NATIONAL ARBITRATION FORUM

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File Number: MX0802002046463
(As it appears on Initial Claim)

HEARING BRIEF OF THE RESPONDENT, ATHENS CONVALESCENT CENTER

The respondent, Athens Convalescent Center ("ACC"), submits this brief for consideration at the Document Hearing in this matter.

STATEMENT OF THE FACTS

This proceeding involves a medical malpractice/wrongful death claim. James Rithmire, who sues as personal representative of the estate of his deceased wife, Jeannette Rithmire, claims that his wife died on March 13, 2007 as a result of a fall sustained while she was a resident at ACC on November 21, 2005. (See Statement of Claim). The claimant contends that the fall resulted from medical negligence or

wantonness by ACC. (*Id.*). Specifically, the claimant asserts that the fall occurred when "one employee attempted to transfer Ms. Rithmire from the wheelchair to her bed by herself, improperly using an aid to lift, against company policy and procedures and dropped Ms. Rithmire." (*Id.*). ACC denies that it breached the standard of care in any respect, and further denies that Mrs. Rithmire's fall was a proximate cause of her death. (See Response to Claim).

Jeannette Rithmire was admitted to ACC on September 1, 2005, when she was 71 years old. (Affidavit of Debbie McSparrin, L.P.N., ¶ 2). Mrs. Rithmire had a long history of vascular necrosis, which led to a total hip replacement approximately one month before she entered ACC. (Affidavit of Dawn Mancuso, M.D., ¶ 3). From the date of her admission until her fall on November 21, 2005, Mrs. Rithmire had very limited ambulation, and she only poorly complied with ambulation routines. (McSparrin Affidavit, ¶ 3; Mancuso Affidavit, ¶ 4). She would occasionally sit in a chair at bedside but preferred to stay in bed. (*Id.*).

Mrs. Rithmire left ACC for a doctor's appointment on the day of her fall. (Affidavit of Lorenea Beltz, C.N.A., ¶ 4). When she returned to the facility, a certified nursing assistant employed by ACC, Lorenea Beltz, assisted in transferring Mrs. Rithmire from the car to a wheelchair, which Beltz used to transport Mrs. Rithmire to the nurses' station and then to her room. (*Id.*). Mr. Rithmire was seated

in a chair in the room when they arrived. (*Id.*, ¶ 5). Ms. Beltz parked the wheelchair beside Mr. Rithmire, and locked the wheelchair's brakes. (*Id.*). Beltz situated Mrs. Rithmire's walker in front of her and placed a gait belt (a device used to assist in patient transfers) on her. (*Id.*). Ms. Beltz probably only placed the gait belt loosely on Mrs. Rithmire, because Beltz did not intend to transfer her to the bed at that moment, without first obtaining assistance from another staff member. (*Id.*).

When Ms. Beltz turned and took a step toward the hall to call for assistance from another staff member to transfer Mrs. Rithmire to the bed, Mrs. Rithmire began attempting to stand from her wheelchair to her walker. (Beltz Affidavit, ¶ 6). Mrs. Rithmire then fell to the floor before Beltz could return to assist her. (*Id.*).

Debbie McSparrin, a licensed practical nurse employed at ACC, was summoned to Mrs. Rithmire's room following the fall. (Affidavit of Debbie McSparrin, ¶ 4). Another CNA, Kathy Hogue, also came to the room. (Affidavit of Kathy Hogue, ¶¶ 6-7). Ms. Hogue testified that Mrs. Rithmire was lying in the floor and "had a gait belt around her which I could immediately see was incorrectly tightened." (*Id.*, ¶ 7). McSparrin and Hogue assisted Beltz in moving Mrs. Rithmire onto her bed. (*Id.*).

The facility physician, Dawn Mancuso, M.D., was notified of the fall and ordered an x-ray, which showed a proximal transverse fracture of the left tibia and

fibula. (*Id.*). Mrs. Rithmire was transferred to the Huntsville Hospital emergency room, where she was provided a Bledsoe brace. (*Id.*; Mancuso Affidavit, ¶ 5). Mrs. Rithmire returned to ACC following her discharge from the emergency room, and her orthopedic surgeon, Dr. Cobb Alexander, continued to provide care until he released Mrs. Rithmire on January 20, 2006. (McSparrin Affidavit, ¶ 7). In his progress not on that date, Dr. Alexander noted that Mrs. Rithmire's leg fracture had healed, and he released her to return "PRN" or "as needed." (McSparrin Affidavit, ¶ 7; Mancuso Affidavit, ¶ 6).

From the time she was released from Dr. Alexander's care on January 20, 2006 through her discharge from ACC on March 13, 2007, Mrs. Rithmire's ambulatory status was the same as it had been prior to her fall on November 21, 2005. (McSparrin Affidavit, ¶ 8). She did not complain about her leg fracture as the basis for her refusals to ambulate. (*Id.*).

Ms. Beltz testified that, in her opinion, she complied with the required standard of care in all respects in providing care and treatment to Mrs. Rithmire. (Beltz Affidavit, ¶ 9). Ms. McSparrin testified that both she and Ms. Beltz fully complied with the standard of care. (McSparrin Affidavit, ¶ 6). Scott Flemmer, a registered nurse retained as an expert by ACC, testified that Ms. Beltz, Ms. McSparrin, and the

remainder of the nursing staff at ACC complied with the standard of care. (Affidavit of Scott W. Flemmer, R.N., M.S.N.).

Dr. Dawn Mancuso, an independent physician who serves as the facility physician at ACC, provided several medical opinions. Dr. Mancuso testified that Mrs. Rithmire's fall on November 21, 2005 was probably caused by a spontaneous fracture. (Mancuso Affidavit, ¶ 9(c)). In other words, it is likely that the fracture caused the fall, and not the reverse. (*Id.*). In Dr. Mancuso's opinion, Mrs. Rithmire's ambulatory limitations from January 20, 2006 through the date of her death were not caused by the November 21, 2005 fall. (*Id.*, ¶ 9(a)). Also, Mrs. Rithmire's bedbound condition after January 20, 2006 was due to her vascular deficiency, osteoporosis, and acute immune conditions. (*Id.*, ¶ 9(b)). Finally, Mrs. Rithmire's fall did not contribute to cause her death, which occurred due to cardiopulmonary arrest secondary to hypoxemia. (*Id.*, ¶ 9(d)).

ARGUMENT

THE CLAIMANT HAS FAILED TO PROVE A SINGLE ELEMENT OF HIS MEDICAL MALPRACTICE CLAIM.

The parties' arbitration agreement requires application of Alabama substantive law. (Arbitration Agreement, Section 4.D.). Because the claim against ACC is based on allegations of improper medical care, the claim is governed by the Alabama Medical Liability Act, *Ala. Code* § 6-5-480, *et seq.* (1975), as supplemented by the Alabama Medical Liability of 1987, *Ala. Code* § 6-5-480, *et seq.* (1975). *See Ala. Code* § 6-5-551 (1975) ("In any action for injury, damages, or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, whether resulting from acts or omissions in providing health care, or the hiring, training, supervision, retention, or termination of care givers, the Alabama Medical Liability Act shall govern the parameters of discovery and all aspects of the action."). As discussed below, the claimant has failed to present the evidence needed to satisfy his burden of proof on a single element of his claim.

A. The claimant count not prove his claim without the testimony of a similarly situated medical expert.

In cases governed by the Medical Liability Act, the party asserting the claim has the burden of proving (1) the appropriate standard of care, (2) that the defendant breached the standard of care, and (3) that this breach proximately caused the injury

or death on which the claim is based. *See, e.g., Looney v. Davis*, 721 So.2d 152, 157 (Ala. 1998); *University of Alabama Health Services Foundation, P.C. v. Bush*, 638 So.2d 794, 798 (Ala. 1994). It has long been the rule in Alabama that all elements of a medical malpractice claim must be proven by expert testimony, except in cases where the claimant relies on a recognized standard or authoritative medical text or treatise, or cases where the "want of skill or lack of care is so apparent . . . as to be understood by a layman, and requires only common knowledge and experience to understand it." *Tuscaloosa Orthopedic Appliance Company v. Wyatt*, 467 So.2d 156, 161 (Ala. 1984) (citation omitted).

The exception involving reliance on an authoritative treatise does not apply in this case, so the claimant was required to prove his claim through the testimony of a qualified medical expert unless the alleged lack of care is "so apparent as to be understood by a layman, and requires only common knowledge and experience to understand it." *Tuscaloosa Orthopedic v. Wyatt*, 467 So.2d at 161. Courts have repeatedly emphasized that this "common knowledge" exception "is reserved for limited situations," *Loeb v. Cappelluzzo*, 583 So.2d 1323, 1325 (Ala. 1991), overruled in part, *Ex parte HealthSouth Corp.*, 851 So.2d 33, 42 (Ala. 2002), and the exception applies only in "the most extreme cases." *Powell v. Mullins*, 479 So.2d 1119, 1122 (Ala. 1985) ("Only in the most extreme cases will the jury be permitted

to find professional misconduct, resulting in injury within the doctor/patient relationship, absent expert testimony as to the standard of care which the doctor is alleged to have breached.") (citation omitted). *See also Sledge v. Colbert County Northwest Alabama Healthcare Authority*, 669 So.2d 182, 187 (Ala. Civ. App. 1995) ("Our supreme court has recognized an exception [to the general rule requiring expert testimony] where 'the want of skill or lack of care was so apparent' that the person does not need expert testimony to understand the malpractice. . . . However, that exception has been reserved for limited situations where it was obvious that, but for the negligence, the injury would not have occurred.") (citation omitted).

This case, where the claimant contends that the decedent fell due to a certified nursing assistant's alleged negligence in transferring her to a bed, is not one of the "limited situations" or "extreme cases" where expert testimony is not required. The Alabama Supreme Court's decision in *Loeb v. Cappelluzzo, supra*, is directly on point. The plaintiff in that case was injured when she fell from a stool after being left unattended in an examination room, and she argued that she was not required to present expert testimony because her case presented a situation where the lack of care was so apparent that it could be understood by a layman. 583 So.2d at 1325. The supreme court rejected the plaintiff's argument and held that the case did not present one of the "limited situations" where expert testimony was unnecessary. *Id.*

Following its decision in *Loeb v. Cappelluzzo*, the supreme court has repeatedly held that expert testimony was required in cases with similar facts. In *Leonard v. Providence Hospital*, 590 So.2d 906 (Ala. 1991), the plaintiff was injured when she fell out of her hospital bed, and the court held that she was required to present expert testimony to establish her claim that the hospital and a nurse were negligent because the side rails on the bed were not raised. The court stated:

> In cases such as this, when there is no medical order requiring a certain type of treatment or precaution, it becomes a question of proper nursing practice and care under the particular facts and circumstances of the case. Expert testimony is needed to establish the degree of "care, skill and diligence" used by "similarly situated health care providers in the same general line of practice."

590 So.2d at 908.

In *Husby v. South Alabama Nursing Home, Inc.*, 712 So.2d 750 (Ala. 1998), the plaintiff claimed that the decedent was injured by multiple falls from her hospital bed because she was not properly restrained or monitored. 712 So.2d at 751-52. The plaintiff failed, however, to present the testimony of a qualified medical expert to support his claim, and the supreme court in *Husby* affirmed a summary judgment for that reason. *Id.* at 754. In *Brookwood Medical Center v. Lindstrom*, 763 So.2d 951 (Ala. 2000), the supreme court reversed a jury verdict in the plaintiff's favor on the ground that the plaintiff did not present the expert testimony necessary to establish

that the hospital breached the standard of care in restraining and monitoring an elderly patient who climbed out of bed and broke her hip. Most recently, in *Tuck v. Health Care Authority of the City of Huntsville*, 851 So.2d 498 (Ala. 2002), the supreme court affirmed this Court's order granting the Hospital's motion for a judgment as a matter of law, holding that a plaintiff who was injured after falling from her hospital bed was required to present expert testimony to prove that the Hospital breached the standard of care in applying restraints to a patient. 851 So.2d at 506-507. The court in *Tuck* expressly rejected the plaintiff's argument that "it was reasonably foreseeable that his mother, in her confused condition, would continue to attempt to leave her bed and that a layperson could understand the standard of care applicable to the routine hospital care used to keep such patients safe, without expert testimony." *Id.* at 506.

It should be noted that the supreme court's decision in *Ex parte HealthSouth Corp.*, 851 So.3d 33 (Ala. 2002), in no way supports an argument that expert testimony is not required in this case. In fact, the *HealthSouth* decision *reaffirms* that expert testimony is required under these circumstances. The plaintiff, Heath, in *HealthSouth* was injured as she climbed out of her hospital bed to go to the bathroom, and she claimed that the defendants breached the standard of care in the following respects:

> [T]he defendants (1) had failed to identify Heath as a patient 'at risk' for falling, (2) had failed to properly supervise and monitor Heath while she was being trained in the facility, (3) had failed to train its nursing staff on safety issues, and (4) had failed to respond to Heath's calls for assistance.

851 So.2d at 35.

After the trial court in *Heath* entered a summary judgment for the hospital, the court of civil appeals affirmed the judgment in part and reversed it in part. *See Heath v. HealthSouth Medical Center*, 851 So.2d 24 (Ala. Civ. App. 2002). The court of civil appeals stated:

> In the present case, we conclude that what constitutes a patient "at risk" for falling and what are the proper monitoring standards, precautions, and procedures to follow when caring for a patient "at risk" for falling are both questions to be answered by experts in the field of nursing care. We, therefore, hold that § 6-5-548 requires expert testimony to demonstrate how HealthSouth breached its duty with respect to Heath's allegation that she was a patient "at risk" for falling and how such a breach, if it occurred, caused or contributed to Heath's injury.
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> . . . .
>
> We also hold, however, that no expert testimony was required to establish that HealthSouth breached its duty of care with respect to Heath's allegation that HealthSouth's nursing staff failed to respond to her calls for assistance in walking to the bathroom and that, as a proximate consequence of that failure, Heath attempted to walk to the bathroom by herself, fell, and was injured. . . . We think

> the circumstances of Heath's injury, insofar as that injury was alleged to have been proximately caused by the defendants' failure to answer Heath's calls for assistance, come within the comprehension of the ordinary layperson and qualify as an exception to the expert-testimony rule of the AMLA.

851 So.2d at 30-32.

The supreme court in *Ex parte HealthSouth* affirmed the court of civil appeals' decision. In doing so, the court revised the list of exceptions to the general rule requiring expert testimony in medical malpractice cases. The court stated:

> [W]e reformulate the exception to the rule, as interpreted by [*Loeb v. Cappelluzzo*], to recognize first, a class of cases " 'where want of skill or lack of care is so apparent . . . as to be understood by a layman, and requires only common knowledge and experience to understand it' " . . . such as when a sponge is left in, where, for example the wrong leg is operated on, or, as here, where a call for assistance is completely ignored for an unreasonable period of time. A second exception to the rule requiring expert testimony applies when a plaintiff relies on "a recognized standard or authoritative medical text or treatise," . . . or is himself or herself a qualified medical expert.

851 So.2d at 39. Applying this reformulated rule, the court in *Ex parte HealthSouth* concluded that the plaintiff was not required to introduce expert testimony to support her claim that the defendants improperly disregarded her call for assistance, because "the nurse's responsibility to respond to Heath's call for assistance clearly falls within the category of routine hospital care," and the jury could "use 'common knowledge

and experience' to determine whether the standard of care was breached in this case, where custodial care, not medical care, is at issue." 851 So.2d at 39.

The court in *Ex parte HealthSouth* overruled *Loeb v. Cappelluzzo* and similar cases only to the extent that those cases indicated that the pre-*HealthSouth* list of exceptions to the general rule requiring expert testimony was an exclusive list, with expert testimony being required in all other situations. 851 So.2d at 38, 42. The *HealthSouth* court merely indicated an unwillingness to conclude that it had previously identified all possible situations where an expert would not be required, and then went on to identify one more situation where an expert would not be needed, *i.e.*, "where a call for assistance is completely ignored for an unreasonable period of time." *Id.* at 39, 42. The court of civil appeals in *HealthSouth* held that expert testimony *was* required to support the very same type of claim made in the instant case. 851 So.2d at 30. The supreme court affirmed the court of civil appeals' decision, and simply clarified the reason why no expert testimony was needed to establish that the hospital was negligent in failing to respond to the patient's calls for assistance. The instant case does not involve ignored calls for assistance, and the *HealthSouth* decision gives the plaintiff no basis for an argument that her medical malpractice claims can be proven without expert testimony.

Although it should be clear from the *HealthSouth* opinion itself that the decision in that case provides no support for an argument that expert testimony is not required in this case, the court's decision in *Tuck v. Huntsville Hospital, supra*, reinforces the point. In *Tuck*, which was released the same day as the *HealthSouth* decision, the court explained the limits of the *HealthSouth* holding. The court stated:

> The issue here is whether [the defendant nurses] breached the standard of care in using, applying, and maintaining the belt restraint on Virginia Tuck. . . . [I]t is inconceivable that a layperson, with no nursing background, could determine and understand the appropriate standard of care. In addition, the use of restraints on patients in Virginia Tuck's condition is not a practice that is considered part of the routine, custodial care of a patient. Compare *HealthSouth*, where the issue was a 30-minute to one-hour delay in responding to a call for assistance, activity that can be classified as a part of routine, custodial care. We hold that expertise was required in implementing the restraint protocol used by [the nurses] and that expertise was necessary to determine the applicable standard of care.

851 So.2d at 506-507.

As in *Tuck v. Huntsville Hospital* and the other cases discussed above, the applicable standard of care, and a breach of that standard, could not be proven in this case without the testimony of a qualified medical expert. As discussed below, the claimant presented no such testimony, which means his claim fails as a matter of law.

B. The plaintiff failed to present the required expert testimony establishing the standard of care and a breach of that standard.

As discussed above, Alabama law required the claimant to present the testimony of a similarly situated medical expert to prove the standard of care owed by the ACC employee who allegedly committed negligence, and that the employee was guilty of an act or omission that breached that standard. The plaintiff has not presented the testimony of a retained expert to meet his burden of proof, and the affidavit the claimant obtained from ACC employee Kathy Hogue is entirely insufficient to meet that burden.

Ms. Hogue testified that, when she arrived in Mrs. Rithmire's room after her fall, she saw that the gait belt Lorenea Beltz had placed on Mrs. Rithmire was "incorrectly tightened." (Hogue Affidavit, ¶ 7). Hogue also testified that "[i]t is strict policy that two employees are required to transfer a patient with a gait belt, including transferring a patient from a wheelchair to a bed." (*Id.*, ¶ 9). In addition to being based on an incorrect assumption that Lorenea Beltz had completed her application of the gait belt and had attempted to transfer Mrs. Rithmire to the bed without assistance, Hogue's affidavit does not identify the standard of care owed by Ms. Beltz, and does not identify any act or omission that breached that standard.

In *Pruitt v. Zeiger*, 590 So.2d 236 (Ala. 1991), the Alabama Supreme Court explained that a failure to establish the standard of care owed by the defendant precludes a recovery on a medical malpractice claim. The court explained:

> The failure of an expert to establish the standard of care results in a lack of proof essential to a medical malpractice plaintiff's case. . . . In order to establish the standard of care in this case, Dr. Taylor [the plaintiff's expert] was required to enumerate the prevailing medical procedures in the national medical community that reasonably competent physicians would ordinarily utilize when acting in the same or similar circumstances. . . . If the standard of care is not established, there is no measure by which the defendant's conduct can be gauged. . . . We find that the deposition testimony of Dr. Taylor failed to establish the standard of care, and therefore, it was not possible for Dr. Taylor to testify as to Dr. Zeiger's deviation from any such standard. . . . It was incumbent upon Dr. Taylor to explain how 'physicians . . . in the same general neighborhood, and in the same general line of practice,' *Ala. Code* 1975, § 6-5-484(a), would communicate under the circumstances presented in this case. A blanket statement that communication was poor does not establish a standard of care. "In order to establish a physician's negligence, the plaintiff must offer expert testimony as to the proper practice, treatment, or procedure." . . . Dr. Taylor did not describe a procedure that rises to the level of a standard of care. He merely gave his opinion as to what Dr. Zeiger should have done under the circumstances presented in this case. "The law does not permit a physician to be at the mercy of testimony of his expert competitors, whether they agree with him or not."

590 So.2d at 238 (citations omitted).

As in *Pruitt v. Zeiger*, there simply is no expert testimony in this case to establish the standard of care. In her affidavit, Ms. Hogue did not "enumerate the prevailing medical procedures in the national medical community that reasonably competent physicians would ordinarily utilize when acting in the same or similar circumstances." *Pruitt v. Zeiger*, 590 So.2d at 238. In this regard, it should be noted that a policy of the facility is *not* the equivalent of the standard of care, and an alleged failure to follow a facility policy is not equivalent to a breach of the standard of care. The standard of care instead is "community standard" that is not established by any one institution. The supreme court made this point in *Henson v. Mobile Infirmary Association*, 646 So.2d 559 (Ala. 1994), where the court rejected the plaintiff's argument that a hospital policy established the standard of care for performing an MRI test. After observing that the standard of care is a *community* standard, and not what any particular health care provider decides is appropriate practice, the court ruled that the defendant hospital was entitled to a summary judgment because its policy for MRI tests did not establish a community standard. 646 So.2d at 563-64. The same is true of any facility policy at issue in this case.

Given Ms. Hogue's failure to identify the applicable standard of care and provide an opinion that the standard was breached, it also should be pointed out that a defendant cannot be liable merely because another health care provider would have

handled the patient's treatment differently than did the defendant. *See, e.g., K.P. v. Reed*, 676 So.2d 933, 938-39 (Ala. Civ. App. 1995), reversed in part on other grounds, *Ex parte N.P.*, 676 So.2d 928 (Ala. 1996) ("Dr. Davis' testimony as to what he personally would have done is inadmissible as expert opinion evidence of Dr. Reed's liability."); *Pruitt v. Zeiger*, 590 So.2d at 238-39 (in which the court held that an expert's mere opinion concerning what the defendant physician "should have done" did not establish any breach of the standard of care). Also, a health care provider cannot be liable merely because a patient had a bad outcome. *See, e.g., Sewell v. Internal Medicine and Endocrine Associates, P.C.*, 600 So.2d 242, 244 (Ala. 1992) ("The statutory standard of care to be considered in medical malpractice actions . . . contemplates that the jury should focus on the circumstances surrounding the defendant's conduct, rather than on the outcome, when determining whether the defendant's conduct was negligent. . . . To hold otherwise would be to hold that a defendant doctor is the insurer of satisfactory results of medical treatment, and such a result is expressly prohibited by § 6-5-484(b).") (citation omitted); *Bates v. Meyer*, 565 So.2d 134, 137 (Ala. 1990) ("[T]he existence of an unfortunate result does not raise an inference of culpability."); *Breaux v. Thurston*, 888 So.2d 1208, 1213 (Ala. 2003).

Although the claimant's failure to establish the applicable standard of care alone precludes a recovery, Ms. Hogue's affidavit also failed to establish a deviation from the standard of care. The plaintiff in a medical malpractice case cannot recover for an alleged act of medical negligence without proving, through expert testimony, that the defendant's act or omission was a breach of the standard of care. *See, e.g., Long v. Wade*, 980 So.2d 378, 387 (Ala. 2007) ("[E]ach such act or omission would require expert testimony as to whether it constituted a breach of the standard of care. . . ."); *Ferguson v. Baptist Health System, Inc.*, 910 So.2d 85, 93 (Ala. 2005) ("[The plaintiff] was required to produce expert medical testimony to establish each applicable standard *and to establish that it had been breached*.") (emphasis added). While Ms. Hogue was generally critical of the care provided to Mrs. Rithmire, her testimony was devoid of any opinion that Ms. Beltz or any other ACC employee breached the required standard of care.

C. The claimant also failed to present the expert testimony needed to establish causation.

In addition to failing to prove *either* the applicable standard of care *or* that an ACC employee breached that standard, the claimant also completely failed to meet his burden of proving causation. This failure to prove that the alleged negligence

proximately caused the death would preclude a recovery *even if* the claimant had proven a breach of the standard of care.

Proximate cause must be proven by expert medical testimony. *See, e.g., Giada v. Tucker*, 746 So.2d 998, 1000 (Ala. 1999) ("In medical-malpractice cases, substantial evidence is provided by expert medical testimony."); *Lyons v. Walker Regional Medical Center*, 791 So.2d 937, 942 (Ala. 2000) (citation omitted) ("The reason for the rule that proximate causation must be established through expert testimony is that the issue of causation in a medical-malpractice case is ordinarily 'beyond the ken of the average layman.' ").

In a medical malpractice case, a claimant can recover only if he proves, through expert testimony, that the alleged negligence *probably* caused the injury or death. *See, e.g., Crowne Investments, Inc. v. Reid*, 740 So.2d 400, 404 (Ala. 1999) ("Under the AMLA, a plaintiff establishes proximate cause by demonstrating that an injury or death was *probably* caused by the defendant's conduct.") (emphasis added); *Shanes v. Kaiser*, 729 So.2d. 319, 320-21 (Ala. 1999) ("In medical malpractice cases, the plaintiff must prove that the alleged negligence '*probably* caused the injury'. . . . [T]he 'proof must go further than merely show that an injury could have occurred in an alleged way — it must warrant the reasonable inference and conclusion that it did so occur as alleged.' ") (emphasis added); *Schuffert v. Morgan*, 777 So.2d at 93 ("It

is well settled that, in order 'to prove causation in a medical malpractice case, the plaintiff must prove, through expert medical testimony, that the alleged negligence *probably* caused, rather than only possibly caused, the plaintiff's injury.'") (citation omitted) (emphasis added).

Here, the claimant presented no expert testimony that any act or omission by ACC probably caused the decedent's death. Moreover, although ACC had no burden of proof, the facility presented the testimony of Dr. Dawn Mancuso, whose opinions actually *dis*prove causation. According to Dr. Mancuso's undisputed expert testimony, Mrs. Rithmire's leg fracture actually caused her fall, rather than the reverse. Also, Dr. Mancuso testified that Mrs. Rithmire's ambulatory limitations and bed-bound condition were not caused by the fall, *and* that the fall (which occurred 15 months before the death) was not a contributing cause of her death. In short, the undisputed expert testimony in this case does not even rise to the level of proving that ACC's alleged negligence *possibly* or "may have" caused the death, much less that it *probably* caused the death. The Alabama Supreme Court has repeatedly held that defendants in medical malpractice cases are entitled to a judgment as a matter of law under these circumstances. *See, e.g., Sorell v. King*, 946 So.2d 854, 865 (Ala. 2006) ("Although Dr. King's testimony establishes that Sorell's pain and bleeding were *possibly* caused by the presence of the adapter in her cervix, Dr. King's testimony

does not establish that the presence of the adapter *probably* caused her injuries. . . . We reject Sorell's contention that Dr. King's testimony amounts to substantial evidence indicating that the presence of the adapter was the proximate cause of her injuries.") (emphasis in the original); *DCH Healthcare Authority d/b/a DCH Regional Medical Center v. Duckworth,* 883 So.2d 1214, 1217-1221 (Ala. 2003)(holding that the trial court erred in failing to grant the defendant hospital's motion for judgment as a matter of law, because the plaintiff's evidence failed to establish that the alleged negligence probably caused the plaintiff's injury); *Williams v. Spring Hill Memorial Hospital*, 646 So.2d 1373, 1375 (Ala. 1994) (in which the court affirmed a summary judgment in the defendant's favor where the plaintiffs' expert testified that the injury "may have" been prevented by appropriate care, and the plaintiffs therefore "failed to present, through their expert, substantial evidence that the alleged negligence of [the defendant] 'probably caused the injury.'") (citation omitted); *Levesque v. Regional Medical Center Board*, 612 So.2d 445, 449 (Ala. 1993) (in which the court, in affirming a directed verdict in a doctor's favor, observed that "[e]ven if Dr. Engle were qualified as an expert on the causation issue, the plaintiff's claim would still fail, because Dr. Engle was unable to testify that acts or omissions of Dr. Victoria *probably* caused Anthony's injuries. The questions posed to Dr. Engle elicited only the answer that Dr. Victoria's actions *probably could have* caused the injury; this

answer falls short when measured by the standard by which evidence of proximate causation is tested.") (emphasis in the original); *Sasser v. Connery*, 565 So.2d 50, 51 (Ala. 1990) (in which the court held that a doctor was entitled to a directed verdict because the plaintiff "did not produce a scintilla of evidence that Dr. Connery's alleged negligence *probably* caused Ollie's death or probably caused her life to be shortened. Without the scintilla of evidence that Dr. Connery *probably* caused Ollie's death or that earlier diagnosis probably would have extended her life, Sasser failed to meet the burden of proof, and the case was improperly submitted to the jury.") (emphasis in the original); *Peden v. Ashmore*, 554 So.2d 1010, 1013-1014 (Ala. 1989) (in which the court held that the defendant physician was entitled to a directed verdict because the plaintiff's medical expert "could not say with any degree of certainty what the outcome would have been if the alleged 'proper' treatment had been rendered.").

CONCLUSION

For the reasons discussed above, the claimant has completely failed to meet his burden of proving a claim for medical malpractice. The respondent, Athens Convalescent Center, is entitled to a ruling in its favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel F. Beasley, attorney for Athens Convalescent Center, assert, under penalty of perjury, that the above listed Athens Convalescent Center's documents were served on the Claimant, James Rithmire, c/o Garry Clem on December 5, 2008 and that this service conforms to the requirements of Rule 6 of the NAF Code of Procedure and the applicable law.

Daniel F. Beasley Date: 12/5/08

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