held that "[Petitioner's] care is 'medical' care, thus requiring expert testimony" and that Petitioner "failed to comply with the pre-litigation requirements set forth in S.C. Code Ann. § 15-79-125 and § 15-36-100." (Am. Appx. 3).

Petitioner served Respondents with his Notice of Appeal on October 27, 2015. On December 10, 2015, Petitioner served his Initial Brief and Designation of Matter to be included in the Record on Appeal. On February 11, 2015, Respondents filed their Initial Brief and Designation of Matter to be included in the Record on Appeal. On February 19, 2016, Petitioner filed a Reply Brief. The Record on Appeal was subsequently prepared, and all parties submitted final briefs for the Court of Appeals' review and consideration. (Am. Appx. 50-94).

On April 5, 2017, the Court of Appeals entered a unanimous Order affirming the Circuit Court's dismissal of the lawsuit. (Am. Appx. 95-96). The appeal was decided without oral argument pursuant to Rule 215, SCACR. On April 18, 2017, Petitioner filed a Petition for Rehearing. (Am. Appx. 97-102). Respondents filed a Return to the Petition for Rehearing on April 29, 2017. On May 19, 2017, the Court of Appeals entered an Order denying Petitioner's Petition for Rehearing, determining there was no "material fact or principle of law" overlooked or disregarded when considering the merits of Petitioner's arguments. (Am. Appx. 103). This matter is now before this Court on Petitioner's Petition for Writ of Certiorari.

STATEMENT OF FACTS

This lawsuit generally arises from Petitioner's presentation to UCI Medical, a healthcare facility located in Kershaw County, for a mandatory pre-employment physical examination.

(Am. Appx. 20, ¶ 8). As part of this pre-employment physical examination, Petitioner was required to complete a respiratory clearance physical by performing different breathing maneuvers through a spirometer device. (Am. Appx. 20, ¶ 8). Nurse Doe administered this test without a licensed physician present. (Am. Appx. 20, ¶ 15). Petitioner was asked to sit down in a chair adjacent to the spirometer and begin performing different breathing maneuvers. (Am. Appx. 21, ¶ 16). During the administration of the test, Nurse Doe instructed Petitioner to stand up and complete additional breathing maneuvers. (Am. Appx. 21, ¶ 17). Petitioner complied with this instruction and was attempting to complete the evaluation when he lost consciousness and fell to the ground. (Am. Appx. 21, ¶ 18, 20). A UCI Medical physician then examined Petitioner, after which Petitioner completed the pre-employment physical examination under the physician's supervision. (Am. Appx. 8, ¶ 18).

According to the Complaint, the respiratory testing Petitioner 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. (Am. Appx. 8, ¶ 23(a-b)). The Amended Complaint alleged Nurse Due was negligent in "instructing [Petitioner] to stand" during the test, "instructing [Petitioner] to stand without providing measures" to ensure he would not fall, "instructing [Petitioner] to stand without seeking assistance" of others, "failing to take any precautionary actions" to ensure Petitioner's safety, and failing to "safely and properly supervise and/or monitor [Petitioner] while administering the PFT." (Am. Appx. 21-22, ¶ 25(a-e)). Similarly, the Amended Complaint alleged UCI Medical was negligent in failing to properly investigate the abilities of Nurse Doe to "safely and properly supervise [Petitioner]", and failing to properly train and supervise Nurse Doe. (Am. Appx. 23, ¶ 28).

ARGUMENT

I. PETITIONER FAILS TO OFFER ANY SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO REVIEW THE UNANIMOUS DECISION OF THE COURT OF APPEALS.

In his Petition for Writ of Certiorari, Petitioner fails to cite any compelling reason why this Court should review the well-reasoned, unanimous decision of the Court of Appeals. Rule 242(b), SCACR, while neither controlling nor fully measuring this Court's power and discretion to grant a Petition for Writ of Certiorari, enumerates five considerations in determining whether "special and important reasons" exist to do so: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question exists.

First, there are no novel questions of law in this case. As the Petition states, this case turns on the distinction between medical malpractice and ordinary negligence, a topic directly addressed in recent years by this Court in Dawkins and other cases. Second, the decision of the Court of Appeals was unanimous with no dissents. Third, the Court of Appeals' decision is consistent with Dawkins and the cases cited therein. The Opinion of Court of Appeals cites Dawkins and clearly notes several distinctions between the facts of that case and the facts of the present case. Furthermore, the Petition is void of reference to any other decisions from this Court which may conflict with the Court of Appeals' Opinion. Finally, this case involves neither constitutional issues nor a federal question.

Ultimately, the Petition is void of any specific explanation for why this case presents "special and important reasons" for the Court to grant the Petition for Writ of Certiorari. Such reasons simply do not exist, and this Court should deny the Petition.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S DISMISSAL OF THE LAWSUIT FOR FAILURE TO COMPLY WITH THE PRE-LITIGATION REQUIREMENTS APPLICABLE TO MEDICAL MALPRACTICE CLAIMS.

As the Petition states, this appeal focuses on the distinction between claims for ordinary negligence and medical malpractice, an issue recently addressed by this Court in Dawkins v. Union Hosp. Dist., 408 S.C. 171, 758 S.E.2d 501 (2014). In Dawkins, this 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 sounding in ordinary negligence are not.

The plaintiff in Dawkins filed suit against a hospital for injuries she sustained 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 this Court found that the particular claims in that case sounded in ordinary negligence rather than medical malpractice, this 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)).

A. Claims occurring during the course of medical care and allegedly caused by the negligent administration of a medical test are claims for medical malpractice.

As correctly noted by the Court of Appeals, Dawkins sets forth two key factors to assist in navigating the distinction between a claim sounding in ordinary negligence versus medical malpractice: (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 . . .").

1. *Commencement of Medical Care*

In contrast to Dawkins, Petitioner makes clear that his injury occurred during the administration of a medical test, and the lawsuit further alleges negligence on the part of UCI Medical and Nurse Doe in administering the test. 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. 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.

More generally, 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 Petitioner's prospective employer required 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.

2. *Negligent Administration of Medical Care*

In further contrast to Dawkins, and as correctly noted by the Court of Appeals, Appellant's Amended Complaint makes clear the alleged injury occurred during the

administration of a medical test. In fact, Petitioner's theory liability hinges exclusively on several allegations Nurse Doe negligently administered the pulmonary function test while evaluating Petitioner's respiratory capacity, and, similarly, UCI Medical failed to properly train Nurse Doe on the correct method of performing this evaluation. (Am. Appx. 21-23, ¶¶ 25, 28).

Petitioner attempts to circumvent this critical distinction by reiterating the same argument that the alleged conduct at issue amounts to "non-medical, administrative, ministerial, or routine care" such that expert testimony establishing the standard of care is not required. *Id.* at 177-178, 504. However, one must look no further than the decisions cited in Dawkins as illustrative of "non-medical, administrative, ministerial, or routine care" to realize the present case is distinguishable. (Am. Appx. 75-76). 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. (Am. Appx. 76-78).

Ultimately, as the Circuit Court and Court of Appeals properly held, this is not a case involving an unattended/unsupervised plaintiff, a slip-and-fall claim, an injury resulting from a falling ceiling tile, or a salmonella-infected turkey sandwich. See generally, Dawkins at 177, 504; FN2. Instead, a prospective jury 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, support a health care professional must provide, and any other precautions a health care professional must consider while conducting the evaluation. 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.

B. Petitioner's claims against Respondents require expert testimony on the standard of care.

Petitioner further contends that expert testimony is not necessary in this case because he 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 Petitioner to stand during the test. According to Petitioner, this testimony, coupled with the jurors' personal experiences of becoming lightheaded or witnessing someone else become lightheaded while blowing up a balloon or raft, 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 Petitioner's analysis omits 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.

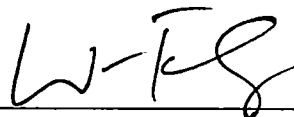
Petitioner attributes his fall and resulting injury to Nurse Doe's decision to ask him to stand and continue the breathing exercises during the test, and UCI Medical's failure to properly train and supervise Nurse Doe regarding the administration of the pulmonary function test. Of course, Nurse Doe, and presumably, Petitioner, will offer fact-based testimony regarding the

subject incident. However, this does not assist a jury in determining whether Respondents' conduct conformed with the applicable standard of care required of them by South Carolina law. A layman simply would not have any means of judging the decisions made by Nurse Doe in administering the examination, or the decisions made by UCI Medical in training and supervising Nurse Doe.

This requires a completely different analysis outside the scope of a jury's general knowledge or experience that is far more complex than merely explaining how a pulmonary function test works, regardless of its mechanical simplicity. Again, as stated in Dawkins, this is precisely the reason for expert testimony in medical malpractice claims – to “aid a jury’s determination of fault, particularly with respect to ‘duty’ and ‘causation’ elements of the claim.” Id. at 177, 504 (emphasis added). This is also why the Court of Appeals properly affirmed the Circuit Court’s dismissal of the lawsuit, and is why this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.



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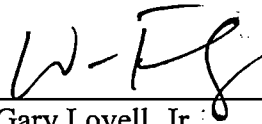
UCI Medical Affiliates, Inc., d/b/a
Doctors Care and Jane Doe,Respondents.

PROOF OF SERVICE

Return in Opposition to

I certify that I have served *Petition for Writ* upon the parties below by depositing a copy of it in the United States Mail, postage prepaid, on 7/7, 2017, addressed as follows:

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July 7, 2017

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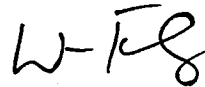
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Re: Cory McMillan v. UCI Medical Affiliates, Inc. *et. al*
Kershaw County Case No.: 2015-CP-28-174
Appellate Court Case No.: 2015-002260
CCS File No.: 3768-51427

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondents UCI Medical Affiliates, Inc. d/b/a Doctors Care and Jane Doe's **Return in Opposition to Appellant's Petition for Writ of Certiorari** in this case, and original and one (1) copy of Proof of Service. Please provide me with clocked copies in the enclosed, self-addressed, stamped envelope. By copy of this letter, I am serving the same upon all counsel of record. If you have any questions, please feel free to contact me.

Sincerely,



D. GARY LOVELL, JR.
WILLIAM J. FARLEY, III

WJF:tjr
Enclosures

cc: James J. Kasprzycki, Jr., Esq. (w/encls)

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